

YEARBOOK

Volume XLIV: 2013



UNITED NATIONS

**UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW**

YEARBOOK

Volume XLIV: 2013



**UNITED NATIONS
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NOTE

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

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

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

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INTRODUCTION

This is the forty-fourth 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 forty-sixth session, which was held in Vienna, from 8-26 July 2013, 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 forty-sixth session of the Commission are reproduced. These documents include reports of the Commission's Working Groups as well as studies, reports and notes by the Secretary-General and the Secretariat. Also included in this part are selected working papers that were prepared for the Working Groups.

Part three contains summary records, the bibliography of recent writings related to the Commission's work, a list of documents before the forty-sixth session and a list of documents relating to the work of the Commission reproduced in the previous volumes of the *Yearbook*.

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

| <i>Volume</i> | <i>Years covered</i> | <i>United Nations publication Sales No. or document symbol</i> |
|---------------|----------------------|--|
| I | 1968-1970 | E.71.V.1 |
| II | 1971 | E.72.V.4 |
| III | 1972 | E.73.V.6 |
| III Suppl. | 1972 | E.73.V.9 |
| IV | 1973 | E.74.V.3 |
| V | 1974 | E.75.V.2 |
| VI | 1975 | E.76.V.5 |
| VII | 1976 | E.77.V.1 |
| VIII | 1977 | E.78.V.7 |
| IX | 1978 | E.80.V.8 |
| X | 1979 | E.81.V.2 |
| XI | 1980 | E.81.V.8 |
| XII | 1981 | E.82.V.6 |
| XIII | 1982 | E.84.V.5 |
| XIV | 1983 | E.85.V.3 |

| <i>Volume</i> | <i>Years covered</i> | <i>United Nations publication Sales No. or document symbol</i> |
|---------------|----------------------|--|
| XV | 1984 | E.86.V.2 |
| XVI | 1985 | E.87.V.4 |
| XVII | 1986 | E.88.V.4 |
| XVIII | 1987 | E.89.V.4 |
| XIX | 1988 | E.89.V.8 |
| XX | 1989 | E.90.V.9 |
| XXI | 1990 | E.91.V.6 |
| XXII | 1991 | E.93.V.2 |
| XXIII | 1992 | E.94.V.7 |
| XXIV | 1993 | E.94.V.16 |
| XXV | 1994 | E.95.V.20 |
| XXVI | 1995 | E.96.V.8 |
| XXVII | 1996 | E.98.V.7 |
| XXVIII | 1997 | E.99.V.6 |
| XXIX | 1998 | E.99.V.12 |
| XXX | 1999 | E.00.V.9 |
| XXXI | 2000 | E.02.V.3 |
| XXXII | 2001 | E.04.V.4 |
| XXXIII | 2002 | E.05.V.13 |
| XXXIV | 2003 | E.06.V.14 |
| XXXV | 2004 | E.08.V.8 |
| XXXVI | 2005 | E.10.V.4 |
| XXXVII | 2006 | A/CN.9/SER.A/2006 |
| XXXVIII | 2007 | A/CN.9/SER.A/2007 |
| XXXIX | 2008 | A/CN.9/SER.A/2008 |
| XL | 2009 | A/CN.9/SER.A/2009 |
| XLI | 2010 | A/CN.9/SER.A/2010 |
| XLII | 2011 | A/CN.9/SER.A/2011 |
| XLIII | 2012 | A/CN.9/SER.A/2012 |

Part One

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

THE FORTY-SIXTH SESSION (2013)

A. Report of the United Nations Commission on International Trade Law, forty-sixth session (Vienna, 8-26 July 2013) (A/68/17)

[Original: English]

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I. Introduction

1. The present report of the United Nations Commission on International Trade Law (UNCITRAL) covers the forty-sixth session of the Commission, held in Vienna from 8 to 26 July 2013.
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.

II. Organization of the session

A. Opening of the session

3. The forty-sixth session of the Commission was opened on 8 July 2013.

B. Membership and attendance

4. The General Assembly, in its resolution 2205 (XXI), established the Commission with a membership of 29 States, elected by the Assembly. By its resolution 3108 (XXVIII) of 12 December 1973, the Assembly increased the membership of the Commission from 29 to 36 States. By its resolution 57/20 of 19 November 2002, the Assembly further increased the membership of the Commission from 36 States to 60 States. The current members of the Commission, elected on 3 November 2009, on 15 April 2010, on 14 November 2012 and on 14 December 2012, are the following States, whose term of office expires on the last day prior to the beginning of the annual session of the Commission in the year indicated: ¹ Algeria (2016), Argentina (2016), Armenia (2019), Australia (2016), Austria (2016), Belarus (2016), Botswana (2016), Brazil (2016), Bulgaria (2019), Cameroon (2019), Canada (2019), China (2019), Colombia (2016), Côte d'Ivoire (2019), Croatia (2016), Denmark (2019), Ecuador (2019), El Salvador (2019), Fiji (2016), France (2019), Gabon (2016), Georgia (2015), Germany (2019), Greece (2019), Honduras (2019), Hungary (2019), India (2016), Indonesia (2019), Iran (Islamic Republic of) (2016), Israel (2016), Italy (2016), Japan (2019), Jordan (2016), Kenya (2016), Kuwait (2019), Liberia (2019), Malaysia (2019), Mauritania (2019), Mauritius (2016), Mexico (2019), Namibia (2019), Nigeria (2016), Pakistan (2016), Panama (2019), Paraguay (2016), Philippines (2016), Republic of Korea (2019),

¹ Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 28 were elected by the Assembly on 3 November 2009, two were elected by the Assembly on 15 April 2010, 29 were elected by the Assembly on 14 November 2012 and one was elected by the Assembly on 14 December 2012. By its resolution 31/99, the Assembly altered the dates of commencement and termination of membership by deciding that members would take office at the beginning of the first day of the regular annual session of the Commission immediately following their election and that their terms of office would expire on the last day prior to the opening of the seventh regular annual session following their election. The following six States members elected by the Assembly on 3 November 2009 agreed to alternate their membership among themselves until 2016 as follows: Belarus (2010-2011, 2013-2016), Czech Republic (2010-2013, 2015-2016), Poland (2010-2012, 2014-2016), Ukraine (2010-2014), Georgia (2011-2015) and Croatia (2012-2016).

Russian Federation (2019), Sierra Leone (2019), Singapore (2019), Spain (2016), Switzerland (2019), Thailand (2016), Turkey (2016), Uganda (2016), Ukraine (2014), United Kingdom of Great Britain and Northern Ireland (2019), United States of America (2016), Venezuela (Bolivarian Republic of) (2016) and Zambia (2019).

5. With the exception of Armenia, Botswana, Cameroon, Côte d'Ivoire, Fiji, Gabon, Greece, Jordan, Liberia, Mauritania, Sierra Leone and Zambia, all the members of the Commission were represented at the session.

6. The session was attended by observers from the following States: Afghanistan, Angola, Belgium, Bolivia (Plurinational State of), Burkina Faso, Chile, Cuba, Czech Republic, Dominican Republic, Finland, Guatemala, Lithuania, Malta, Netherlands, Poland, Qatar, Romania, Senegal, Slovakia, Slovenia, Sweden and Viet Nam.

7. The session was also attended by observers from the State of Palestine and the European Union.

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

(a) *United Nations system*: International Centre for Settlement of Investment Disputes, United Nations Conference on Trade and Development, Economic Commission for Europe and World Bank;

(b) *Intergovernmental organizations*: International Institute for the Unification of Private Law (Unidroit), Inter-Parliamentary Assembly of the Eurasian Economic Community, Permanent Court of Arbitration and World Customs Organization;

(c) *Invited non-governmental organizations*: American Arbitration Association and International Centre for Dispute Resolution, American Bar Association, Center for International Environmental Law, Center for International Legal Studies, European Law Students Association, Forum for International Conciliation and Arbitration, Institute of International Banking Law and Practice, Institute of Law and Technology (Masaryk University), Inter-American Bar Association, International Arbitration Institute, International Association of Lawyers, International Bar Association, International Insolvency Institute, International Institute for Sustainable Development, International Swaps and Derivatives Association, International Women's Insolvency and Restructuring Confederation, Madrid Court of Arbitration, Moot Alumni Association, National Law Center for Inter-American Free Trade, New York State Bar Association and Swiss Arbitration Association.

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

C. Election of officers

10. The Commission elected the following officers:

| | |
|---------------------|--|
| <i>Chair:</i> | Michael Schöll (Switzerland) |
| <i>Vice-Chairs:</i> | Rodrigo Labardini Flores (Mexico) Salim Moollan (Mauritius) Hrvoje Sikirić (Croatia) |
| <i>Rapporteur:</i> | Sukpuck Phongsathit (Thailand) |

D. Agenda

11. The agenda of the session, as adopted by the Commission at its 958th meeting, on 8 July 2013, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of issues in the area of arbitration and conciliation:
 - (a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration;
 - (b) Consideration of instruments on the applicability of the UNCITRAL rules on transparency to the settlement of disputes arising under existing investment treaties;
 - (c) Preparation of a guide on the 1958 New York Convention;
 - (d) International commercial arbitration moot competitions.
5. Consideration of issues in the area of security interests:
 - (a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry;
 - (b) Progress report of Working Group VI;
 - (c) Coordination in the field of security interests.
6. Consideration of issues in the area of insolvency law:
 - (a) Finalization and adoption of revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency;
 - (b) Finalization and adoption of legislative recommendations on directors' obligations in the period approaching insolvency;
 - (c) Finalization and adoption of revisions to the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective;
 - (d) Progress report of Working Group V.
7. Consideration of issues in the area of public procurement.

8. Online dispute resolution: progress report of Working Group III.
9. Electronic commerce: progress report of Working Group IV.
10. Technical assistance to law reform.
11. Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts.
12. Status and promotion of UNCITRAL legal texts.
13. Coordination and cooperation:
 - (a) General;
 - (b) Reports of other international organizations;
 - (c) International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups.
14. UNCITRAL regional presence.
15. Role of UNCITRAL in promoting the rule of law at the national and international levels.
16. Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests.
17. Relevant General Assembly resolutions.
18. Other business.
19. Date and place of future meetings.
20. Adoption of the report of the Commission.

E. Adoption of the report

12. The Commission adopted the present report by consensus at its 965th meeting, on 11 July 2013, its 972nd meeting, on 17 July 2013, its 975th meeting, on 19 July 2013, and its 982nd and 983rd meetings, on 26 July 2013.

III. Consideration of issues in the area of arbitration and conciliation

A. Finalization and adoption of a revised version of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

1. Introduction

13. The Commission recalled the decision made at its forty-first session,² in 2008, and forty-third session,³ in 2010, namely that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules.⁴ At its forty-third session, the Commission entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic. At its forty-fourth session, in 2011, the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration.⁵

14. At its current session, the Commission had before it the reports of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session, held in Vienna from 1 to 5 October 2012, and its fifty-eighth session, held in New York from 4 to 8 February 2013 (A/CN.9/760 and A/CN.9/765, respectively). It also had before it the text of the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration, as it resulted from the third reading of those rules, at the fifty-eighth session of the Working Group, and as contained in document A/CN.9/783.

15. The Commission took note of the summary of the deliberations on the rules on transparency that had taken place since the fifty-third session of the Working Group, held in Vienna from 4 to 8 October 2010. The Commission also took note of the comments on the rules on transparency and on the proposed amendments to the UNCITRAL Arbitration Rules (as revised in 2010) that had been submitted by Governments, as set out in document A/CN.9/787 and its addenda.

2. Consideration of the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration

Draft article 1: Scope of application

16. The Commission was reminded that, at its fifty-eighth session, the Working Group had expressed formal and unanimous support for a revised compromise proposal (A/CN.9/765, paras. 75 and 78), which included article 1, on the scope of

² *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.

³ *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 190.

⁴ For the text of the UNCITRAL Arbitration Rules (1976), see *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17). For the text of the UNCITRAL Arbitration Rules (as revised in 2010), see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), annex I.

⁵ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 200-202.

application. On that basis, the Commission considered the drafting suggestions as contained in paragraphs 6 to 10 of document A/CN.9/783.

General

17. It was agreed to retain the structure and paragraph order of article 1.

Paragraph (2) chapeau; and new paragraph (9)

18. The Commission noted that paragraphs (1) and (2) addressed application of the rules on transparency to investor-State arbitration initiated under the UNCITRAL Arbitration Rules. The application of the rules on transparency in conjunction with other arbitration rules was dealt with indirectly under paragraph (7). For the sake of consistency with that provision, and to clarify that the rules on transparency could apply irrespective of the applicable arbitration rules, the Commission considered whether the words in brackets in paragraph (2), “[or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc]”, should be added in the chapeau of paragraph (2).

19. The view was expressed that the rules on transparency should be available for use in all forms of arbitration, whether under the UNCITRAL Arbitration Rules, under the arbitration rules of arbitral institutions or in ad hoc arbitration. The Commission took note of submissions by arbitral institutions as contained in document A/CN.9/WG.II/WP.173, in which they had indicated that their institutional arbitration rules could operate in conjunction with the rules on transparency should the parties to the treaty or the disputing parties so decide.

20. The Commission agreed that, for the sake of clarity, the possible application of the rules on transparency in conjunction with other arbitration rules or in ad hoc arbitration ought to be expressly provided for in the rules on transparency. In support of that approach, it was further said that the mandate of UNCITRAL was to prepare a legal standard on transparency that could be applied universally, without limiting its application to arbitration under the UNCITRAL Arbitration Rules.

21. The Commission further agreed that the matter should not be addressed in paragraph (2), which distinguished between the application of the rules on transparency under existing treaties and the application of the rules under future treaties, in both cases when investor-State arbitration was initiated under the UNCITRAL Arbitration Rules. It was agreed that different considerations applied with respect to other arbitration rules or in ad hoc proceedings.

22. After discussion, the Commission agreed to include in article 1 a new paragraph, numbered paragraph (9), which would read as follows: “These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings”. A new sub-heading, “Application in non-UNCITRAL arbitrations”, would also be added. It was clarified that that provision, which was designed to indicate the availability of the rules on transparency under other sets of arbitration rules or in ad hoc proceedings, would apply subject to party autonomy, namely when parties to the treaty or the disputing parties so agreed.

23. In line with that decision, it was agreed that the chapeau of paragraph (2) would read as follows: “In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before (*date of coming into effect of the Rules on Transparency*), these Rules shall apply only when:”.

Paragraph (2)(b)

24. It was suggested that the term “home State of the investor” in paragraph (2)(b) was unusual and could raise arguments on jurisdiction and nationality in relation to the application of the rules on transparency. In that respect, a suggestion was made to replace the phrase “in the case of a multilateral treaty, the home State of the investor and the respondent State” with the phrase “in the case of a multilateral treaty, the relevant parties”.

25. In response, it was said that the phrase “the relevant parties” would not be suitable in relation to proceedings initiated under multilateral treaties such as the Energy Charter Treaty,⁶ in which identifying the “relevant parties” might be difficult and in which use of the criterion of “respondent State” would be more straightforward. It was decided to retain the phrase “respondent State”.

26. In order to achieve a more neutral outcome, and the one presumably intended by the reference to the “home State of the investor”, it was proposed to replace that phrase with “the State of the claimant”. It was said that such wording: (a) avoided the need to make a determination based on jurisdiction or nationality by referring to the State under which the claimant had invoked the treaty protection; and (b) avoided the risk of issues arising in relation to the phrase “investor” and whether, for example, there had been a qualifying investment. It was said that, while such issues might be raised at a jurisdictional phase of proceedings, it was not intended that they should be invoked in relation to the application of the rules on transparency.

27. After discussion, the Commission agreed to replace the words “the home State of the investor” in paragraph (2)(b) with the words “the State of the claimant”.

Paragraph (3)(b)

28. It was said that the language “whilst not undermining the transparency objective of the Rules” in paragraph (3)(b) could be reframed in a more positive and neutral manner.

29. A proposal was made to replace the words “whilst not undermining” with “achieving”.

30. A second proposal was made to replace the phrase “whilst not undermining” with the phrase “and is consistent with”, such that paragraph (3)(b) would read: “(b) The arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules”.

31. It was agreed that it was desirable to avoid the value judgement attached to words such as “achieving” or “undermining”. Consequently, it was agreed to adopt the phrase “and is consistent with”.

32. It was furthermore agreed that paragraph (3)(b) should be made consistent with other provisions in the rules that gave the arbitral tribunal power or discretion after consultation with the disputing parties. The location of such wording in paragraph (3)(b) was left open for further consideration.

⁶ United Nations, *Treaty Series*, vol. 2080, No. 36116.

33. It was also said that, if such consultation by the arbitral tribunal was intended, the rules should expressly so state, and the Secretariat was requested to review the text of the rules in its entirety and ensure consistency in that respect.

34. Further to that review and the clarification that, throughout the rules on transparency, wherever it was intended that the arbitral tribunal should consult with disputing parties, that fact was explicitly specified, it was agreed that the words “after consultation with the disputing parties” would be included in paragraph (3)(b) after the words “to the particular circumstances of the case”.

Footnotes

35. It was suggested to amend the footnotes to article 1, paragraph (1), in order to ensure that the term “treaty providing for the protection of investments or investors” could also be applied to territories that might be treaty parties but that would not fall under the definition as currently drafted. As part of that proposal, it was suggested to remove the definition in the second footnote of “‘party to the treaty’ or ‘State’”. In response, it was recalled that the word “State” was used throughout the rules and that therefore a second footnote to paragraph (1) was necessary in order to ensure, *inter alia*, that regional economic integration organizations were included within that definition.

36. Another suggestion was made to align the definition of “treaty providing for the protection of investments or investors” in the first footnote more closely with the definition of a “treaty” in the Vienna Convention on the Law of Treaties,⁷ with necessary adaptation for the purpose of the rules on transparency.

37. A subsequent proposal was made to amend the first footnote so that it would read as follows: “For the purpose of the Rules on Transparency, a ‘treaty’ shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.”

38. That proposal was accepted, and it was agreed that the language contained in paragraph 37 above would replace the first footnote. In addition, as the definition in the footnote referred to the term “treaty”, instead of the phrase “treaty providing for the protection of investment or investors”, it was agreed to move the footnote reference in the text of paragraph (1) to appear after the word “(‘treaty’)”.

39. In relation to the second footnote, it was agreed that the word “a” should be added before the word “State” and that the words “applies equally to” should be replaced with the words “includes, for example, a”.

Adoption of article 1

40. With the modifications agreed and reflected under paragraphs 16 to 39 above, the Commission adopted the substance of article 1.

⁷ Ibid., vol. 1155, No. 18232.

Draft article 2: Publication of information at the commencement of arbitral proceedings

41. It was suggested that a control mechanism might need to be included in article 2 in order to provide for some discretion on the part of the repository institution when a disputing party contested the applicability of the rules, or when a frivolous or abusive claim was initiated. It was also said that such a mechanism might be included in guidelines for the repository.

42. It was recalled that article 2 deliberately restricted information to be published at the notice stage to the factual information listed in that article in order to ensure that the role of repository was one that did not require discretion or decision-making. Any disagreement between disputing parties would then be resolved by the arbitral tribunal before further documents were sent to the repository. The Commission expressed its understanding that the repository was indeed expected, upon receipt of information, to publish that information according to the rules.

Adoption of article 2

43. After discussion, the Commission adopted the substance of article 2.

Draft article 3: Publication of documents*Paragraph (3)*

44. It was considered whether to retain the text contained in square brackets in paragraph (3). It was said that, while as a legal matter that text, which provided an example as to how the arbitral tribunal might make information available under that paragraph, was not necessary, it did provide useful guidance to arbitral tribunals.

45. After discussion, it was agreed that the text should be retained and the square brackets deleted.

Paragraph (5)

46. It was said that the current text of paragraph (5) was not sufficiently clear. It was furthermore said that paragraph (5) should encompass only requests made under paragraph (3) of article 3, and not requests made under paragraph (2), since documents falling under the latter category would be automatically published in any event.

47. After discussion, the Commission agreed on the following drafting proposal in relation to paragraph (5): “A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository”.

48. It was said that the repetition of the words “that person” was necessary in order to clarify that the relevant costs to be borne were limited to the costs of making those documents available to the person making that request, and did not include, for example, the photocopying or shipping costs relating to delivering documents to the registry.

Adoption of article 3

49. One delegation expressed concerns that article 3 opened the door to the publication of large volumes of documentation requiring redaction, which it said might considerably increase the costs and length of investment arbitration proceedings.

50. After discussion, the Commission adopted the substance of article 3 as modified by paragraphs 44 to 48 above.

Draft article 4: Submission by a third person*Paragraph (2)*

51. As a matter of drafting, it was agreed that the words “such” and “as may be” in the chapeau of paragraph (2) would be deleted.

52. It was also agreed to replace the words “such as, for example, funding around 20 per cent of its overall operations annually” with the following: “(e.g. funding around 20 per cent of its overall operations annually)”.

Paragraph (3)

53. It was suggested to align the language of paragraph (3) with the wording of the second sentence of article 5, paragraph (2), and therefore to replace the words “In determining whether to allow such a submission” in article 4, paragraph (3), with the words “In exercising its discretion to allow such submissions”.

54. In response, it was said that the purpose of those paragraphs was different. Article 5, paragraph (2), granted arbitral tribunals discretion in relation to whether to accept submissions, while article 4, paragraph (3), enumerated a list of factors that the arbitral tribunal should take into consideration in its determination of whether to allow a submission. Consequently, it was agreed that the wording of article 4, paragraph (3), should not be amended, and the substance of article 4, paragraph (3), was adopted in the form set out in paragraph 17 of document A/CN.9/783.

Paragraphs (5) and (6)

55. It was agreed to replace the phrase “the submission” in both paragraphs (5) and (6) with the phrase “any submission” for the sake of consistency with the mirroring provisions of article 5, paragraphs (4) and (5).

Adoption of article 4

56. After discussion, the Commission adopted the substance of article 4, with the modifications agreed under paragraphs 51 to 55 above.

Draft article 5: Submission by a non-disputing party to the treaty*Paragraphs (1) and (2)*

57. As a matter of drafting, it was agreed to change the word “accept” in paragraphs (1) and (2) to the word “allow”, to promote consistency with the terminology used in article 4.

Paragraph (2)

58. Concerns were expressed that, under paragraph (2), there would be a risk that the submission by the non-disputing party to the treaty might come very close to relying on diplomatic protection. It was clarified that that risk pertained only to paragraph (2). It was pointed out that paragraph (1) was addressing submissions on issues of treaty interpretation from a non-disputing party to the treaty. Regarding treaty interpretation, it was said that the non-disputing party to the treaty might bring a perspective on the interpretation of the treaty, including access to the *travaux préparatoires*, which might not be otherwise available to the arbitral tribunal, thus avoiding one-sided interpretations limited to the respondent State's contentions.

59. In relation to paragraph (2), it was clarified that that paragraph was not meant to allow submissions that would support the claim of the investor in a manner tantamount to diplomatic protection. One delegation said that the word "tantamount" might not give the arbitral tribunal sufficient guidance. That view was not shared.

60. Some delegations supported leaving paragraph (2) unamended.

61. Other delegations supported either deleting paragraph (2) or including express language to clarify that such a provision should not permit a State to provide arguments in an arbitration in support of an investor who was a national of that State, which would go beyond the intended scope of that provision and amount to diplomatic protection. A proposal was made in that respect to add, at the end of paragraph (2), the following text: "and the need to avoid submissions by a non-disputing party which would support the claim of the investor in a manner which would be tantamount to diplomatic protection".

62. Delegations expressed differing views in relation to whether the purpose of that language was in fact covered under article 4, paragraph (3)(b), of the rules, to which article 5, paragraph (2), was in any event subject. After discussion, the Commission expressed the view that, even if that matter was already covered under article 4, paragraph (3)(b), it would be useful, for the avoidance of doubt, to include a specific provision on that matter in article 5, paragraph (2). In that light, an alternative proposal was made to include, at the end of paragraph (2), a new sentence as follows: "For the avoidance of doubt, in exercising its discretion to allow such submissions, the arbitral tribunal shall take into consideration the need to avoid submissions by a non-disputing party which would support the claim of the investor in a manner which would be tantamount to diplomatic protection." The Commission agreed to consider that proposal further at a later stage.

63. After further consideration of the matter, the Commission agreed that the following phrase would be added at the end of paragraph (2): "and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection".

64. The Commission considered that the opening words of article 4, paragraph (3), and article 5, paragraph (2), could in fact be harmonized, because it was said that the reasoning set out in paragraphs 53 and 54 above no longer applied in the light of that amendment. The Commission reviewed paragraph 40 of document A/CN.9/760 in that respect but agreed that, when an arbitral tribunal was called upon in the rules to exercise its discretion, as a matter of fact, the criteria in article 1, paragraph (4), were plainly brought into application regardless of whether the rules used the term "discretion". The Commission agreed that the words "In exercising its discretion to

accept such submissions” in article 5, paragraph (2), would be replaced with the phrase “In determining whether to allow such submissions”.

Adoption of article 5

65. After discussion, the Commission adopted the substance of article 5, with the modifications agreed under paragraphs 57 to 64 above.

Draft article 6: Hearings

66. The Commission was reminded that, at its fifty-eighth session, the Working Group had expressed formal and unanimous support for the revised compromise proposal that included article 6, on open hearings.

67. In response to a concern that article 6 might be ambiguous in relation to whether disputing parties could agree to close hearings, it was clarified that the principle set forth in paragraph (1) was that hearings were public, subject only to paragraphs (2) and (3) of article 6. It was recalled that the question of whether disputing parties could agree to close hearings was considered at length by the Working Group, which had not accepted that proposal. It was pointed out that article 6 should be considered in the light of the provisions of article 1.

Adoption of article 6

68. After discussion, article 6 was adopted in substance without modification.

Draft article 7: Exceptions to transparency

69. The Commission was reminded that, at its fifty-eighth session, the Working Group had expressed formal and unanimous support for the revised compromise proposal that included article 7, on exceptions to transparency. It was further recalled that the Working Group had agreed to limit the exceptions to transparency to the protection of confidential or protected information (article 7, paragraphs (1) to (5)) and the protection of the integrity of the arbitral process (article 7, paragraphs (6) and (7)) (A/CN.9/765, paras. 75 and 78).

General

70. It was agreed to retain the structure and paragraph order of article 7.

“Third persons” — “Non-disputing parties” — “Public”

71. A suggestion was made to delete the phrase “non-disputing parties to the treaty” from paragraphs (1), (3) and (5) on the basis that the phrase “the public” was sufficiently broad.

72. The Commission expressed the understanding that the term “the public” as used in the rules was a generic one, which was intended to include within its ambit “third persons”, as referred to under article 4, and “non-disputing parties”, as referred to under article 5. The Commission considered whether there was a need to clarify that understanding in the rules, by way of a footnote or in the text of the rules itself.

73. In response, it was said that information made available to the public would be published on the website of the repository, and that by implication the term “the public” must include both “third persons” and “non-disputing parties”.

74. After discussion, the Commission agreed that the term “the public” was a generic term, which, when used in the rules, included also both third persons and non-disputing parties. Consequently, it was agreed to adopt the suggestion set out in paragraph 71 above.

Paragraph (3)

75. A suggestion was made to place the last sentence of paragraph (3) at the beginning of that paragraph. That proposal did not receive support for the reason that the last sentence of the provision was meant to address the specific situation of parties not agreeing on the redaction of confidential or protected information.

76. For the sake of drafting consistency, the Commission agreed to replace the word “in” appearing before the word “consultation” in the chapeau of paragraph (3) with the word “after”.

Paragraph (5)

77. A suggestion was made to add the words “public interest or” before the words “security interest” for the reason that the term “public interest” was more commonly used in certain jurisdictions than the term “security interest”. That proposal did not receive support.

Adoption of article 7

78. After discussion, the Commission adopted the substance of article 7, with the modifications agreed under paragraphs 70 to 76 above.

Draft article 8: Repository of published information

79. The Commission recalled the unanimous decision of the Working Group that the UNCITRAL secretariat was the natural and preferred choice to undertake the role of a repository of information under the rules. It was said that the United Nations, as a neutral and universal body, and its secretariat, as an independent organ under the Charter of the United Nations, should be expected to undertake the core functions of a repository under the rules on transparency, as a public administration directly responsible for the servicing and proper operation of its own legal standards.

80. The Commission expressed its strong and unanimous opinion that the UNCITRAL secretariat should fulfil the role of a transparency repository. The Commission emphasized that the work of UNCITRAL was crucial for the promotion of the rule of law at the national and international levels, and that legislative standards elaborated by UNCITRAL directly contributed to the promotion of sustainable development.

81. In that regard, it was stated that the aim of the transparency repository was the promotion of economic development and welfare. The Commission expressed agreement that transparency was a main value of good governance and of the rule of law and that therefore its work in that field promoted the welfare of developing countries. It was also noted that the mention of the United Nations on the list of the international organizations eligible for official development assistance covered UNCITRAL, as a permanent commission of the General Assembly of the United Nations.

82. The Commission mandated the Secretariat to seek, through the Fifth and Sixth Committees of the General Assembly, the funding necessary to enable it to undertake the role of transparency repository. Several delegations indicated that the request for additional funding of the UNCITRAL secretariat should be made on a cost-neutral budgetary basis in relation to the United Nations regular budget.

83. The Commission agreed that the date of coming into effect of the rules on transparency would be 1 April 2014, that date having been chosen to allow the Secretariat sufficient time to seek regular budget or extrabudgetary funding to fulfil the mandate set out in paragraph 79 above.

84. After discussion, the Commission agreed that article 8 of the rules would be amended to read: "The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL".

85. It was said that that wording would permit, in the event the UNCITRAL secretariat was not able to obtain funding from the General Assembly or extrabudgetary funding prior to the coming into effect of the rules on transparency on 1 April 2014, another institution, designated by the Commission at its current session, to undertake the repository function until such time as the UNCITRAL secretariat did obtain the necessary resources.

86. It was emphasized that any other institution designated by the Commission to undertake the repository function in those circumstances would be doing so on a temporary, "backup" basis, and only until the UNCITRAL secretariat had obtained the requisite resources. It was clarified that any institution would, upon notice by the UNCITRAL secretariat that it had obtained the necessary resources, provide all data it held or published in relation to functioning as a repository, cease to perform the functions of a repository at that time, and do so at no cost to UNCITRAL and its secretariat.

87. It was recalled that two institutions, the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA), had expressed willingness to act as a repository should the UNCITRAL secretariat not have the resources to do so. The International Centre and PCA both reaffirmed their willingness to undertake that function. Each institution separately confirmed to the Commission that it was willing to do so on a temporary basis, and to return data to the UNCITRAL secretariat at no cost upon confirmation from the UNCITRAL secretariat that it had obtained the relevant resources to fulfil the mandate of the Commission to undertake that role.

88. The Commission highly commended PCA and ICSID, both for the quality of the work of their respective institutions in the field of investment arbitration and for the support they had shown for the work of the Working Group and their contributions thereto, as well as their support of the functions of a transparency repository and their willingness to support that work should the UNCITRAL secretariat not have the resources to do so.

89. Having expressed its gratefulness for the offers of both institutions and the technical quality of such offers, the Commission emphasized that it expected any institution that might be called upon to serve as a repository on a temporary basis to work closely with the UNCITRAL secretariat and, as required, with the other institution.

90. The Permanent Court and ICSID proceeded to present their respective technical capabilities in relation to fulfilling the role of transparency repository. Both institutions referred to letters they had made available to delegations in order to set out their capabilities in a more detailed written form.

Presentation by the institutions

91. The Deputy Secretary-General of PCA made a presentation and indicated that PCA was an intergovernmental organization founded in 1899 pursuant to the Convention for the Pacific Settlement of International Disputes, which was revised in 1907.⁸ The two founding conventions of PCA specified that PCA was to remain available at all times and to all States, whether or not they had signed one of its founding conventions. The cooperation of PCA with UNCITRAL was long-standing. It was the designator of appointing authorities under the 1976 and 2010 UNCITRAL Arbitration Rules and had acted in that capacity in over 500 cases. In the past 10 years, PCA had also been asked to provide administrative support in the majority of known investment treaty arbitrations initiated under the UNCITRAL Arbitration Rules, and currently administered an estimated two thirds of known investor-State disputes under the UNCITRAL Arbitration Rules. In connection with its existing role as an archive for a growing number of public arbitrations, PCA was developing an upgraded database and search engine for case information on its website. That project was already fully funded and could be adapted to any specific needs identified by UNCITRAL for the repository. Should UNCITRAL itself be unable to fulfil the role of transparency repository under the rules on transparency, PCA indicated its willingness to take on that role, including on an interim basis.

92. The International Centre summarized its capacity to act as the transparency repository in a letter of 1 July 2013, circulated to attendees. In short, ICSID indicated that it:

- (a) Was a member of the World Bank Group, which was a United Nations specialized agency and thus part of the United Nations system;
- (b) Was a global organization with 149 member States, virtually all of which were United Nations Member States;
- (c) Would not ask States to contribute any funds to the repository, either directly or indirectly through membership fees (there were no fees for ICSID membership);
- (d) Had administered approximately 70 per cent of all known investment arbitrations, and had administered more investment cases than all other organizations combined;
- (e) Administered investment cases under any rules, including the UNCITRAL rules. It also undertook the full menu of related functions, such as acting as appointing authority or consolidating authority;

⁸ See Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (New York, Oxford University Press, 1915). The text of the Convention is available from www.minbuza.nl/en/key-topics/treaties/search-the-treaty-database/1907/10/003316.html (accessed on 1 August 2013).

(f) Was the only institution with an established track record of transparency. It had published procedural details, awards, decisions and other case-related documents since 1995. It had offered basic, advanced and full-text search of documents since 2007, and had actually done the tasks envisioned for the repository since 2007;

(g) Was in the unique position to offer users a “one-stop” service, with full-text search of all documents published in ICSID cases and in cases published by ICSID as a repository. That would be a significant advantage to users, as it would combine the two lead sources of case law in one easily accessible location, through a single search;

(h) Was a highly cost-effective option, with absolutely no funding expected from States, and a minimal, one-time fee for disputing parties;

(i) Could develop and deploy a repository within 2-3 months if asked to do so.

The International Centre also indicated that, owing to the scope of article 1 of the rules on transparency, those rules might be adopted in treaties and by agreement of disputing parties, and hence would increasingly apply to cases under ICSID and other rules.

Discussion

93. It was said by some delegations that, as a matter of membership, they had not ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States,⁹ that other countries had denounced the Convention and that those States thus felt more comfortable supporting the temporary option of the designation of PCA. In response, it was said that, in the context of the transparency repository, membership of one institution or the other was not relevant.

94. Some delegations expressed the view that ICSID had more expertise in the field of investment arbitration and of transparency in investment arbitration proceedings. It was said that in particular, given the presumptive temporary nature of any alternative institution hosting the transparency repository, a maximum of pre-existing institutional knowledge and expertise would be critical, and ICSID would be best placed in that regard.

95. Other delegations also observed that the technical specifications provided by ICSID, as well as the possibility for global full-text-search functionality with respect to both ICSID and UNCITRAL proceedings, were desirable.

96. Other delegations considered the role of the Secretary-General of PCA, as designator of appointing authorities in the UNCITRAL Arbitration Rules, as providing for a more natural link with UNCITRAL. It was also said that PCA handled a variety of cases involving States, including inter-State disputes under treaties and contract disputes between States and private parties, making it a desirable choice for some delegations. Some delegations referred to the slightly lower quoted cost that PCA would charge to parties to a dispute (free for the publication of up to 50 documents, and a flat fee of 750 euros for the publication of more than 50 documents).

97. After discussion, the Commission agreed by consensus that PCA should be designated, if necessary, to undertake the role of transparency repository on a temporary basis until the UNCITRAL secretariat obtained the resources to do so.

⁹ United Nations, *Treaty Series*, vol. 575, No. 8359.

98. Concerns were raised that any temporary solution of having PCA act as the transparency repository should not become a permanent one. The Commission therefore requested the Secretariat to report to the Commission at its next session, in 2014, on the status of the establishment and functioning of the transparency repository.

Title of rules on transparency

99. It was said that entitling the rules on transparency “UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration” would provide further *prima facie* clarity in relation to their applicability in the context of investment arbitration as opposed to purely commercial arbitration. That proposal was agreed.

Form of the rules on transparency: Appendix or stand-alone rules

100. The Commission considered the question of the form in which the rules on transparency would be made available, i.e. whether the rules would be presented as a stand-alone text or would be appended to an amended version of the UNCITRAL Arbitration Rules. First, the Commission noted that the form of the rules on transparency would not affect the scope of their applicability under article 1. The Commission further noted that article 1 of the rules on transparency provided for their application under both the UNCITRAL Arbitration Rules (art. 1, paras. (1) and (2)) and other rules or in *ad hoc* proceedings (art. 1, para. (9)). In addition, it was said that the form that the rules on transparency would take raised two primary policy considerations. On the one hand, users of the UNCITRAL Arbitration Rules ought to be made fully cognizant of the existence of the rules on transparency. On the other hand, commercial users of the amended version of the UNCITRAL Arbitration Rules should not be discouraged from using the Rules, or given an improper impression that the UNCITRAL Arbitration Rules would no longer be suitable for commercial arbitration.

101. A proposal was made with a view to reconciling those policy concerns. It was suggested that the rules on transparency should be published together with the amended version of the UNCITRAL Arbitration Rules, although not as an appendix thereto. In addition, it was suggested that the rules on transparency should be published as a stand-alone text.

102. After discussion, the proposal contained in paragraph 101 above was adopted. The Commission requested the Secretariat to publish the rules on transparency, including electronically, both together with the amended version of the UNCITRAL Arbitration Rules and as a stand-alone text.

3. UNCITRAL Arbitration Rules (with new article 1, paragraph (4), as adopted in 2013)

103. It was recalled that, following the agreement of the Commission on the scope of application of the rules on transparency, article 1 of the UNCITRAL Arbitration Rules (as revised in 2010) would require amendment in order to articulate a link with the rules on transparency (A/CN.9/765, paras. 79-80; and A/CN.9/783, paras. 28-39).

104. The Commission took note of the fact that the establishment of the amended version of the UNCITRAL Arbitration Rules, which would create a link to the rules on transparency, would necessarily have an implication for references to the UNCITRAL

Arbitration Rules in treaties concluded after the coming into force of the rules on transparency. Specifically, it was clarified that a reference to the UNCITRAL Arbitration Rules as adopted in 1976, or as revised in 2010, in a treaty concluded after the coming into force of the rules on transparency would have the effect of precluding the application of the rules on transparency (A/CN.9/783, para. 31).

Amendment to the UNCITRAL Arbitration Rules

105. The Commission considered a new paragraph (4) of article 1 to amend the UNCITRAL Arbitration Rules (as revised in 2010): “4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency [as an appendix] [as amended from time to time], subject to article 1 of the UNCITRAL Rules on Transparency.” (A/CN.9/765, para. 79; and A/CN.9/783, para. 29).

106. Further to the agreement (set out in paragraphs 101 and 102 above) that the rules on transparency would not be included as an appendix to the amended version of the UNCITRAL Arbitration Rules, it was consequently agreed that the text in square brackets, “[as an appendix]”, should be deleted.

107. It was also considered whether the language of a new paragraph (4) of article 1 of the UNCITRAL Arbitration Rules should be evolutive in nature, and include language such as “as amended from time to time” or “in effect on the date of commencement of the arbitration”.

108. A number of delegations expressed the view that including evolutive language might deter countries from adopting the rules on transparency in future treaties. It was pointed out that, while the UNCITRAL Arbitration Rules (as revised in 2010) did have evolutive language (in article 1, paragraph (2)), the 1976 UNCITRAL Arbitration Rules did not.

109. After discussion, it was agreed that the UNCITRAL Arbitration Rules (as revised in 2010) would be amended to include a new article 1, paragraph (4), as follows: “4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, subject to article 1 of the Rules on Transparency.”

Title of amended UNCITRAL Arbitration Rules

110. It was recalled that the amendment to the UNCITRAL Arbitration Rules (as revised in 2010) would result in a new version of the UNCITRAL Arbitration Rules, bearing the date of the adoption of the amendment and becoming effective as from the date of coming into effect of the rules on transparency (A/CN.9/765, paras. 33 and 79; and A/CN.9/783, para. 30).

111. The Commission considered the title of that amended version of the UNCITRAL Arbitration Rules. The following proposal was made in that respect: “UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)”. That proposal was adopted.

B. Consideration of instruments on the applicability of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to the settlement of disputes arising under existing investment treaties

112. The Commission recalled that, at its forty-fourth session, in 2011, it had confirmed that the question of applicability of the legal standard on transparency to investment treaties concluded before the date of coming into effect of the rules on transparency was part of the mandate of the Working Group and a question of great practical interest, taking account of the high number of investment treaties currently in existence.¹⁰ In that context, the Commission considered the options for making the rules on transparency applicable to existing investment treaties, either by way of a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, or by a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement. The Commission also took note of the possibility of making the rules on transparency applicable to existing investment treaties by joint interpretative declaration pursuant to article 31, paragraph (3)(a) of the Vienna Convention on the Law of Treaties, or by an amendment or modification of a relevant treaty pursuant to articles 39-41 of that Convention (A/CN.9/784).

Consideration of a recommendation

113. A view was expressed that the mandate of the Working Group was to explore options to make the rules on transparency applicable to existing investment treaties, but that it did not prejudge the outcome in favour of a recommendation.

114. The Commission agreed to include in its decision adopting the rules on transparency a recommendation urging parties to investment treaties to apply the standard to existing investment treaties. The purpose of the recommendation would be to highlight the importance of transparency in the context of treaty-based investor-State arbitration. The recommendation would leave it to parties to investment treaties to decide on the means of implementing the transparency standard in the context of existing investment treaties. The text of paragraph 1 of the draft recommendation as set out in paragraph 20 of document A/CN.9/784 was considered by the Commission.

115. Some delegations requested that qualifying language be introduced into that text. The request did not receive support.

116. After discussion, the following text was agreed, and its inclusion in the decision of the Commission adopting the rules on transparency was requested:

Also recommends that, subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties.

(See paragraph 128 below for the decision.)

¹⁰ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200.

Consideration of the preparation of a convention on transparency in treaty-based investor-State arbitration

117. Several delegations expressed support for entrusting Working Group II (Arbitration and Conciliation) with the task of preparing a convention on transparency. By way of clarification, it was said that, should a convention be concluded, it would be open for those States that wished to opt in to the rules on transparency in relation to their existing treaties to ratify it. It was emphasized that there would not be any expectation on any other State to sign or ratify such a convention.

118. It was further said that an essential component of the revised compromise proposal (see para. 16 above), was the need, ancillary to the rules on transparency, for a convention which would provide States a simple and efficient mechanism to apply the rules to existing treaties.

119. In support of that view, it was said that the large number of existing treaties, to which the rules on transparency would be applicable only on an opt-in basis, rendered such a convention critical in promoting and developing the work on transparency as contained in the rules. It was further stated that the elaboration of a multilateral instrument would be a logical next step for a credible commitment towards transparency in investment arbitration under existing treaties.

120. It was pointed out that those States that had large portfolios of existing bilateral investment treaties and that wished to make the rules on transparency applicable to those treaties in an efficient way should not be precluded from doing so.

121. In reply, it was noted that the standards embodied by the rules on transparency were new, and that all States could not be expected to be ready to apply those standards at the present time. A view was expressed that, while delegations had acknowledged the importance of transparency, the compromise achieved by the rules was not a perfect one and a convention would have the effect of upsetting the delicate balance struck in article 1 of the rules.

122. A concern was also expressed that a convention could be perceived as changing dynamics in terms of negotiating bilateral investment treaties, or that pressure could be brought to bear on States to adopt it.

123. To alleviate that concern, the Commission agreed that there was not, and should not be, any value judgement attached to whether a State decided to accede to the convention, and that pressure ought not be brought to bear on States to accede to a convention. It was said that that matter could be clarified, for instance, in the preamble to the convention.

124. For the record, it was noted that the draft text of a convention placed before the Commission in paragraph 5 of document A/CN.9/784 was a proposal by the secretariat which had not yet been the subject of any discussion in the Working Group.

125. After discussion, the Commission agreed to provide, in addition to the existing mandate it had given to the Working Group to consider options in relation to the application of the rules on transparency to existing treaties, a specific mandate to prepare a convention thereon. The views of delegations that had expressed concerns in relation to a convention were also noted and, in that light, the Commission considered the possibility of providing a mandate to the Working Group that would explicitly take into account that the aim of the convention was to give those States

that wished to make the rules on transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.

126. Some delegations proposed a differently worded mandate as follows: “The Commission gives the mandate to the Working Group to draft a convention to facilitate the application of the rules on transparency while taking into account the concerns by some States as regards possible difficulties of immediate application of the rules on transparency to existing treaties.” That wording was said not to articulate the aim of the convention set out in paragraph 125 above, namely to give those States that wished to make the rules on transparency applicable to their existing treaties an efficient mechanism to do so, and was not supported.

127. After discussion, the Commission agreed by consensus to entrust the Working Group with the task of preparing a convention on the application of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration to existing treaties, taking into account that the aim of the convention was to give those States that wished to make the rules on transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States would use the mechanism offered by the convention.

C. Decision adopting the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the UNCITRAL Arbitration Rules (with a new article 1, paragraph (4), as adopted in 2013)

128. At its 965th meeting, on 11 July 2013, the Commission adopted the following decision:

“The United Nations Commission on International Trade Law,

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

“Recalling also General Assembly resolutions 31/98 of 15 December 1976 and 65/22 of 10 January 2011 recommending the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹¹

“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the wide use of arbitration for the settlement of treaty-based investor-State disputes,

“Recognizing also the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

¹¹ For the text of the UNCITRAL Arbitration Rules (1976), see *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C. For the text of the UNCITRAL Arbitration Rules (as revised in 2010), see *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex I.

“Recognizing further that some parties to investment treaties have adopted high transparency standards in certain treaties providing for the protection of investments or investors,

“Bearing in mind that the UNCITRAL Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

“Bearing in mind also that, in connection with the modernization of the UNCITRAL Arbitration Rules (as revised in 2010), adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration is particularly timely,

“Noting that the preparation of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration was the subject of due deliberation in UNCITRAL and that they benefitted from extensive consultations with Governments and interested intergovernmental and international non-governmental organizations,

“Believing that the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes,

“Recognizing the need pursuant to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration for an institution to serve as a repository of information and the critical role the transparency repository would play in implementing those Rules,

“Recalling the universal membership of the United Nations and the independence and neutrality of its Secretariat,

“1. Adopts the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as they appear in annex I to the report of UNCITRAL on its forty-sixth session (A/68/17), and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), as provided for in chapter III, section A.3, of that report;

“2. Requests the Secretary-General, through the UNCITRAL secretariat, to perform the functions of the transparency repository in relation to the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration;

“3. Also requests the Secretary-General to publish and disseminate broadly the text of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), including electronically, and to transmit them to Governments and organizations interested in the field of dispute settlement;

“4. Recommends the use of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration and the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013) in relation to the settlement of investment disputes, and invites parties to investment treaties that include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration in their investment treaties to advise the Commission accordingly;

“5. *Also recommends* that, subject to any provision in the relevant investment treaties that may require a higher degree of transparency, the Rules on Transparency be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to investment treaties concluded before the date of coming into effect of the Rules on Transparency, to the extent such application is consistent with those investment treaties.”

D. Future work

129. The Commission took note of document A/CN.9/785, on possible future work in the field of settlement of commercial disputes, and held a preliminary discussion regarding work that could be recommended in the field of international arbitration in view of the consideration of that matter by the Commission under agenda item 16 (see paras. 292 to 332 below).

130. It was said that the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)¹² required updating as a matter of priority. It was agreed that the preferred forum for that work would be that of a working group, to ensure that the universal acceptability of those Notes would be preserved. It was recommended that a single session of the working group should be devoted to consideration of the Notes and that such consideration should take place as the next topic of future work, after completion of the draft convention (see para. 127 above).

131. It was suggested that the subject of concurrent proceedings was increasingly important, particularly in the field of investment arbitration, and might warrant further consideration. In particular, it was said that it was not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, to seek, in whole or in part, the same relief. It was further said that addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. Some delegations observed that the issue of concurrent proceedings was in such flux that developing a harmonized approach at the present time might be premature.

132. Another issue raised was that of parallel proceedings in commercial arbitrations, where preventing or avoiding parallel State court proceedings and arbitral proceedings in relation to the same subject matter might be an issue best dealt with on a multilateral level. Different suggestions were made as to the form work might take in relation to concurrent proceedings in commercial arbitration. It was suggested that promoting a uniform interpretation of article 8 of the UNCITRAL Model Law on International Commercial Arbitration¹³ might be one solution. Another option suggested was that of guidelines in relation to that matter. Yet another view was that it would be premature to decide which form such future work might take and that any decision on future work on that topic ought to preserve the option of analysing the

¹² *Official Records of the General Assembly, Fifty-first Session, Supplement No. 17 (A/51/17)*, chap. II.

¹³ For the text of the UNCITRAL Model Law on International Commercial Arbitration (1985), see *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I. For the text of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, see *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, annex I (revised articles only), and United Nations publication, Sales No. E.08.V.4.

issue of parallel proceedings in commercial arbitrations in the context of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10 June 1958.¹⁴

133. It was suggested that the topic of future work should be revisited at a future session of the Commission, after completion of the current work on developing a convention on transparency.

E. Preparation of a guide on the 1958 New York Convention

134. At its twenty-eighth session, in 1995, the Commission approved a project, undertaken jointly with Committee D (now known as the Arbitration Committee) of the International Bar Association, aimed at monitoring the legislative implementation of the New York Convention.¹⁵

135. At its forty-first session, in 2008, the Commission considered a written report in respect of the project, covering implementation of the New York Convention by States, its interpretation and application, and the requirements and procedures put in place by States for enforcing an award under the New York Convention, based on replies sent by 108 States parties to the Convention (A/CN.9/656 and Add.1). At that session, the Commission welcomed the recommendations and conclusions contained in the report, noting that they highlighted areas where additional work might need to be undertaken to enhance uniform interpretation and effective implementation of the Convention. The Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony in that field. The Commission was generally of the view that the outcome of the project should consist in the development of a guide on the New York Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that practices of States might diverge from the spirit of the Convention. The Commission requested the Secretariat to study the feasibility of preparing such a guide. Also at that session, the Commission agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.¹⁶

136. The Commission took note of General Assembly resolution 62/65 of 6 December 2007, in which the Assembly, recognizing the value of arbitration as a method of settling disputes in international commercial relations, contributing to harmonious commercial relations, stimulating international trade and development and promoting the rule of law at the international and national levels, and expressing its conviction that the New York Convention had strengthened respect for binding commitments, inspired confidence in the rule of law and ensured fair treatment in the resolution of disputes arising over contractual rights and obligations, requested the

¹⁴ United Nations, *Treaty Series*, vol. 330, No. 4739.

¹⁵ *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17)*, paras. 401-404.

¹⁶ *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, paras. 355 and 360.

Secretary-General to increase efforts to promote wider adherence to the Convention and its uniform interpretation and effective implementation.

137. The Commission recalled that it had been informed, at its forty-fourth and forty-fifth sessions, in 2011 and 2012, that the Secretariat was carrying out a project related to the preparation of a guide on the New York Convention, in close cooperation with G. Bermann (Columbia University School of Law) and E. Gaillard (Sciences Po, École de Droit), who had established research teams to work on the project. The Commission had been informed that Mr. Gaillard and Mr. Bermann, in conjunction with their respective research teams and with the support of the Secretariat, had established a website (www.newyorkconvention1958.org) to make the information gathered in preparation of the guide on the New York Convention publicly available. The website was aimed at promoting the uniform and effective application of the Convention by making available details on its judicial interpretation by States parties. The Commission had also been informed that the UNCITRAL secretariat planned to maintain close connection between the cases collected in the system for collecting and disseminating case law relating to UNCITRAL texts (the "CLOUT system") (see paras. 235 to 240 below) and the cases available on the website dedicated to the preparation of the guide on the New York Convention.¹⁷ At its forty-fifth session, the Commission had expressed its appreciation for the establishment of the website and the work done by the Secretariat, as well as by the experts and their research teams, and requested the Secretariat to pursue efforts regarding the preparation of the guide on the New York Convention.¹⁸

138. At its current session, the Commission had before it an excerpt of the guide on the New York Convention for its consideration (A/CN.9/786).

139. The Commission expressed its appreciation to the Secretariat and the experts and their teams involved in the project for their work towards the implementation of the mandate the Commission had received from the General Assembly to promote and ensure a uniform interpretation and application of international conventions.

140. Concerns were expressed that a guide would indicate preference for some views over others, and would therefore not reflect an international consensus on the interpretation of the New York Convention. The question of the form in which the guide might be published was therefore raised. In response, it was pointed out that the drafting approach adopted in the preparation of the guide was similar to that of other UNCITRAL guides or digests, such as the *Digest of Case Law on the United Nations Convention on Contracts for the International Sales of Goods*.¹⁹ It was explained that various options were available for the publication of such works. One option was that the guide could be published under the responsibility of the Secretariat; the example of the *UNCITRAL Legal Guide on Electronic Funds Transfers* (1987)²⁰ was given. It was suggested that the Commission could also take note of the guide on the New York Convention, without endorsing its content, and request the Secretariat to publish it. Another possibility would be for the Secretariat to circulate the text of the guide, once completed, with a view to collecting comments from States for consideration by the Commission at a future session. After discussion, the Commission requested the

¹⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 252; and

ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 135.

¹⁸ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 136.

¹⁹ Available from www.uncitral.org/uncitral/en/case_law/digests.html (accessed 1 August 2013).

²⁰ United Nations publication, Sales No. E.87.V.9.

Secretariat, resources permitting, to submit the guide to the Commission at its next session, in 2014, for further consideration of the status of the guide and how it would be published.

F. International commercial arbitration moot competitions

1. Willem C. Vis International Commercial Arbitration Moot

141. It was noted that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had organized the Twentieth Moot, the oral arguments phase of which had taken place in Vienna from 22 to 28 March 2013. As in previous years, the Moot had been co-sponsored by the Commission. Legal issues addressed by the teams of students participating in the Twentieth Moot were based on the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).²¹ A total of 291 teams from law schools in 66 countries participated, with the best team in oral arguments being from the City University of Hong Kong. The oral arguments phase of the Twenty-first Willem C. Vis International Commercial Arbitration Moot will be held in Vienna from 11 to 17 April 2014.

142. It was also noted that the Tenth Willem C. Vis (East) International Commercial Arbitration Moot had been organized by the Chartered Institute of Arbitrators, East Asia Branch, and co-sponsored by the Commission. The final phase had been organized in Hong Kong, China, from 11 to 17 March 2013. A total of 93 teams from 27 jurisdictions had taken part in the Tenth (East) Moot. The winning team in the oral arguments was from the University of Canberra. The Eleventh (East) Moot would be held in Hong Kong, China, from 31 March to 6 April 2014.

2. Madrid Commercial Arbitration Moot 2013

143. It was noted that Carlos III University of Madrid had organized the Fifth International Commercial Arbitration Competition in Madrid from 15 to 20 April 2013. The Madrid Moot had also been co-sponsored by the Commission. The legal issues involved in the competition related to an international sale of shares in which the United Nations Sales Convention and the Unidroit Principles of International Commercial Contracts²² were applicable, as well as the UNCITRAL Model Arbitration Law, the New York Convention and the UNCITRAL Arbitration Rules (as revised in 2010), with the Madrid Court of Arbitration as the appointing authority. A total of 23 teams from law schools or masters programmes in eight countries had participated in the Madrid Moot in Spanish. The best team in oral arguments was ICADE University which won the final against Pontifical Catholic University of Peru. The Sixth Madrid Moot would be held from 21 to 25 April 2014.

²¹ United Nations, *Treaty Series*, vol. 1489, No. 25567.

²² Available from www.unidroit.org/english/principles/contracts/main.htm (accessed 1 August 2013).

IV. Consideration of issues in the area of security interests

A. Finalization and adoption of the UNCITRAL Guide on the Implementation of a Security Rights Registry

1. Introduction

144. At the current session, the Commission had before it: (a) a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.54 and Add.1-4), which contained commentary; (b) a note by the Secretariat entitled “Draft UNCITRAL Guide on the Implementation of a Security Rights Registry” (A/CN.9/781 and Add.1 and 2), which contained, respectively, all of the changes to the commentary, terminology and recommendations, and the examples of registry forms of the draft registry guide agreed to by the Working Group at its twenty-third session (A/CN.9/767, para. 15); and (c) the reports of Working Group VI (Security Interests) on its twenty-second and twenty-third sessions (A/CN.9/764 and A/CN.9/767, respectively).

145. At the outset, the Commission agreed that the Secretariat should be given the mandate to make the changes necessary to implement the decisions of the Commission taken at the current session, ensure consistency in the terminology used and avoid duplication.

2. Consideration of the draft Registry Guide

Preface (A/CN.9/WG.VI/WP.54 and A/CN.9/781, paras. 1 and 2)

146. The Commission adopted the preface of the draft Registry Guide unchanged, on the understanding that the preface would be updated to reflect the decisions of the Commission at its current session.

Introduction (A/CN.9/WG.VI/WP.54, A/CN.9/WG.VI/WP.54/Add.1, paras. 1-23, A/CN.9/781, paras. 3-24, and A/CN.9/781/Add.1, terminology)

147. With respect to paragraph 4, subparagraph (g), of document A/CN.9/WG.VI/WP.54, the Commission agreed that reference to the Regulations and Procedures for the International Registry of the International Civil Aviation Organization should be updated to refer to the fifth edition, published in 2013.

148. With respect to the term “address”, the Commission agreed that it should be revised to refer to: (a) a physical address, which could be either a street address or a post office box number; and (b) an electronic address. The Commission further agreed that the commentary should provide examples of other addresses that would also be effective for communicating information and explain that enacting States should design the registry forms in such a way as to allow registrants to choose from the types of addresses mentioned.

149. With respect to the term “grantor”, the Commission agreed that it should be revised to refer to the person identified “in the designated field” in the notice as the grantor (for the meaning of the term “grantor”, see also paras. 169 and 170 below).

150. With respect to the term “registrant”, the Commission agreed that it should be revised to refer to “the person who submits the prescribed registry notice form to the registry”. The Commission also agreed that the commentary should explain that a

courier or other mail service provider used by the registrant to transmit a paper notice would not be considered as a registrant.

151. With respect to the term “regulation”, the Commission agreed that it should be revised to refer to the body of rules “adopted” (rather than “implemented”) by the enacting State with respect to the registry, as adoption would precede implementation.

152. With respect to the term “secured creditor”, the Commission agreed that it should be revised to refer to the person identified “in the designated field” in the notice as the secured creditor (for the meaning of the term “secured creditor”, see also paras. 169 and 170 below).

153. With respect to paragraph 23 of document A/CN.9/WG.VI/WP.54, the Commission agreed that the words in subparagraph (c) of the second sentence “that indicates the grantor’s intent to create a security right” should be deleted, as the matter was already covered in subparagraph (b) of that sentence.

154. With respect to paragraph 28 of document A/CN.9/WG.VI/WP.54, the Commission agreed that the second sentence should be revised to state that registration of a notice in a general security rights registry was the general method of achieving third-party effectiveness except with respect to a security right in a right to receive the proceeds under an independent undertaking (see the *UNCITRAL Legislative Guide on Secured Transactions*,²³ recommendations 32 and 50).

155. With respect to paragraphs 18 to 20 of document A/CN.9/WG.VI/WP.54/Add.1, the Commission agreed that they should be revised to clarify that coordination among registries would be required only if the secured transactions law included certain types of assets and a specialized registry existed with respect to those types of assets.

156. Subject to above-mentioned changes, the Commission adopted the introduction to the draft Registry Guide.

**Chapter I. Establishment and functions of the security rights registry
(A/CN.9/WG.VI/WP.54/Add.1, paras. 34-49, A/CN.9/781, paras. 26-31, and
A/CN.9/781/Add.1, recommendations 1-3)**

157. The Commission adopted chapter I (Establishment and functions of the security rights registry) unchanged.

**Chapter II. Access to the services of the registry (A/CN.9/WG.VI/WP.54/Add.1,
paras. 50-65, A/CN.9/781, paras. 26-31, and A/CN.9/781/Add.1,
recommendations 4-10)**

158. With respect to recommendations 4 to 10, the Commission agreed that:

(a) Recommendation 6, subparagraph (a) (i), should be revised to refer to “the applicable” form prescribed by the registry;

(b) The words “except as provided in recommendations 8, subparagraph (a), and 10, subparagraph (a)” should be added at the beginning of recommendation 7, subparagraph (c);

²³ United Nations publication, Sales No. E.09.V.12.

(c) Recommendation 8, subparagraph (a), should be revised to refer to “information”, rather than “the information”, not entered in “each required designated field”.

159. Subject to above-mentioned changes, the Commission adopted chapter II (Access to the services of the registry).

Chapter III. Registration (A/CN.9/WG.VI/WP.54/Add.2, paras. 1-49, A/CN.9/781, paras. 32-40, and A/CN.9/781/Add.1, recommendations 11-22)

160. With respect to paragraph 44 of document A/CN.9/WG.VI/WP.54/Add.2, the Commission agreed that it should further explain that any attachment to a notice would be part of that notice and, therefore, should also be removed when information contained in the notice was to be removed from the public registry record.

161. With respect to recommendation 12, the Commission agreed that the words “for the purposes of recommendations 16, 18, 30, 32 and 34,” should be added at the beginning of recommendation 12 to clarify its scope and that recommendation 12 should be placed right before recommendation 16.

162. With respect to recommendation 13, the Commission considered various suggestions as to how to implement the aim of option C to set a maximum time limit for the period of effectiveness of the registration of a notice. One suggestion was that, in the case of an extension, the new period could start when the amendment notice was registered, with the maximum limit applying to that amendment notice. It was stated that, as a result, if the maximum limit was, for example, 15 years and the registrant chose to indicate seven years in the initial notice, the registrant could indicate 15 years in each amendment notice. In support of that suggestion, it was observed that such an approach would be similar to the approach taken in option A, according to which each amendment notice could be for the period of time specified in the law. It was also pointed out that such an approach would provide the flexibility necessary to accommodate the needs of parties to long-term security agreements. Another suggestion was that the new period should start when the current period expired, as long as all the notices together would not exceed the maximum time limit. It was stated that, as a result, in the example mentioned above, the registrant could indicate only eight years in the amendment notice. In support of that suggestion, it was observed that such an approach would appropriately implement the policy of option C to set a maximum time limit and thus draw a real distinction between option B (which included no maximum limit) and option C. Yet another suggestion was that the new period could start when the amendment notice was registered, with the maximum limit applying to one amendment notice only, with the result that, in the example mentioned above, the registration could indicate 15 years only in the first amendment notice.

163. After discussion, the Commission agreed that recommendation 13 should be revised to read along the following lines:

“The regulation should provide that:

“Option A

“(a) The registration of an initial notice is effective for [a short period of time, such as five years, specified in the law of the enacting State];

“(b) The period of effectiveness of the registration may be extended within [a short period of time, such as six months, specified in the law of the enacting State] before its expiry; and

“(c) The registration of an amendment notice extending the period of effectiveness extends the period for [the period of time specified in subparagraph (a)] beginning from the time of expiry of the current period.

“Option B

“(a) The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field in the notice;

“(b) The period of effectiveness of the registration may be extended at any time before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness; and

“(c) The registration of an amendment notice extending the period of effectiveness extends the period for the amount of time specified by the registrant in the amendment notice beginning from the time of expiry of the current period.

“Option C

“(a) The registration of an initial notice is effective for the period of time indicated by the registrant in the designated field in the notice, not exceeding [a long period of time, for example, 20 years, specified in the law of the enacting State];

“(b) The period of effectiveness of the registration may be extended within [a short period of time, such as six months, specified in the law of the enacting State] before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness not exceeding [the maximum period of time specified in subparagraph (a)]; and

“(c) The registration of an amendment notice extending the period of effectiveness extends the period for the amount of time specified by the registrant in the amendment notice beginning from the time of expiry of the current period.”

164. With respect to recommendation 14, the Commission agreed that it should refer to “a” security right and “a” security agreement.

165. With respect to recommendation 18, the Commission agreed that subparagraph (b)(ii) should: (a) refer also to cancellation notices; (b) refer to “a” current address of the grantor, as the grantor might have more than one address; and (c) clarify that, if the secured creditor did not know the grantor’s address, the secured creditor would be entitled to send the copy of the notice to the grantor’s last “known” address or to the grantor’s address that was “reasonably available”. The Commission also agreed that the commentary should explain that the change referred to the grantor’s relevant address (for example, the grantor’s address set forth in the registry record), as otherwise the secured creditor might be exposed to the risk of sending the copy to a wrong address or might abuse that right and send the copy to an address that would be irrelevant to the transaction, giving rise to the security right to which the notice related.

166. With respect to recommendation 22, the Commission agreed that it should be revised to clarify that the information in the notice ought to be expressed in the character set determined and publicized by the registry.

167. Subject to the above-mentioned changes, the Commission adopted chapter III (Registration) of the draft Registry Guide.

Chapter IV. Registration of initial notices (A/CN.9/WG.VI/WP.54/Add.2, paras. 50-71, A/CN.9/WG.VI/WP.54/Add.3, paras. 1-35, A/CN.9/781, paras. 41-58, and A/CN.9/781/Add.1, recommendations 23-29)

168. With respect to paragraph 55 of document A/CN.9/WG.VI/WP.54/Add.2, the Commission agreed that the reference in the second sentence to the search request form should be deleted, as the address of the grantor did not need to be indicated in a search request.

169. With respect to certain recommendations, the view was expressed that the terms “grantor” and “secured creditor” did not mean the persons identified in the notice as the grantor and the secured creditor (as explained in the terminology) but rather meant the actual grantor and the actual secured creditor. Various suggestions were made. One suggestion was that, depending on the context, different terms should be used (e.g. “grantor” and “grantor of record”). Another suggestion was that the terminology should clarify that, depending on the context, the grantor (or the secured creditor) was either the actual grantor (or the actual secured creditor) or the grantor (or the secured creditor) identified or to be identified in the notice as the grantor (or the secured creditor). Yet another suggestion was that that clarification could be made in the commentary, with an additional clarification as to the context in which those terms had one or the other meaning.

170. After discussion, the Commission agreed that: (a) the explanation of the terms “grantor” and “secured creditor” in the terminology section of the draft Registry Guide should be deleted; (b) the commentary in the terminology section should explain that those terms had generally the same meaning as they had in the Secured Transactions Guide, except in certain instances in which, depending on the context, they meant the person identified in the notice; (c) the term “secured creditor” in recommendation 3, subparagraph (g), and recommendations 18, 19 and 31 should be replaced by the words “the person identified in the notice as the secured creditor”; (d) the term “grantor” in recommendation 18 should be replaced with the words “the person identified in the notice as the grantor”; (e) the commentary to recommendation 19, as revised, should clarify that the person identified in the notice as the secured creditor would be the person authorized to amend the information in a registered notice; and (f) the commentary to recommendation 33 should clarify that that recommendation dealt with the obligation of the actual secured creditor.

171. With respect to recommendation 23, it was agreed that the words “either in the same notice or in separate notices” at the end of subparagraph (b) should be deleted, while the commentary could explain that, in the case of multiple grantors or secured creditors, it was up to the registrant to determine whether to enter the required information in the same notice or in separate notices.

172. With respect to recommendation 24, the Commission agreed that subparagraphs (b) to (e) were overly prescriptive and, in any case, each enacting State would have to revise it depending on its naming conventions. Thus, the Commission

decided that the examples in subparagraphs (b) to (e) should be included in the commentary and that recommendation 24 should instead include text along the following lines: “(b) [the enacting State should specify the various components of the grantor’s name and the designated field for each component]”; and “(c) [the enacting State should specify the official documents on the basis of which the grantor’s name should be determined and the hierarchy among those official documents]”. In addition, the Commission agreed that a new subparagraph should be added along the following lines “(d) [the enacting State should specify the way in which the grantor’s name should be determined in the case of a name change after the issuance of an official document]”.

173. With respect to recommendation 25, the Commission agreed that, for reasons of consistency with recommendation 24, it should be revised to include two subparagraphs along the following lines “(a) the grantor identifier is the name of the grantor; and (b) the name of the grantor is the name as specified in a current [document, ...] constituting the legal person”.

174. With respect to recommendation 26, for reasons of consistency with recommendation 24, the Commission agreed that it should be revised to read along the following lines “[the enacting State should specify the grantor identifier in special cases, such as a person that is subject to insolvency proceedings and a trustee or representative of an estate]”. It was also agreed that the examples set forth in recommendation 26 should be included in the commentary, with appropriate modifications (see the note to the Commission that follows recommendation 26 in document A/CN.9/781/Add.1).

175. With respect to recommendation 28, the Commission agreed that the words “unless otherwise provided in the law” at the beginning of subparagraphs (b) and (c) should be deleted, as they might inadvertently give the impression that they were intended to introduce an exception to the rule of law contained in subparagraph (a) (see the Secured Transactions Guide, recommendation 14, subpara. (d), and recommendation 63).

176. With respect to recommendation 29, subparagraph (a), it was agreed that, to avoid the tautology “an amendment notice that amends”, that wording should be revised to read as follows: “an amendment notice that changes”.

177. Subject to the above-mentioned changes, the Commission adopted chapter IV (Registration of initial notices).

**Chapter V. Registration of amendment and cancellation notices
(A/CN.9/WG.VI/ WP.54/Add.4, paras. 1-41, A/CN.9/781, paras. 59-69, and
A/CN.9/781/Add.1, recommendations 30-33)**

178. With respect to recommendation 31, the Commission agreed that both options A and B should be revised to provide that a secured creditor named in multiple registered notices may amend or request the registry to amend “its information” (and not the information of other secured creditors mentioned in those notices).

179. With respect to recommendation 32, while a registration number was defined to mean a unique number allocated by the registry to an initial notice, for consistency with recommendation 30, subparagraph (a)(i), the Commission agreed that reference should be made to the registration number of the “initial” notice.

180. With respect to recommendation 33, the Commission agreed that it should refer to the obligation of the secured creditor to “register” (rather than submit) an amendment or cancellation notice. The Commission also agreed that the commentary should explain that that wording was intended to ensure that a secured creditor could not be considered as having discharged that obligation by merely submitting a notice without ensuring that it was actually registered and not rejected for any of the reasons mentioned in recommendation 8.

181. Subject to the above-mentioned changes, the Commission adopted chapter V (Registration of amendment and cancellation notices).

Chapter VI. Search criteria and search results (A/CN.9/WG.VI/WP.54/Add.4, paras. 42-51, A/CN.9/781, paras. 70-71, and A/CN.9/781/Add.1, recommendations 34 and 35)

182. With respect to paragraphs 46-48 of document A/CN.9/WG.VI/WP.54/Add.4, the Commission agreed that retrieval of information should be explained by reference to a search by the registry in accordance with the registry’s search logic. The Commission also agreed that reference to the term “search logic” should be deleted, as it was a technical term that might not be used in all States and, in any case, its substance (namely the way in which information was organized and retrieved) would be an integral part of any registry system. Accordingly, the Commission agreed that the reference to “search logic” in recommendation 35, subparagraph (b), should be deleted. Subject to those changes, the Commission adopted chapter VI (Search criteria and search results).

Chapter 7. Registration and search fees (A/CN.9/WG.VI/WP.54/Add.4, paras. 52-58, A/CN.9/781, para. 72, and A/CN.9/781/Add.1, recommendation 36)

183. The Commission adopted chapter VII (Registration and search fees) unchanged.

Annex II. Examples of registry forms (A/CN.9/781/Add.2)

184. The Commission then turned to the examples of registry forms set forth in annex II of the draft Registry Guide. With respect to form I (Initial notice), the Commission agreed that: (a) the checkboxes in front of “natural person” and “legal person” in sections A and B should be deleted (the same change should be made to form II, sections A to F; form IV, sections C and D; and form VI, section A); (b) reference to “P.O. Box (if any)” in sections A and B should be revised to “Street or P.O. Box (if any)” (the same change should be made to form II, sections A, C, D and F; form IV, sections A and D; and form V, section A); (c) reference to “Electronic or other address (if any)” in sections A and B should be changed to “Electronic address (if any)” (the same change should be made to form II, sections A, C, D and F; form IV, sections A and D; and form V, section A); (d) the box “additional information about the grantor” following legal person in section A should be deleted (the same changes should be made to form II, sections A and C; and form IV, section D); (e) the box on special cases of grantors in section A should be placed in square brackets, with a footnote making reference to the relevant commentary (the same changes should be made to form II, sections A and C; and form IV, section D); (f) sections A.2 and B.2 should be removed and a note should be inserted stating that the forms should be designed to accommodate cases in which there were multiple grantors and/or secured

creditors; and (g) section D should be revised to reflect options A to C of recommendation 13.

185. With respect to form II (Amendment notice), the Commission agreed that: (a) “registration no. of initial notice” in the second box should be revised to “registration no. of the initial notice to which the amendment relates” (the same changes should be made to the second box of form IV and to form VIII, section B.2); and (b) section J should read “J. Extend duration of registration” and should be revised to reflect options A to C of recommendation 13.

186. With respect to form III (Cancellation notice), the Commission agreed that “registration no. of initial notice to be cancelled” in the second box should be revised to state “registration no. of the initial notice to which the cancellation relates” (the same changes should be made to the second box of form V and form VIII, sections B.3).

187. With respect to form IV (Amendment notice pursuant to a judicial or administrative order), the Commission agreed that section G (extend or reduce duration of registration) should be deleted entirely. With respect to form VI (Search request form), the Commission agreed that a separate section should be provided for searchers submitting a paper search request to indicate the person and the address to which the paper search result should be mailed.

188. With respect to form VII (Search results), the Commission agreed that the footnote should reiterate recommendation 35, which required that the search result should set forth all information in each registered notice that matched the specific search criterion, without the need for an additional search, while the presentation of such information might differ depending on the registry system.

189. With respect to form VIII (Rejection of a registration of a search request), the Commission agreed that: (a) the reasons for rejection in section B should be more specific and separate checkboxes should be inserted with regard to the address of the grantor and the secured creditor; and (b) the word “relevant” in section B.2 should be deleted, and separate checkboxes should be placed, respectively, for information for addition, deletion and change.

190. Subject to the above-mentioned changes, the Commission adopted annex II (Examples of registry forms).

3. Adoption of the UNCITRAL Guide on the Implementation of a Security Rights Registry

191. At its 970th meeting, on 16 July 2013, the Commission adopted the following decision:

“The United Nations Commission on International Trade Law,

“Recalling General Assembly resolution 63/121 of 11 December 2008, in which the Assembly recommended that all States give favourable consideration to the UNCITRAL Legislative Guide on Secured Transactions²⁴ when revising or adopting legislation relevant to secured transactions,

²⁴ United Nations publication, Sales No. E.09.V.12.

“Recognizing that an efficient secured transactions regime with a publicly accessible security rights registry of the kind recommended in the Secured Transactions Guide is likely to increase access to affordable secured credit and thus promote economic growth, sustainable development, the rule of law and financial inclusion and assist in combating poverty,

“Noting with satisfaction that the UNCITRAL Guide on the Implementation of a Security Rights Registry is consistent with and usefully supplements the Secured Transactions Guide and that, together, the two guides will provide comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

“Noting also that secured transactions law reform could not be effectively implemented without the establishment of an efficient, publicly accessible security rights registry where information about the potential existence of a security right in movable assets may be registered, and that States urgently need guidance with respect to the establishment and operation of such registries,

“Noting further that the harmonization of national security rights registries on the basis of the Registry Guide is likely to increase the availability of credit across national borders and thus facilitate the development of international trade, which, if achieved on the basis of equality and mutual benefit to all States, is an important element in promoting friendly relations among States,

“Expressing its appreciation to international intergovernmental and non-governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the Registry Guide,

“Expressing also its appreciation to the participants of Working Group VI (Security Interests), as well as to the Secretariat, for their contribution to the development of the Registry Guide,

“1. *Adopts* the UNCITRAL Guide on the Implementation of a Security Rights Registry, consisting of the text contained in documents A/CN.9/WG.VI/WP.54, A/CN.9/WG.VI/WP.54/Add.1-4, A/CN.9/781 and A/CN.9/781/Add.1-2, with amendments adopted by the Commission at its forty-sixth session, and authorizes the Secretariat to edit and finalize the text of the UNCITRAL Guide on the Implementation of a Security Rights Registry pursuant to the deliberations of the Commission at that session;

“2. *Requests* the Secretary-General to publish the UNCITRAL Guide on the Implementation of a Security Rights Registry, including electronically, and to disseminate it broadly to Governments and other interested bodies;

“3. *Recommends* that all States give favourable consideration to the UNCITRAL Guide on the Implementation of a Security Rights Registry when revising relevant legislation, administrative regulations or guidelines, and to the *UNCITRAL Legislative Guide on Secured Transactions*²⁵ when revising or adopting legislation relevant to secured transactions, and invites States that have used the guides to advise the Commission accordingly;

²⁵ Ibid.

“4. *Also recommends* that all States continue to consider becoming party to the United Nations Convention on the Assignment of Receivables in International Trade,²⁶ the principles of which are also reflected in the *UNCITRAL Legislative Guide on Secured Transactions*, and the optional annex of which refers to the registration of notices with regard to assignments.”

B. Progress report of Working Group VI and future work

192. Recalling its decision to refer to the Working Group the preparation of a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions, the Commission noted that, at its twenty-third session, Working Group VI (Security Interests) had had a general exchange of views on the basis of a note prepared by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.55 and Add.1 to 4). The Commission also noted that the Secretariat was in the course of preparing a revised version of the draft Model Law that would implement the mandate given by the Commission to the Working Group and facilitate commercial finance transactions.

193. It was agreed that the preparation of the draft Model Law was an extremely important project to complement the work of the Commission in the area of security interests and provide urgently needed guidance to States as to how to implement the recommendations of the Secured Transactions Guide. It was also agreed that, in view of the importance of modern secured transactions law for the availability and the cost of credit, and the importance of credit for economic development, such guidance was extremely important and urgent to all States at a time of economic crisis but in particular to States with developing economies and economies in transition. In addition, it was stated that the scope of the draft Model Law should include all economically valuable assets.

194. After discussion, subject to further discussions on the priorities to be set by the Commission with regard to planned and possible future work (see paras. 292 to 332 below), the Commission confirmed its decision that Working Group VI should prepare a simple, short and concise model law on secured transactions based on the recommendations of the Secured Transactions Guide and consistent with all texts prepared by UNCITRAL on secured transactions.

V. Consideration of issues in the area of insolvency law

A. Finalization and adoption of revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency

195. The Commission recalled its decision to entrust Working Group V (Insolvency Law) with a mandate to develop several topics, the first of which concerned a proposal by the United States, as described in document A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency²⁷ relating to

²⁶ General Assembly resolution 56/81, annex.

²⁷ General Assembly resolution 52/158, annex.

centre of main interests and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.²⁸

196. With respect to the first part of that mandate, the Commission had before it the draft of proposed revisions to the Guide to Enactment of the Model Law on Cross-Border Insolvency (see A/CN.9/WG.V/WP.112) and the further revisions agreed by the Working Group at its forty-third session (see A/CN.9/766).

197. Having considered the text, the Commission adopted the following additional revisions:

(a) Reinsertion of paragraphs 14 to 17 of the published version of the Guide to Enactment of the Model Law on Cross-Border Insolvency²⁹ after paragraph 13, under the heading “B. Origin of the Model Law”;

(b) Insertion of a cross reference in paragraphs 123F and G so as to clarify that the date by reference to which those factors were to be considered by the court should be the date as discussed in paragraphs 128A to D;

(c) Replacement of the words “The Model Law” at the beginning of paragraph 166 with the words “Article 23, paragraph 1”.

198. At its 973rd meeting, on 18 July 2013, the Commission adopted the following decision:

“The United Nations Commission on International Trade Law,

“Noting that legislation based upon the UNCITRAL Model Law on Cross-Border Insolvency³⁰ has been enacted in some 20 States,

“Noting also the widespread increase in the incidence of cross-border insolvency proceedings and, accordingly, the growing opportunities for use and application of the Model Law in cross-border insolvency proceedings and the development of international jurisprudence interpreting its provisions,

“Noting further that courts frequently have reference to the Guide to Enactment of the Model Law³¹ for guidance on the background to the drafting and interpretation of its provisions,

“Recognizing that some uncertainty with respect to the interpretation of certain provisions of the Model Law has emerged in the jurisprudence arising from its application in practice,

“Convinced of the desirability, in the interpretation of those provisions, of regard to the international origin of the Model Law and the need to promote uniformity in its application,

“Convinced also of the desirability of providing additional guidance through revision of the Guide to Enactment of the Model Law with respect to the

²⁸ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259.

²⁹ A/CN.9/442, annex.

³⁰ General Assembly resolution 52/158, annex.

³¹ A/CN.9/442, annex.

interpretation and application of selected aspects of the Model Law to facilitate uniform interpretation,

“*Appreciating* the support and participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the revision of the Guide to Enactment of the Model Law,

“*Expressing* its appreciation to Working Group V (Insolvency Law) for its work in revising the Guide to Enactment of the Model Law,

“1. *Adopts* the Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, contained in document A/CN.9/WG.V/WP.112, as revised by the Working Group at its forty-third session (see A/CN.9/766) and by the Commission at its current session (see the report of the Commission on its forty-sixth session, (A/68/17), para. 197), and authorizes the Secretariat to edit and finalize the text of the Guide to Enactment and Interpretation in the light of those revisions;

“2. *Requests* the Secretary-General to publish, including electronically, the revised text of the Guide to Enactment and Interpretation of the Model Law, together with the text of the Model Law, and to transmit it to Governments and interested bodies, so that it becomes widely known and available;

“3. *Recommends* that the Guide to Enactment and Interpretation of the Model Law be given due consideration, as appropriate, by legislators, policymakers, judges, insolvency practitioners and other individuals concerned with cross-border insolvency laws and proceedings;

“4. *Also recommends* that all States continue to consider implementation of the UNCITRAL Model Law on Cross-Border Insolvency, and invites States that have enacted legislation based upon the Model Law to advise the Commission accordingly.”

B. Finalization and adoption of legislative recommendations on directors’ obligations in the period approaching insolvency

199. The Commission recalled its decision to entrust Working Group V (Insolvency Law) with a mandate to develop several topics, the second of which concerned a proposal by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6) concerning the obligations of directors and officers of an enterprise in the period approaching insolvency. The focus of the work undertaken on that topic has been upon the obligations that arise in the period approaching insolvency, but that become enforceable only once insolvency proceedings commence.

200. With respect to that part of that mandate, the Commission had before it a draft of the proposed text on directors’ obligations in the period approaching insolvency (A/CN.9/WG.V/WP.113) and the revisions agreed by the Working Group at its forty-third session (see A/CN.9/766).

201. In accordance with the working assumption adopted by the Working Group, the draft text has been prepared as an additional part of the UNCITRAL Legislative Guide on Insolvency Law,³² and thus contains a commentary and a set of legislative recommendations.

202. Having considered the text, the Commission adopted the following additional revisions:

(a) Deletion of the words “As noted above” at the beginning of the third sentence of paragraph 37;

(b) Deletion of the words “such as” in the second sentence of paragraph 51; and

(c) Addition of a footnote with a cross-reference to paragraph 12 (a) of the glossary to the Legislative Guide to explain the phrase “administrative expenses” in recommendation 10.

203. Although no proposal was made to revise the current text, the concern was reiterated as to the appropriateness of including draft recommendation 12 on the basis that it could not properly be considered part of the law relating to insolvency, but pertained instead to corporate or criminal law. A different view was that the sorts of measures contemplated were available in the insolvency regimes in a number of jurisdictions and were aimed at encouraging appropriate behaviour on the part of directors.

204. At its 973rd meeting, on 18 July 2013, the Commission adopted the following decision:

“The United Nations Commission on International Trade Law,

“Recognizing that effective insolvency regimes are increasingly seen as a means of encouraging economic development and investment, as well as fostering entrepreneurial activity and preserving employment,

“Considering that effective insolvency regimes, in addition to providing a predictable legal process for addressing the financial difficulties of troubled enterprises and the necessary framework for their efficient reorganization or orderly liquidation, should also permit an examination to be made of the circumstances giving rise to insolvency, and in particular the conduct of directors of such an enterprise in the period before insolvency proceedings commence,

“Noting that the UNCITRAL Legislative Guide on Insolvency Law,³³ while addressing the obligations of directors of an enterprise once insolvency proceedings commence, does not address the conduct of directors in the period approaching insolvency and the obligations that might be applicable to directors in that period,

“Considering that providing incentives for directors to take timely action to address the effects of financial distress experienced by an enterprise may be key to its successful reorganization or liquidation and that such incentives should be part of an effective insolvency regime,

³² United Nations publication, Sales No. E.05.V.10.

³³ United Nations publication, Sales No. E.05.V.10.

“*Appreciating* the support and participation of international intergovernmental and non-governmental organizations active in the field of insolvency law reform in the development of an additional part of the Legislative Guide addressing the obligations of directors in the period approaching insolvency,

“*Expressing its appreciation* to Working Group V (Insolvency Law) for its work in developing part four of the Legislative Guide, on the obligations of directors in the period approaching insolvency,

“1. *Adopts* part four of the UNCITRAL Legislative Guide on Insolvency Law, consisting of the text in document A/CN.9/WG.V/WP.113 as revised by the Working Group at its forty-third session (see A/CN.9/766) and by the Commission at its current session (see the report of the Commission on its forty-sixth session (A/68/17), para. 202), and authorizes the Secretariat to edit and finalize the text of part four of the UNCITRAL Legislative Guide on Insolvency Law in the light of those revisions;

“2. *Requests* the Secretary-General to publish, including electronically, the text of part four of the UNCITRAL Legislative Guide on Insolvency Law, to transmit it to Governments and other interested bodies and to consider consolidating parts one to four of the Legislative Guide and publishing them, including electronically, at a future date;

“3. *Recommends* that all States utilize the UNCITRAL Legislative Guide on Insolvency Law to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the Legislative Guide when revising or adopting legislation relevant to insolvency, and invites States that have used the Guide to advise the Commission accordingly.”

C. Finalization of revisions to the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective

205. The Commission recalled its decision at its forty-fourth session, in 2011, to adopt the UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective and its request to the Secretariat to establish a mechanism for updating the Judicial Perspective on an ongoing basis in the same flexible manner in which it was developed, ensuring that its neutral tone was maintained and that it continued to meet its stated purpose.³⁴

206. The Commission noted that the Secretariat had established a board of experts to advise on the updating of the Judicial Perspective to take account of recent jurisprudence interpreting the Model Law on Cross-Border Insolvency and to reflect revisions proposed to the Guide to Enactment of the Model Law on Cross-Border Insolvency.

207. The Commission had before it the draft of the proposed updates to the Judicial Perspective (A/CN.9/778) and the report of the Working Group on its forty-third session (A/CN.9/766), in which the Working Group had noted the proposed updates to the text. The Commission noted that the updated text had also been

³⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 198.

provided to the participants in the Tenth Multinational Judicial Colloquium, organized by UNCITRAL in conjunction with INSOL International and the World Bank, which had been held in The Hague on 18 and 19 May 2013.

208. The Commission agreed that the preface should include reference to the names and States of the experts constituting the board of experts consulted on the updates to the Judicial Perspective. The Commission also supported a suggestion that the preface should clarify that judgements issued prior to 15 April 2013 were included and that later judgements would be considered for inclusion in a subsequent update of the Judicial Perspective.

209. The Commission took note of the updates to the Judicial Perspective and commended the Secretariat and the board of experts for their work in maintaining the currency of the text, which provided a valuable resource for judges considering insolvency cases involving cross-border issues. The Commission authorized the Secretariat to edit and finalize the text of the updated Judicial Perspective and requested that it be published, including electronically, and transmitted to Governments, together with the request that the text be made available to relevant authorities so that it would become widely known and available.

D. Progress report of Working Group V

210. The Commission considered the reports of the Working Group on its forty-second and forty-third sessions (A/CN.9/763 and A/CN.9/766), noting that at its forty-third session (New York, 15-19 April 2013) the Working Group had discussed remaining elements of the mandate referred to in paragraph 195 above, particularly as it related to the applicability of the concept of centre of main interests to enterprise groups and the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention, together with other topics for possible future work.

211. The Commission held a preliminary exchange of views, noting that decisions on the priority of these issues and on issues of future work would subsequently be made under agenda item 16 (see paras. 292-332 below). Reference was made to the proposal in A/CN.9/789 and to the conclusions of the Working Group in paragraphs 104 to 109 of A/CN.9/766. It was noted that enterprise group issues in cross-border insolvency continued to be an area of key concern and that continuing the work in this area could usefully build upon existing consensus reached in respect of centre of main interests and directors' obligations in the context of single enterprises.

212. Support was expressed for the holding of a colloquium to enable the Working Group to clarify enterprise group issues and other parts of its current mandate. It was suggested that such a colloquium could also provide an opportunity to consider topics for possible future work, including those that may be of particular interest to developing countries, those of particular relevance to dealing with the global financial crisis and specific matters such as treatment of employee rights in insolvency and the interface between specialized insolvency regimes being developed for banking and financial institutions and general insolvency law. Another view was that Working Group V should continue with its mandate as planned. Yet another view was that the mandate should not proceed, as the Working Group did not have a plan for what its work on those topics would produce and no work should take place until that issue was clarified.

213. A related issue was whether such a colloquium should replace Working Group sessions currently scheduled for 2013 and 2014. One view was that it should not, and that once the colloquium had been held to clarify how best to approach the existing mandate, the Working Group sessions should proceed and that further approval from the Commission was not required to undertake work to complete the existing mandate. A different view was that a colloquium should take the place of Working Group sessions scheduled for 2013 and 2014 and that Working Group sessions would resume only with the approval of the Commission. (For further consideration of this matter, see paras. 324-326 below.)

VI. Consideration of issues in the area of public procurement

214. The Commission recalled its instructions to the Secretariat to undertake a study of topics that were not adequately covered in the UNCITRAL Model Law on Public Procurement (2011)³⁵ and its accompanying Guide to Enactment and that might warrant guidance papers to support the effective implementation, interpretation and use of the Model Law, to explore options for publishing and publicizing the various resources and papers themselves, including through cooperation with other relevant reform agencies, and to undertake a study of existing resources and publications of those agencies that might be made available to such ends.³⁶

215. The Commission considered two draft documents produced to support the Model Law in this way: “Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement” (A/CN.9/770) and “Glossary of procurement-related terms used in the UNCITRAL Model Law on Public Procurement” (A/CN.9/771).

216. The Commission adopted the following decision regarding those documents:

“The United Nations Commission on International Trade Law,

“Recalling the adoption of its Model Law on Public Procurement at its forty-fourth session, in 2011, and an accompanying Guide to Enactment at its forty-fifth session, in 2012,³⁷

“Expressing appreciation to the Secretariat for having prepared the documents “Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement” (A/CN.9/770) and “Glossary of procurement-related terms used in the UNCITRAL Model Law on Public Procurement” (A/CN.9/771),

“1. Adopts the documents “Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement” and “Glossary of procurement-related terms used in the UNCITRAL Model Law on Public Procurement”;

“2. Requests the Secretary-General to publish those documents, including electronically, to disseminate them broadly to Governments and other

³⁵ Ibid., annex I.

³⁶ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 110 and 114.

³⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 192; and *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 46.

interested bodies and to make all efforts to ensure that they become generally known and available;

“3. *Recommends* that those documents be considered by States and reform agencies when reforming public procurement systems on the basis of the UNCITRAL Model Law on Public Procurement and accompanying Guide to Enactment, so as to support the effective implementation and use of the Model Law.”

217. As regards the other topics with regard to which additional guidance had been suggested by the Commission at its forty-fifth session, in 2012,³⁸ and in response to an oral report of the Secretariat on its consultations with experts on these topics, the Commission decided that:

(a) Issues of contract management and administration and procurement planning might be addressed in any future work in the field of public-private partnerships; accordingly, no further work on those topics should be undertaken at this time (as regards future work in the field of public-private partnerships, see paras. 327-331 below);

(b) A detailed existing publication of a member State on issues of promoting competition in the procurement process and mitigating risks of collusion had been provided to UNCITRAL, and the Secretariat was encouraged to make reference to it on the UNCITRAL website;

(c) The Model Law and the Guide addressed in sufficient detail the legal aspects of the effective use of the Model Law's procurement methods, centralized purchasing and framework agreements, sustainability and environmental procurement and access for small and medium-sized enterprises to procurement markets, but recognized that other reform agencies might publish additional material on the implementation and use of legal enabling provisions, as experience with such tools increases; where such additional materials could support the effective implementation and use of the Model Law, they would be brought to the Commission for its consideration in due course;

(d) Although the importance of the remaining topics was growing, they were not addressed in the Model Law or in detail in the Guide to Enactment (notably, use of contractors, issues relating to their capabilities, suspension, debarment and “self-cleaning”); if additional materials from outside sources, or if it were suggested that additional materials developed by UNCITRAL, could support the effective implementation and use of the Model Law, the matter would be brought to the Commission for its consideration in due course;

(e) Further work on harmonization between public procurement law and other branches of law was considered to be of lower priority and would not be considered further at this time.

³⁸ Ibid., *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 110.

VII. Online dispute resolution: progress report of Working Group III

218. The Commission recalled its previous discussions of online dispute resolution³⁹ and took note with appreciation of the progress made by Working Group III (Online Dispute Resolution), as reflected in its reports on its twenty-second to twenty-seventh sessions (A/CN.9/716, A/CN.9/721, A/CN.9/739, A/CN.9/744, A/CN.9/762 and A/CN.9/769). The Commission commended the Secretariat for the working papers and reports prepared for those sessions.

219. In relation to the recent deliberations of the Working Group, the Commission recalled that differing views had been expressed in the Working Group in relation to the nature of the final stage of online dispute resolution proceedings under the draft rules being discussed in the Working Group, and that in order to reconcile those views, the Working Group had proposed at its twenty-sixth session, a two-track system, one track of which ended in arbitration and one of which did not. It was recalled that the genesis of that proposal could be found in document A/CN.9/762 and its annex.

220. The Commission noted that at the twenty-seventh session of the Working Group, a number of delegations had reiterated that the Working Group needed to devise a global online dispute resolution system accommodating both jurisdictions that provided for pre-dispute arbitration agreements to be binding on consumers and jurisdictions that did not (A/CN.9/769, para. 16). The Commission took note of the two structural proposals in relation to the rules that had been made at that session, one for a business-to-business set of rules intended to precede the development of a business-to-consumer set of rules, and the other a modified proposal implementing a two-track system. The Commission further noted the determination of the Working Group in relation to those proposals, namely, that there had not been a preponderance of views supporting the discarding of the two-track system in favour of a business-to-business-only set of rules as a preliminary stage, and that all components of the modified two-track proposal would be put in square brackets for further consideration and that the concerns raised in relation to that proposal would be further addressed (A/CN.9/769, paras. 14-43).

221. At its forty-fifth session, in 2012, the Commission had decided that the Working Group should: (a) consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; (b) continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations, including in cases where the consumer was the respondent party in an online dispute resolution process; and (c) continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration. At that session, the Commission furthermore reaffirmed the mandate of the Working Group on online dispute resolution in respect of low-value,

³⁹ Ibid., *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 338 and 341-343; *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 252 and 257; *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 213; and *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 71-79.

high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to conduct its work in the most efficient manner possible.⁴⁰

222. After discussion, the Commission unanimously confirmed the decision made at its previous session on the matter,⁴¹ namely that:

(a) The Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process;

(b) The Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations, including in cases where the consumer was the respondent party in an online dispute resolution process;

(c) The Working Group should continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, including arbitration and possible alternatives to arbitration;

(d) The mandate of the Working Group on online dispute resolution in respect of low-value, high-volume cross-border electronic transactions was reaffirmed, and that the Working Group was encouraged to continue to conduct its work in the most efficient manner possible.

VIII. Electronic commerce: progress report of Working Group IV

223. The Commission recalled that at its forty-fourth session, in 2011, it had mandated Working Group IV (Electronic Commerce) to undertake work in the field of electronic transferable records. At its current session, the Commission had before it reports of the Working Group on its forty-sixth session (A/CN.9/761), held in Vienna from 29 October to 2 November 2012, and forty-seventh session (A/CN.9/768), held in New York from 13 to 17 May 2013.

224. The Commission noted that the Working Group, at its forty-sixth session, had agreed that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records and that draft provisions should be prepared in the form of a model law, without prejudice to the decision on the final form (A/CN.9/761, paras. 18 and 93). It was further noted that the Identity Management Legal Task Force of the American Bar Association had submitted a paper on identity management (A/CN.9/WG.IV/WP.120) for that session.

225. The Commission noted that the Working Group, at its forty-seventh session, had had the first opportunity to consider the draft provisions on electronic transferable records with the general understanding that its work should be guided by the principles of functional equivalence and technological neutrality, and should not deal with matters governed by the substantive law (A/CN.9/768, para. 14).

226. The view was expressed that work on electronic transferable records should take into consideration the Convention Providing a Uniform Law for Bills of Exchange and

⁴⁰ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

⁴¹ Ibid.

Promissory Notes (Geneva, 7 June 1930)⁴² and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931),⁴³ as dematerialization or introduction of electronic equivalents of such instruments might create legal difficulties in States parties to those conventions.

227. Noting that the current work of the Working Group would greatly assist in facilitating electronic commerce in international trade, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.

228. The Commission also took note of other developments in the field of electronic commerce. It was first noted that the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)⁴⁴ had entered into force on 1 March 2013 with three States parties. It was further explained that substantive provisions of the Electronic Communications Convention, which had 16 additional signatories, had influenced States that were revising or enacting their legislation on electronic commerce, and thus had the unforeseen yet very positive effect of updating and supplementing the UNCITRAL Model Law on Electronic Commerce.⁴⁵

229. The Commission was also informed about the technical assistance and coordination activities in the field of electronic commerce undertaken by the Secretariat, including through the UNCITRAL Regional Centre for Asia and the Pacific. It was noted that cooperation activities, such as the Secretariat's participation in the revision of recommendation No. 14 on authentication of trade documents by means other than signature of the United Nations Centre for Trade Facilitation and Electronic Business, ensured the consistency of such projects with UNCITRAL texts on electronic commerce. Coordination with the Economic and Social Commission for Asia and the Pacific, the World Customs Organization and the European Commission were also noted.

230. After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting to the Commission on relevant developments in the field of electronic commerce.

IX. Technical assistance: law reform

231. The Commission had before it a note by the Secretariat (A/CN.9/775) describing the technical cooperation and assistance activities undertaken subsequent to the date of the note on that topic submitted to the Commission at its forty-fifth session, in 2012 (A/CN.9/753). The Commission stressed the importance of such technical cooperation and assistance and expressed its appreciation for the activities undertaken by the Secretariat referred to in document A/CN.9/775.

232. The Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was

⁴² League of Nations, *Treaty Series*, vol. CXLIII, No. 3313.

⁴³ Ibid., vol. CXLIII, No. 3316.

⁴⁴ General Assembly resolution 60/21, annex.

⁴⁵ General Assembly resolution 51/162, annex.

dependent upon the availability of funds to meet associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. Accordingly, requests for technical cooperation and assistance activities continued to be very carefully considered, and the number of such activities, which of late had mostly been carried out on a cost-share or no-cost basis, was limited. The Commission requested the Secretariat to continue exploring alternative sources of extrabudgetary funding, in particular by more extensively engaging permanent missions, as well as other possible partners in the public and private sectors. The Commission also encouraged the Secretariat to seek cooperation with international organizations, including through regional offices, and bilateral assistance providers in the provision of technical assistance, and appealed to all States, international organizations and other interested entities to facilitate such cooperation and take any other initiative to maximize the use of relevant UNCITRAL standards in law reform.

233. The Commission reiterated its appeal to all States, international organizations and other interested entities to consider making contributions to the UNCITRAL Trust Fund for Symposia, if possible in the form of multi-year contributions or as specific-purpose contributions, in order to facilitate planning and enable the Secretariat to meet the increasing number of requests from developing countries and countries with economies in transition for technical cooperation and assistance activities. The Commission expressed its appreciation to the Government of the Republic of Korea, through its Ministry of Justice, and to the Government of Indonesia for their contributions to the Trust Fund since the Commission's forty-fifth session, as well as to organizations that had contributed to the programme by providing funds or by hosting seminars.

234. The Commission appealed to the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that were members of the Commission. The Commission expressed its appreciation to Austria for contributing to the UNCITRAL Trust Fund since the Commission's forty-fifth session, thereby enabling travel assistance to be granted to developing countries that were members of UNCITRAL.

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

235. The Commission considered document A/CN.9/777, "Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts", which provided information on the current status of the case law on UNCITRAL texts (CLOUT) system and of the digests of case law on the United Nations Convention on Contracts for the International Sale of Goods and on the UNCITRAL Model Law on International Commercial Arbitration.

236. The Commission expressed its continuing belief that the CLOUT system and the digests were an important tool for promoting uniform interpretation of international trade law and noted with appreciation the increasing number of UNCITRAL legal texts that were currently represented in the CLOUT system. As at 26 April 2013 (date of document A/CN.9/777), 128 issues of compiled case-law abstracts had been

prepared, dealing with 1,234 cases. The cases relate to the New York Convention⁴⁶ and the following nine UNCITRAL texts:

- Convention on the Limitation Period in the International Sale of Goods (New York, 1974)⁴⁷ and Convention on the Limitation Period in the International Sale of Goods as amended by the Protocol of 11 April 1980 (Vienna)⁴⁸
- United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978)⁴⁹
- United Nations Sales Convention
- UNCITRAL Model Law on International Credit Transfers (1992)⁵⁰
- United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995)⁵¹
- UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006⁵²
- UNCITRAL Model Law on Electronic Commerce, 1996⁵³
- UNCITRAL Model Law on Cross-Border Insolvency
- Electronic Communications Convention.

While most of the abstracts published came from Western European and other States, a small decrease in the number of abstracts attributable to that regional group and a parallel modest increase in the abstracts from Latin America and the Caribbean was recorded, compared to the figures in 2012. The volume of abstracts from the other regional groups had not changed.

237. The network of national correspondents initiated its mandate on the first day of the forty-fifth session of the Commission, in 2012. The network is currently composed of 64 correspondents representing 31 countries. The Commission noted that paragraph 7 of document A/CN.9/777 was inaccurate in that respect, since it failed to list Denmark among the countries that had recently nominated national correspondents. Since the previous note to the Commission (A/CN.9/748), national correspondents had provided approximately 36 per cent of the abstracts published.

238. The Commission noted with appreciation that the Secretariat had promoted the *Digest of Case Law on the United Nations Convention on Contracts for the*

⁴⁶ The Commission may recall that at its forty-first session, in 2008, it agreed that, resources permitting, the Secretariat could collect and disseminate information on the judicial interpretation of the New York Convention. For this reason, the CLOUT system includes only recent case law concerning the Convention. See *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 360.

⁴⁷ United Nations, *Treaty Series*, vol. 1511, No. 26119.

⁴⁸ Ibid., vol. 1511, No. 26121.

⁴⁹ Ibid., vol. 1695, No. 29215.

⁵⁰ *Official Records of the General Assembly, Forty-seventh Session, Supplement No. 17* (A/47/17), annex I.

⁵¹ United Nations, *Treaty Series*, vol. 2169, No. 38030, p. 163.

⁵² *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

⁵³ General Assembly resolution 51/162, annex.

International Sale of Goods and the *Digest of Case Law on the Model Law on International Commercial Arbitration* in various ways and that the English version of the former had been printed in paper format thanks to the financial support and collaboration of the University of Pittsburgh School of Law and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). The Commission also noted that translation of the Digest into the other five official languages of the United Nations in some cases had been finalized and in other cases was under way. The Commission was informed of the progress of preparation of the digest of case law on the UNCITRAL Model Law on Cross-Border Insolvency.

239. The Commission also took note of the collaboration with Professors G. Bermann and E. Gaillard and their teams, which had resulted in the setting up of a database on the New York Convention, including material used in the preparation of the guide on that Convention (see para. 137 above).

240. The Commission welcomed the news that the Secretariat had found some internal resources for the updating and upgrading of the CLOUT system in order to make it more user-friendly. The Commission, expressing its appreciation for the work of the Secretariat on the CLOUT system, noted the resource-intensive nature of the system and once again acknowledged the need for further resources to sustain it. As it had done previously,⁵⁴ the Commission appealed to all States to assist the Secretariat in the search for available funding at the national level to ensure the coordination and expansion of the system.

XI. Status and promotion of UNCITRAL texts

241. The Commission considered the status of the conventions and model laws emanating from its work and the status of the New York Convention, on the basis of a note by the Secretariat (A/CN.9/773). The Commission noted with appreciation the information on treaty actions and legislative enactments received since its forty-fifth session. In particular, it expressed appreciation for the efforts made by the Max Planck Institute for Comparative and International Private Law (Hamburg, Germany) to identify and provide information to the Secretariat on legislation enacting UNCITRAL model laws.

242. The Commission also noted with appreciation the following actions and enactments made known to the Secretariat subsequent to the submission of the note by the Secretariat:

(a) New York Convention: withdrawal of declaration by Mauritius (149 States parties);

(b) UNCITRAL Model Law on Electronic Commerce (1996):⁵⁵ legislation based on the Model Law had been adopted in Grenada (2008), Oman (2008) and San Marino (2013); legislation influenced by the principles on which the Model Law is based had been adopted in Bangladesh (2006) and the United States, in the State of Georgia (2009);

⁵⁴ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 372.

⁵⁵ General Assembly resolution 51/162, annex.

(c) UNCITRAL Model Law on Electronic Signatures (2001):⁵⁶ legislation based on the Model Law had been adopted in Grenada (2008) and San Marino (2013); legislation influenced by the principles on which the Model Law is based had been adopted in Oman (2008);

(d) UNCITRAL Model Law on International Commercial Conciliation (2002):⁵⁷ legislation based on the Model Law had been adopted in Belgium (2005) and Luxembourg (2012); legislation influenced by the principles on which the Model Law is based had been adopted in France (2011), Switzerland (2008) and the United States, in the State of Hawaii (2013).

243. The Commission noted that, to make it even more useful, the record of treaty actions and legislative enactments of model laws could reflect additional aspects of the impact of UNCITRAL texts. In this regard, it took note of the May 2013 Accord on Fire and Building Safety in Bangladesh.⁵⁸ The Accord is an agreement between trade unions and international fashion retailers to establish certain minimum safety standards in the Bangladesh garment industry in the light of the Rana Plaza tragedy. In order to create a binding dispute settlement regime, the Accord references the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.⁵⁹ The Accord demonstrates the wide recognition of the legal effectiveness of those texts, and it also serves as a reminder of the status of those texts as widely accepted norms and models for the creation of legal accountability.

244. Considering the broader impact of UNCITRAL texts, the Commission also took note of the bibliography of recent writings related to the work of UNCITRAL (A/CN.9/772) and noted with appreciation the influence of UNCITRAL legislative guides, practice guides and contractual texts. To facilitate a comprehensive approach to the creation of the bibliography and to further the understanding of the influence of UNCITRAL texts, the Commission called on non-governmental organizations, in particular those invited to the Commission's annual session, to donate copies of their journals, annual reports and other publications to the UNCITRAL Law Library for review. In this regard, the Commission expressed appreciation to the German Institution of Arbitration for its donation of all existing and forthcoming issues of the *German Arbitration Journal (Zeitschrift für Schiedsverfahren)*.

XII. Coordination and cooperation

A. General

245. The Commission had before it a note by the Secretariat (A/CN.9/776) providing information on the activities of international organizations active in the field of international trade law in which the UNCITRAL secretariat had participated since the last note to the Commission (A/CN.9/749). The Commission noted with appreciation

⁵⁶ General Assembly resolution 56/80, annex.

⁵⁷ General Assembly resolution 57/18, annex.

⁵⁸ Available from www.industrialunion.org/sites/default/files/uploads/documents/2013-05-13_-_accord_on_fire_and_building_safety_in_bangladesh_0.pdf (accessed 16 July 2013).

⁵⁹ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17), annex I; and *ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), annex I.

that the Secretariat had engaged in activities with a number of organizations both within and outside the United Nations system, including the European Union, the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the United Nations Centre for Trade Facilitation and Electronic Business, the United Nations Conference on Trade and Development, the Economic Commission for Europe, Unidroit, the United Nations Inter-Agency Cluster on Trade and Productive Capacity of the United Nations System Chief Executives Board for Coordination, and the World Bank.

246. The Commission noted that the coordination activity of the Secretariat concerned topics discussed in all the current UNCITRAL working groups and that the Secretariat participated in expert groups, working groups and plenary meetings with the purpose of sharing information and expertise and avoiding duplication of work and of the resultant products. The Commission also noted that that work often involved travel to meetings of the organizations mentioned in paragraph 245 above and the expenditure of funds allocated for official travel. The Commission reiterated the importance of coordination work being undertaken by UNCITRAL as the core legal body in the United Nations system in the field of international trade law and supported the use of travel funds for that purpose.

247. As examples of current efforts, the Commission noted with particular appreciation the coordination activities involving the Hague Conference on Private International Law and Unidroit.

B. Coordination and cooperation in the field of security interests

248. The Commission took note with appreciation of the coordination efforts undertaken in the last two decades in the field of security interests, as reflected, for example, in a United Nations publication entitled “UNCITRAL, Hague Conference and Unidroit texts on security interests: comparison and analysis of major features of international instruments relating to secured transactions”.⁶⁰ It was widely felt that those efforts were an excellent example of the kind of coordination and cooperation that the Commission had been supporting for years in order to avoid duplication of efforts and conflicts among legal texts prepared by various organizations.

249. Recalling the mandate it had given to the Secretariat at its forty-fourth session, in 2011,⁶¹ the Commission noted with appreciation the efforts of the Secretariat in: (a) preparing in cooperation with the World Bank a first draft of a joint set of UNCITRAL-World Bank principles on secured transactions that would incorporate the recommendations of the *UNCITRAL Legislative Guide on Secured Transactions*; and (b) cooperating closely with the European Commission with a view to ensuring a coordinated approach to the issue of the law applicable to the third-party effects of assignments of receivables, taking into account the approach followed in the United Nations Convention on the Assignment of Receivables in International Trade and the Secured Transactions Guide. It was widely felt that such coordination was particularly

⁶⁰ Available from www.uncitral.org/uncitral/en/uncitral_texts/security/2011UNCITRAL_HCCH_Unidroit_texts.html (accessed 1 August 2013).

⁶¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 228.

important and should continue. After discussion, the Commission renewed its mandate to the Secretariat to continue with such coordination efforts and report to the Commission.

C. Reports of other international organizations

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

International Institute for the Unification of Private Law (Unidroit)

251. The Commission heard a statement made on behalf of Unidroit welcoming the current coordination and cooperation with UNCITRAL and reaffirming its commitment to cooperate closely with the Commission.

252. Unidroit reported that:

(a) At its 92nd session (Rome, 8-10 May 2013), the Unidroit Governing Council had adopted the Model Clauses for the Use of the Unidroit Principles of International Commercial Contracts. The UNCITRAL secretariat had provided comments to the draft Model Clauses in order to clarify the relationship between the Unidroit Principles and article 7 of the United Nations Sales Convention. The Unidroit Governing Council had adopted the Model Clauses and reflected the UNCITRAL secretariat's observations through an amendment to the comments accompanying the Model Clauses;

(b) At the same session, the Unidroit Governing Council had taken note of the report concerning possible future work on long-term contracts and invited the Unidroit secretariat to undertake preliminary in-house steps to identify the issues related to investment and other long-term contracts not adequately addressed in the 2010 edition of the Unidroit Principles;

(c) The Unidroit Governing Council had taken note of the progress in negotiations for the establishment of the international registry for railway rolling stock and of the first meeting of the Preparatory Commission for the Establishment of the International Registry for Space Assets (Rome, 6-7 May 2013). The following States had participated in the work of the Preparatory Commissions: Brazil, China, Czech Republic, France, Germany, India, Italy, Russian Federation, Saudi Arabia, South Africa and United States. The International Telecommunication Union, the International Civil Aviation Organization and the Intergovernmental Organization for Carriage by Rail, as well as a number of other participants and representatives of the financial and commercial world, had been invited to attend the session as observers. The Unidroit Governing Council had requested that the Unidroit secretariat continue assigning high priority to the promotion of both Protocols to the Convention on International Interests in Mobile Equipment (Cape Town, 2001);⁶²

(d) The Cape Town Convention now had 58 States parties and the Registry established under the Protocol to the Convention on International Interests in Mobile

⁶² Available from www.unidroit.org/english/conventions/mobile-equipment/main.htm (accessed 1 August 2013).

Equipment on Matters Specific to Aircraft Equipment⁶³ had reached the remarkable level of nearly 400,000 entries since its establishment in 2006;

(e) The Unidroit Governing Council had continued to consider possible additions to the Cape Town system. At its ninety-second session, the Council had taken note of reports on: (a) a possible fourth protocol to the Cape Town Convention on agricultural, mining and construction equipment, as well as the expressions of support from several industry associations on its potential economic impact; (b) a possible future protocol on ships and maritime transport equipment; and (c) a possible future protocol on off-shore wind power generation equipment. The Governing Council agreed to proceed with preliminary work on a potential fourth protocol, on agricultural, mining and construction equipment, assigned medium priority, and had requested that the Unidroit secretariat prepare a feasibility study on whether satisfactory conditions existed to move forward with work in respect of the other two topics;

(f) The draft principles on the operation of close-out netting provisions had been adopted by the Governing Council together with the accompanying comments;

(g) The Unidroit Committee on Emerging Markets Issues would hold its third meeting in Istanbul later in the year, for the purpose of establishing the scope and methodology for drafting a legislative guide on principles and rules capable of enhancing trading in securities in emerging markets;

(h) Two sessions had been held by the Unidroit working group charged with the preparation of a legal guide on contract farming, a project to which the Unidroit Governing Council had assigned high priority with a view to its substantive completion in 2014. The Food and Agriculture Organization of the United Nations, the International Fund for Agricultural Development and the World Food Programme had actively participated in the preparation of the guide. The Council had reaffirmed its interest in possible future work on private law aspects of agricultural investment and financing (including land investment contracts, land tenure regimes, legal structure of agricultural enterprises) and had encouraged the Unidroit secretariat to revisit those issues once the legal guide on contract farming had been completed.

253. With regard to the Model Clauses, the Commission recalled its observations at its fortieth session related to its endorsement of the 2004 edition of the Unidroit Principles, in which it had developed its position on the proper relationship between the Unidroit Principles and the United Nations Sales Convention.⁶⁴ It was reiterated that the Unidroit Principles should not be construed as the “general principles” on which the United Nations Sales Convention is based. It was noted that those “general principles” formed an integral component of the interpretive hierarchy found in article 7 of the United Nations Sales Convention. It was also noted that, for the Unidroit Principles to displace the principles referred to in article 7 of the United Nations Sales Convention, it was necessary for the parties contractually to exclude the application of article 7. While noting the amendment made to the comments found in the Model Clauses, the Commission suggested that, with a view to avoiding any confusion as to the roles of the Unidroit Principles and the United Nations Sales Convention, and the relationship between the two instruments, this issue should be

⁶³ United Nations, *Treaty Series*, vol. 2367, No. 41143.

⁶⁴ *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, paras. 209-213.

further discussed at the colloquium to be held in celebration of the thirty-fifth anniversary of the United Nations Sales Convention, or at another event (see para. 315 below).

254. The Commission took note of the decision by the Unidroit Governing Council to seek substantive cooperation with UNCITRAL. After discussion, the Commission agreed that Unidroit, the Hague Conference on Private International Law and UNCITRAL should emphasize their cooperation with particular regard to the areas of intersection of the three organizations. The Commission also expressed broad support for the suggestion that a report, jointly prepared by the UNCITRAL secretariat and Unidroit highlighting possible joint projects, be submitted to the Commission at its next session.

European Union

255. The Commission heard a statement by the European Commission on its proposal for a Common European sales law. The justifications for the proposal were noted, including the legal barriers to trade presented by divergent contract laws. It was noted that the proposal was for an optional contract law instrument that would be open for selection in cross-border business-to-consumer transactions and business-to-business transactions where one party was a small or medium-sized enterprise. It was also noted that the Common European sales law, as proposed, would be available for selection in any transaction where at least one party to the transaction was located in the European Union. The influence of international instruments, including the United Nations Sales Convention and the Unidroit Principles, on the European Commission's proposal was also noted. Finally, it was noted that the proposal was still being considered under the legislative procedures of the European Union.

World Bank

256. The Commission heard a statement made on behalf of the World Bank, in which appreciation was expressed to UNCITRAL and its secretariat for the continuing cooperation with the World Bank. It was noted that over the previous years the work of the World Bank in supporting the modernization of the enabling legal environment for economic growth and trade had been significantly enhanced by the work of UNCITRAL and its working groups. In particular, the work being done by the two organizations in establishing uniform legal frameworks in the field of public procurement, arbitration and conciliation, insolvency and secured transactions was highlighted.

D. International governmental and non-governmental organizations invited to sessions of UNCITRAL and its Working Groups

257. At its current session, the Commission recalled that, at its forty-third session, in 2010, it had adopted the summary of conclusions on UNCITRAL rules of procedure and methods of work.⁶⁵ In paragraph 9 of the summary, the Commission had decided to draw up and update as necessary a list of international organizations and non-governmental organizations with which UNCITRAL had long-standing cooperation and which had been invited to sessions of the Commission. The

⁶⁵ Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, annex III.

Commission also recalled that, further to its request,⁶⁶ the Secretariat had adjusted the online presentation of information concerning intergovernmental and non-governmental organizations invited to sessions of UNCITRAL and its working groups and the modality of communicating such information to States, and the adjustments made were to the satisfaction of the Commission.⁶⁷

258. The Commission took note that since its forty-fifth session, in 2012, the following organizations had been added to the list of non-governmental organizations invited to sessions of UNCITRAL and its working groups: European Law Institute, (www.europeanlawinstitute.eu), Korean Commercial Arbitration Board (www.kcab.or.kr) and Panel of Recognised International Market Experts in Finance (www.primefinancedisputes.org).

259. In response to a query on the inclusion in the list of the Korean Commercial Arbitration Board, it was explained that the national affiliation of a non-governmental organization was not a decisive factor in deciding on whether to invite it to UNCITRAL sessions. The Commission recalled that a number of national non-governmental organizations were invited by UNCITRAL to its sessions because of their prominent role in legal developments not only in their own jurisdiction but also in the jurisdictions of a particular region or worldwide, as reflected by their generally multinational membership. The need to achieve a balanced representation of non-governmental organizations from various geographical regions and groups of countries at different levels of development was also taken into account. Efforts were also made to avoid overrepresentation of organizations from a particular country or region or with a particular expertise that was already sufficiently represented in the Commission.

260. The Commission recalled the criteria that the Secretariat applied when deciding on whether to invite a new organization to UNCITRAL sessions. The Commission reaffirmed its understanding, as reflected in paragraph 10 of the summary of conclusions on UNCITRAL rules of procedure and methods of work (see para. 257 above), that it was for the Secretariat to inform the States members of the Commission about its decision to invite a new non-governmental organization to UNCITRAL sessions and it was for the Commission to take a final decision when an objection was raised to that decision. The Commission also confirmed its understanding that invitations extended to non-governmental organizations to attend sessions of UNCITRAL and its working groups had no bearing on the observer status of those organizations in any body of the United Nations system, and that the status of a non-governmental organization with the Economic and Social Council had no bearing on a decision on whether that organization should be invited to UNCITRAL sessions. The list of non-governmental organizations invited to sessions of UNCITRAL was compiled and made available to States for the sole purpose of informing them about organizations being invited to the sessions.

261. The point was made that the criteria applied by the Secretariat in taking decisions on inviting new non-governmental organizations to UNCITRAL sessions and the procedure for applying such criteria should be made as objective as possible. The view was also expressed that the Secretariat ought to inform States members of the Commission before an invitation was extended to a new non-governmental

⁶⁶ Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 288-298.

⁶⁷ Ibid., *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 176-178.

organization and before that organization was added to the list. It was recalled that the same issues had been discussed at length at previous sessions of the Commission. The Commission reaffirmed the compromise achieved on those issues, as reflected in paragraphs 9 and 10 of the summary of conclusions on UNCITRAL methods of work referred to above.

XIII. UNCITRAL regional presence

262. The Commission took note of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific subsequent to the date of the report on that topic to the Commission at its forty-fifth session, in 2012, and referred to in paragraphs 51 to 70 of document A/CN.9/775.

263. The representative of the Republic of Korea made reference to the close cooperation that its Government, in particular its Ministry of Justice, had enjoyed with the Regional Centre for Asia and the Pacific and provided some examples of the outcome of that cooperation. The interest of the Republic of Korea in pursuing further joint work was indicated.

264. The representative of Kenya confirmed that its Government was continuing to consider hosting an UNCITRAL regional centre in Nairobi.⁶⁸

265. The Commission stressed the importance of the tasks assigned to the Regional Centre for Asia and the Pacific and expressed its appreciation for the activities undertaken.

266. The Commission acknowledged with gratitude the contribution of the Republic of Korea to the Regional Centre for Asia and the Pacific and welcomed the continuing interest in the establishment of a regional centre by the Government of Kenya. The Commission requested the Secretariat to keep the Commission informed of developments regarding the operation of the Regional Centre for Asia and the Pacific and the establishment of other UNCITRAL regional centres, with particular respect to their funding and budget.

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

A. Introduction

267. The Commission recalled that the item on the role of UNCITRAL in promoting the rule of law at the national and international levels had been on the agenda of the Commission since its forty-first session, in 2008,⁶⁹ in response to the General Assembly's invitation to the Commission to comment, in its report to the General Assembly, on the Commission's current role in promoting the rule of law.⁷⁰ The Commission further recalled that since that session, the Commission, in its annual

⁶⁸ Ibid., para. 192.

⁶⁹ For the decision of the Commission to include the item on its agenda, see *Official Records of the General Assembly, Sixty-second Session, Supplement No. 17 (A/62/17)*, part two, paras. 111-113.

⁷⁰ General Assembly resolutions 62/70, para. 3; 63/128, para. 7; 64/116, para. 9; 65/32, para. 10; and 66/102, para. 12.

reports to the General Assembly, had transmitted comments on its role in promoting the rule of law at the national and international levels, including in the context of post-conflict reconstruction. It expressed its conviction that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group supported by the Rule of Law Unit in the Executive Office of the Secretary-General.⁷¹ The Commission noted with satisfaction that that view had been endorsed by the General Assembly.⁷²

268. The Commission further recalled that at its forty-third session, in 2010, it had indicated that it considered it essential to maintain a regular dialogue with the Rule of Law Coordination and Resource Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into United Nations joint rule of law activities. To that end, it had requested the Secretariat to organize briefings by the Rule of Law Unit every other year, when sessions of the Commission were held in New York.⁷³ Consequently, a briefing had taken place at the Commission's forty-fifth session in New York in 2012.⁷⁴

269. At that session, the Commission had been informed about the progress made in achieving increased awareness about the work of UNCITRAL and integration of that work into the rule of law activities of the United Nations and other organizations. The Commission had also been informed of the preparations for the September 2012 high-level meeting of the General Assembly on the rule of law at the national and international levels and expected outcomes of that meeting. At that session, the Commission had formulated its position as regards ways and means of ensuring that aspects of the work of UNCITRAL were duly reflected at the high-level meeting and in its outcome document, and in the message to the high-level meeting itself.⁷⁵

B. Relevant developments since the forty-fifth session of the Commission

270. At its forty-sixth session, the Commission heard an oral report by the Chairman of its forty-fifth session on the implementation of the relevant decisions of the Commission taken at its forty-fifth session.⁷⁶ It was reported, in particular, that by a special invitation of the General Assembly, the Chairman of the forty-fifth session of UNCITRAL had delivered a statement to the high-level meeting in which he had underscored the mutually reinforcing impact of the rule of law and economic development and highlighted the importance of the work of UNCITRAL in promoting

⁷¹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 386; *ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 413-419; *ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 313-336; *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 299-321; and *ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 195-227.

⁷² Resolutions 63/120, para. 11; 64/111, para. 14; 65/21, paras. 12-14; 66/94, paras. 15-17; and 67/89, paras. 16-18.

⁷³ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 335.

⁷⁴ *Ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 195-227.

⁷⁵ *Ibid.*, paras. 211-223.

⁷⁶ *Ibid.*

the rule of law in commercial relations and in the broader context. The Commission took note with satisfaction of the Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels,⁷⁷ in paragraph 7 of which Member States reaffirmed that the rule of law and development were interlinked and mutually reinforcing and expressed their conviction that that interrelationship should be considered in the post-2015 international development agenda. The Commission was, in particular, glad to note that in paragraph 8 of the Declaration, States recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship, and in that regard commended the work of UNCITRAL.

271. The Commission expressed its appreciation to the Chairman of its forty-fifth session for the report and for ensuring that the UNCITRAL message to the high-level meeting was delivered and that aspects of the work of UNCITRAL were duly reflected at the high-level meeting and in its outcome document.

272. The Commission also noted with satisfaction the participation of the Chairman of its forty-fifth session in the General Assembly's thematic debate on "Entrepreneurship for development", held in New York on 26 June 2013, and in a conference co-hosted by the Peacebuilding Commission and the United Nations Global Compact on potential of private sector to help fragile countries emerge from conflict. The Commission endorsed efforts to increase awareness across the United Nations system of the work done by UNCITRAL and its relevance to other areas of work of the United Nations.

273. The Commission was also informed that its secretariat, upon the request of the Rule of Law Unit, had prepared a draft guidance note of the Secretary-General on the promotion of the rule of law in commercial relations. The draft guidance note, which was under consideration by the Unit and would subsequently be transmitted to members of the Rule of Law Coordination and Resource Group for comment, drew on the Commission's decisions taken since 2008 under the agenda item that were aimed at (a) building sustained capacity of States to promote the rule of law in commercial relations, with the assistance of the international community where necessary; and (b) increasing the ability of the United Nations to respond effectively, when called upon to do so, to the needs of States to build such local capacity. The note was intended to be relevant to United Nations rule of law activities, in particular those promoting economic development, in a variety of situations, including conflict prevention, post-conflict reconstruction and development contexts. The Commission requested the Secretariat to bring the guidance note to the attention of the Commission once it was issued, for the purpose of disseminating it as widely as possible.

274. The Commission heard about other developments since its last session related to the implementation of the rule of law agenda of the United Nations. In particular, it learned about initiatives across the United Nations system to formulate the post-2015 development agenda, to which the rule of law was integral. It was, in particular, informed about the work of the Open Working Group on Sustainable Development Goals and the Intergovernmental Committee of Experts on Sustainable Development Financing.

⁷⁷ General Assembly resolution 67/1.

275. The Commission noted the relevance of its work to those and other efforts across the United Nations system. It requested its Bureau at the current session and its secretariat to take appropriate steps to ensure that the areas of work of UNCITRAL and the role of UNCITRAL in the promotion of the rule of law and sustainable development were not overlooked, and to report to the Commission at its next session on the steps taken in that direction.

C. Comments to the General Assembly on the current role of UNCITRAL in the promotion of the rule of law

276. The Commission took note of General Assembly resolution 67/97 on the rule of law at the national and international levels. In paragraph 14 of that resolution, the Assembly had invited the Commission to continue to comment, in its reports to the General Assembly, on its current role in promoting the rule of law. In paragraph 17 of that resolution, the Assembly had decided to focus the upcoming Sixth Committee debates in 2013 under the agenda item “The rule of law at the national and international levels” on the subtopic “The rule of law and the peaceful settlement of international disputes”. Consequently, the Commission decided to focus its comments to the General Assembly on its role in promoting the rule of law and the peaceful settlement of international disputes.

277. To facilitate the formulation by the Commission of the comments on that subtopic pursuant to the above-mentioned invitation by the General Assembly, a panel discussion was organized by the Secretariat with participation of experts in the relevant areas of work of UNCITRAL (arbitration and conciliation and online dispute resolution).

1. Summary of the rule of law briefing on the role of UNCITRAL in promoting the rule of law and the peaceful settlement of international disputes

278. The panel discussion started by highlighting the important role of international commercial arbitration rules in strengthening the rule of law through the peaceful settlement of international disputes. Arbitration was an area in which UNCITRAL had been working since its inception, and UNCITRAL had become well known for its development of core legal instruments, such as the UNCITRAL Arbitration Rules and the UNCITRAL Model Arbitration Law, and for monitoring the effective implementation of the 1958 New York Convention.

279. It was noted that international commercial arbitration had been one of the most effective means of resolving international economic disputes, such as cross-border disputes over investments in natural resources. As such, it was argued, international commercial arbitration might have reduced the opportunity for inter-State conflicts by obviating the need for States to confront one another directly on behalf of their aggrieved citizens, through reprisals, claims espousals or other means. Moreover, it might have contributed to avoiding aggravation of situations in volatile situations (for example, by preventing societies from sliding back into conflict).

280. The speakers highlighted the distinct features of international arbitration that made it valuable in the peaceful settlement of disputes, especially those disputes arising in unstable and politically charged relationships (for example, cross-border investments in the extractive industries, post-conflict disputes related to

transboundary damages, seizure of property or territorial claims). Among such valuable features, the speakers noted flexibility (the ability of disputing parties to deploy an ad hoc procedure that was specifically adapted to the particular dispute, rather than being bound by the fixed procedures of a local court) and neutrality through denationalization of the legal forum for adjudicating disputes (the arbitral tribunal was independent of disputing parties, as well as insulated from instructions or interference by the respective Governments, and was empowered to rule on its own jurisdiction).

281. It was indicated that the neutrality of the forum was of special value in post-conflict situations and other volatile situations where recourse to domestic courts of States in conflict was often out of the question (either because the courts were dysfunctional or because of suspicion of bias or even hostility of the local courts, raising also questions of personal safety, or because of the lack of court independence, including where a domestic court was charged with determining the legality of the actions of its own government).

282. UNCITRAL instruments in the area of international commercial arbitration, it was said, provided practical means to ensure that those distinct features of international arbitration worked in practice. As regards flexibility, it was said that the UNCITRAL Arbitration Rules allowed great flexibility in adapting the procedure to the requirements of the dispute by permitting the parties to define the issues to be resolved, the number of arbitrators, the identity of the arbitrators, the forum and the applicable law. Once the tribunal had been empanelled, it was said, it had the inherent power to work out its own procedures, in consultation with the parties, such as the time within which the award would be rendered, the number and order of pleadings and how the tribunal would obtain evidence. As regards neutrality, it was submitted that the UNCITRAL Model Arbitration Law had been the most successful single instrument for ensuring an independent and harmonized approach to international arbitration.

283. The speakers also commended the efforts of UNCITRAL, in cooperation with other stakeholders, towards achieving near-universal accession to the 1958 New York Convention (which currently had 149 States parties) and towards its effective implementation and uniform interpretation and application by collecting and disseminating case law and other materials related to that Convention. It was stated that the contribution of the Convention to strengthening the rule of law was indisputable: the Convention had been the bedrock of international arbitration, providing for more than 50 years a common set of standards for the recognition and enforcement of international arbitration awards. (On this subject, see also para. 136 above.)

284. The framework provided by those instruments, it was said, was an effective means of attracting investment needed for sustainable development and capacity-building, which in turn might effectively deter many conflicts currently triggered by economic factors.

285. The speakers recalled the adoption by UNCITRAL, earlier in the session, of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (see para. 128 above). With reference to the definition of the rule of law as articulated in

United Nations documents,⁷⁸ which explicitly refers to legal and procedural transparency, it was emphasized that without such transparency no other fundamental requirements of the rule of law, such as accountability, legal certainty, fairness in the application of laws and the avoidance of arbitrariness, could be achieved. The potential impact of the UNCITRAL Rules on Transparency on achieving all those fundamentals of the rule of law was highlighted, in particular in an area where transparency seemed much needed: exploitation of public resources. The UNCITRAL Rules on Transparency, it was said, covered nearly all aspects of treaty-based investor-State arbitrations. They were nuanced and balanced, but to achieve what they were intended to achieve they needed to be effectively implemented. According to speakers, the important work of UNCITRAL should therefore continue: UNCITRAL should not only soon prepare a convention devising a mechanism for applicability of the Rules to existing investment treaties but also take steps towards practical implementation of the Rules, collection and dissemination of the relevant information as required under the Rules and promotion of good practices with respect to the use of the Rules. In response, it was noted that that ought to be balanced with the need to respect the basis on which investment decisions were made, and that changing the rules that were applicable to such decisions was itself contrary to the rule of law.

286. The Commission heard then the suggestion for increased use of mediation and the role of domestic courts in the settlement of international economic disputes. The value of mediation was highlighted as a flexible, cheap and fast method of settlement of disputes and as the effective mechanism towards reaching an early amicable settlement between disputing parties. Data were presented indicating that in many cases of investor-State arbitration, disputes were in fact settled amicably before the final award was rendered. It was said that, despite that preference for amicable settlements of disputes, mediation was not widely used and known. The perceived disadvantages of that mechanism, in particular uncertainties as regards enforcement of the results of mediation, as well as the lack of the explicit power in law by any entity to negotiate on behalf of the State in the framework of mediation procedures, contributed to its relative unpopularity. Many jurisdictions did not have a consolidated law encompassing substantially all aspects of commercial mediation or capacity to handle mediation of commercial disputes. That was despite the fact that many jurisdictions surveyed by the World Bank provided for court referral of cases to mediation or conciliation in commercial disputes where court proceedings had been initiated. The role of the UNCITRAL Conciliation Rules (1980)⁷⁹ and the UNCITRAL Model Law on International Commercial Conciliation⁸⁰ in strengthening the domestic framework for mediation was highlighted: robust domestic rules on mediation were considered to be a prerequisite for fostering mediation of international disputes and ensuring that safeguards of at least some transparency, accountability and anti-corruption applied to negotiations held in the framework of mediation procedures.

287. The Commission also heard a presentation on the evolving nature of online dispute resolution and its potential to expedite resolution of disputes in various contexts, especially in post-conflict societies where face-to-face communication with the aim of resolving disputes could be difficult. The Commission was informed that

⁷⁸ See the report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), para. 6.

⁷⁹ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17 (A/35/17)*, chap. V, sect. A, para. 106.

⁸⁰ General Assembly resolution 57/18, annex.

technology-assisted or technology-based online dispute resolution mechanisms, as well as technology-facilitated online dispute prevention guarantees, were already being tested, including in some post-conflict communities. To some extent, state-of-the-art technologies using artificial intelligence and an ability to learn and improve automatically may work as a substitute for arbitrators, conciliators or mediators by generating dispute settlement options with minimal human intervention or without such intervention. Factors such as their round-the-clock availability and accessibility, speed and affordability could also increase their popularity. Any endeavour at the international level to increase effectiveness and efficiency of peaceful settlement of international disputes should therefore not underestimate the potential role of online dispute resolution. Globally harmonized principles and standards (including on accreditation of providers, procedural safeguards, substantive regulation and trust-building applications) for online dispute resolution to be used in various contexts (including business-to-business, business-to-consumer or consumer-to-consumer, and possibly other contexts) were paramount to ensure sustainable operation of providers of online dispute resolution and the effectiveness of such mechanisms. In that respect, the work of UNCITRAL Working Group III (Online Dispute Resolution) was highlighted as being very valuable.

2. Action by the Commission

288. The Commission expressed its appreciation to the panellists for their statements and endorsed their views about the role of UNCITRAL and its instruments in the area of arbitration and conciliation in the promotion of the rule of law and the peaceful settlement of international disputes. The Commission highlighted the potentially significant role of the UNCITRAL Rules on Transparency in that respect as well. The Commission also noted the evolving nature of online dispute resolution and its potential role in dispute settlement in various contexts, in particular in post-conflict situations.

289. The Commission recalled the activities of the Secretariat on technical assistance with law reforms in the area of settlement of disputes, as reported in the note by the Secretariat on technical cooperation and assistance (A/CN.9/775) (see para. 231 above). The Commission also heard a statement on projects in South-East Europe and the State of Palestine as regards domestic arbitration and conciliation laws, undertaken in cooperation with GIZ. It also recalled the technical assistance mission to Iraq on the adoption of the New York Convention, in cooperation with the United States Department of Commerce. The Commission recalled its discussion of the role of the guide on the 1958 New York Convention in facilitating the understanding of the text of the Convention, its effective implementation, uniform interpretation and application (see paras. 134-140 above). In that respect, the Commission noted with appreciation that GIZ expressed the wish to support the preparation of the guide on the 1958 New York Convention as an important tool in technical assistance activities in the area of dispute settlement.

290. The Commission emphasized the importance of technical assistance activities of its secretariat for strengthening the rule of law and called for closer cooperation and coordination within the United Nations system and with the relevant stakeholders outside the United Nations system to achieve the increased use of UNCITRAL standards. The Commission reiterated that the role of States in that respect should also be considerably enhanced.

291. The Commission recalled that the General Assembly, in paragraph 17 of its resolution 67/97, had decided to focus the Sixth Committee debates in 2014 under the agenda item entitled “The rule of law at the national and international levels” on the subtopic “Sharing States’ national practices in strengthening the rule of law through access to justice”. The Commission invited comments and studies on that subtopic for consideration by the Commission at its forty-seventh session, to be held in 2014.

XV. Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests

292. The Commission recalled its request at its forty-fourth session, in 2011, that the Secretariat should prepare a note on strategic planning, for consideration by the Commission at its forty-fifth session, to include possible options for the future work of UNCITRAL and an assessment of their financial implications.⁸¹ It also recalled its agreement to provide further guidance on the strategic direction of UNCITRAL at the present session, and had requested the Secretariat to reserve sufficient time in the present forty-sixth session to allow for a detailed discussion on the matter.⁸²

293. The Commission considered the note by the Secretariat on planned and possible future work (A/CN.9/774), which supplemented the note by the Secretariat on a strategic direction for UNCITRAL (A/CN.9/752 and Add.1), prepared in response to the request at the forty-fourth session referred to above. The attention of the Commission was also drawn to the reports and documents referred to in those documents. There was broad support for the approach and key points set out in documents A/CN.9/774 and A/CN.9/752 and Add.1.

294. The Commission discussed some general considerations that it might apply in planning and prioritizing the future work of UNCITRAL, including both its legislative activity and the other activities to support the adoption and use of UNCITRAL texts described in paragraph 12 of document A/CN.9/774. It underscored the importance of taking a strategic approach to the allocation of the scarce resources of UNCITRAL, in the context of its mandate to modernize and harmonize international trade law, and in the light of the increasing number of topics referred to UNCITRAL for consideration.

295. The Commission recalled certain strategic considerations that had been raised at its forty-fifth session, namely:

(a) Identifying the subject areas that should be accorded the highest priority, by reference to the role and relevance of UNCITRAL;

(b) The sustainability of the existing *modus operandi*, i.e. current emphasis on formal rather than informal negotiations when developing texts, given current resources;

⁸¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 343.

⁸² *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 231.

(c) Achieving the optimal balance among the activities of UNCITRAL, given current resources;

(d) The mobilization of additional resources and the extent to which UNCITRAL should seek external resources for its activities, such as through joint activities and cooperation with other bodies.⁸³

296. As regards the subject areas that should be accorded the highest priority, the Commission noted that prioritization involved issues of both importance and urgency, and recalled the various considerations that the Commission had previously set out referred to in section IV.B (“Prioritization of subject areas”) of document A/CN.9/774.

297. The Commission emphasized the importance of undertaking legislative development on those topics on which it was likely that consensus could be achieved, for which an economic need (in the sense used in document A/CN.9/774) existed, and which were likely to result in a legislative text with a beneficial effect on the development of international trade law. It was underscored that the extent to which an envisaged legislative text would support the development of international trade law as expressed in the mandate given to UNCITRAL by the General Assembly should be the main factor guiding the Commission in deciding whether or not to take up a topic. While some delegations emphasized the issues of promoting sustainable economic and social development and the rule of law in assessing the priority to be ascribed to topics, others stated that such support would be a desirable effect of harmonizing and modernizing international trade law itself.

298. The Commission heard a description of certain issues set out in a proposal by the United States, contained in section II of document A/CN.9/789. With reference to the issues set out in section II of that document (in the subsection entitled “Sustainability of existing *modus operandi*”), some States considered that the project-based approach to the denomination of working groups described therein would be appropriate. Others expressed the view, which subsequently prevailed, that the flexibility that a project-based approach was designed to have had existed since the decision taken in 2003 to increase the number of working groups from three to six. It was acknowledged that the allocation of conference time among working groups could also be undertaken flexibly, rather than through an automatic allocation of two weeks per subject per year.

299. Concern was expressed that, should the Commission establish semi-permanent or permanent working groups whose remit and mandate were not regularly reviewed, topics that the Commission might consider to be high priorities for UNCITRAL to work upon might be crowded out. However, it was agreed that the expertise within working groups should be recognized and supported, as a way of supporting the high quality and sustained relevance of UNCITRAL texts.

300. The Commission also emphasized that the development of UNCITRAL texts as a matter of course should be undertaken through the working group process. In that regard, the Commission recalled the link between that formal negotiation process and the universal applicability and hence acceptance of UNCITRAL texts, the importance of the transparency that that process conferred, and the need to continue the inclusive working methods of UNCITRAL. It was also agreed that the multilingualism of the

⁸³ Ibid., para. 229.

working methods of UNCITRAL constituted key support for its work and, even though it was resource-hungry, should be continued.

301. The Commission agreed that there were exceptional situations in which more informal working methods might be appropriate, including addressing highly technical aspects of topics, and addressing drafting issues when a text was nearing completion. It was suggested that, in the latter scenario, such methods might be accelerated through reliance on experts and special rapporteurs to facilitate the final preparation for submission of a text to the Commission for adoption. The importance of transparency and inclusiveness and of avoiding the dominance of specialized groups and interests in informal working methods was emphasized. It was agreed that the Secretariat should be permitted the flexibility to organize informal work to suit the needs of each relevant subject area. The Commission stressed, however, that there should both be limits to such informal working methods and that all legislative texts should be considered by the Commission prior to adoption. In addition, it was noted that preparatory work prior to referring a topic to a working group was both appropriate and necessary, such as through Secretariat studies, the holding of colloquiums and the assistance of outside experts from different legal traditions and affiliations. The Commission recalled earlier statements in that regard, cited in section II of document A/CN.9/789,⁸⁴ under the heading “Subject matters that should be accorded highest priority”, to the effect that as a rule a subject matter would not be referred to a working group before a study was undertaken by the Secretariat.

302. The nature of a legislative text was also raised. It was suggested that formal negotiations should be limited to the development of binding texts (such as conventions) and standard-setting documents (such as model laws), and that informal legislative development would be appropriate for legislative guides and other forms of guidance. Another view, which subsequently prevailed, was that a more flexible approach was needed, both because there was not always a clear dividing line between binding and other types of text and because the type of text that was appropriate might become clear only during formal negotiations. It was nonetheless agreed that the mandate for a working group should be precise, should reflect the maturity of the subject matter and should clearly identify the scope of work to be undertaken, including the envisaged nature of the legislative text where appropriate.

303. Bearing in mind the scarce resources available to UNCITRAL and particularly the limited conference time available (14 weeks annually in the period 2012-2013, including each Commission session), the Commission agreed to assess whether or not legislative development in any particular topic should be referred to a working group on the basis of four tests, the first of which was whether it was clear that the topic was likely to be amenable to harmonization and the consensual development of a legislative text. In that regard, recalling that UNCITRAL was a global rather than regional organization, it was agreed that such an assessment required the potential for international and not merely regional harmonization.

304. The second test was whether the scope of a future text and the policy issues for deliberation were sufficiently clear. The third test was whether there existed a sufficient likelihood that a legislative text on the topic would enhance modernization,

⁸⁴ See, for example, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), paras. 67-68; and a note by the Secretariat on the UNCITRAL rules of procedure and methods of work (A/CN.9/638, para. 20).

harmonization or unification of the international trade law. The fourth test was that legislative development should generally not be undertaken if so doing would duplicate legislative work on topics being undertaken by other international or intergovernmental bodies and that preparatory work to identify any areas of potential duplication should be undertaken before a topic was referred to a working group.

305. The Commission agreed that it would normally assess topics for consideration and legislative development on an annual basis, but that some longer-term indicative planning would be appropriate, so as to understand what the Commission would be expected to address over a three-to-five year period. Possible preparations for an event to celebrate the thirty-fifth anniversary of the United Nations Sales Convention in 2015 were cited as an example (see para. 315 below). The importance of giving appropriate flexibility to the Secretariat in such planning was recalled.

306. The Commission noted that it would also bear in mind the relevance of assessing the role and relevance of UNCITRAL activities within the broader United Nations agenda and the priorities of donor communities and national Governments. While there was broad support for pursuing a harmonized approach to relevant issues with these bodies, views differed as to the benefits of adopting other agencies' priorities, and it was agreed that cooperation in this area should be undertaken on a case-by-case basis.

307. The Commission also considered the balance of the work of UNCITRAL in legislative development and the other activities undertaken to support UNCITRAL texts. As regards technical assistance, and noting the increasing demand for Secretariat participation in such work as reflected in the note by the Secretariat on technical cooperation and assistance (A/CN.9/775) (see para. 231 above), the Commission underlined the importance of such assistance in ensuring the effective implementation of UNCITRAL texts. It was suggested that a significant element of technical assistance would be to educate potential users of the texts on the policy solutions and rules they encompassed, so as to enable the users to implement and use the texts effectively. The Secretariat was invited to consider methods of undertaking that work commensurate with its resources, for example through coordination with other relevant agencies within the United Nations system and beyond. The limited extent of the Secretariat's ability to engage in such activities was highlighted, however, bearing in mind both the need to ensure that the Secretariat allocated sufficient resources to servicing the sessions of the Commission and its working groups and the need for States to play a major role in technical assistance activities.

308. As regards coordination and cooperation with other relevant law reform agencies, the Commission emphasized the need for ongoing efforts to secure effective links within and beyond the United Nations (such as with the multilateral development banks and other international and regional organizations, in particular the Hague Conference on Private International Law and Unidroit), to identify joint projects where appropriate, and to set priorities with such bodies based on the expertise within each such body. Examples were given of such coordination and cooperation referred to in the note by the Secretariat on coordination activities (A/CN.9/776) (see para. 245 above). (See also paras. 245-256 above.)

309. A suggestion was made that the possibility of appointing the Chairman of the Commission for the duration of the calendar year and not for the duration of the Commission session (which begins at the opening of the session and ends immediately before the following annual session) should be examined.

310. The Commission considered the proposals for ongoing and future work before it in the light of the above-mentioned matters, and agreed that it should reserve time for discussion of future work as a separate topic at each Commission session. Its conclusions regarding the subject areas for planned and possible future legislative work identified in document A/CN.9/774 were as follows.

Arbitration and conciliation

311. The Commission recalled the summary of its discussion on planned and future work in the area of arbitration and conciliation (see paras. 127 and 129-133 above) and agreed that the future activities in the area of commercial dispute settlement identified in paragraphs 127 and 129-133 above should be submitted to Working Group II (Arbitration and Conciliation), which would meet for two one-week sessions during the year to June 2014.

Commercial fraud

312. The Commission heard an oral report on the topic of commercial fraud, drawing upon the information set out in the note by the Secretariat on commercial fraud (A/CN.9/788). The Commission recalled that, at its forty-first session, in 2008, it had requested the Secretariat to publish the “Indicators of commercial fraud” (A/CN.9/624 and Add.1 and 2), as subsequently amended, a text that had been considered generally useful,⁸⁵ and heard that a group of experts convened pursuant to the Commission’s suggestion at its previous session, in 2012,⁸⁶ should continue to meet periodically to consider the continuing relevance and accuracy of those indicators. Reference was made to plans to develop under the auspices of the core group of experts on identity-related crime of the Commission on Crime Prevention and Criminal Justice model legislation on identity-related crime, and to a request made in that context to the United Nations Office on Drugs and Crime to coordinate with UNCITRAL on the development of such model legislation.⁸⁷ Noting that there was no current proposal to prepare a new legislative text in this area, the Commission welcomed the suggestion that it be kept informed of future developments.

Electronic commerce

313. The Commission recalled the summary of its discussion on planned and future work in the area of electronic commerce (paras. 223-230 above) and agreed that the continuation of work towards developing a legislative text in the field of electronic transferable records would be continued at two one-week sessions of Working Group IV (Electronic Commerce) during the year to June 2014, and that at a future time it would be assessed whether that work would extend to identity management, single windows and mobile commerce.

⁸⁵ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1).

⁸⁶ *Ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 232.

⁸⁷ See *Official Records of the Economic and Social Council, 2013, Supplement No. 10* and corrigendum (E/2013/30 and Corr.1), chap. I, sect. B, draft resolution III, para. 7.

International contract law

314. The Commission heard an oral report on international contract law. It recalled the related discussions at its forty-fifth session, in 2012,⁸⁸ as summarized in paragraph 11 (e) of document A/CN.9/774, and the proposal from Switzerland set out in document A/CN.9/758 referred to therein. The Commission recalled that at that session it had requested the Secretariat to organize symposiums and other meetings, including at the regional level and within available resources, maintaining close cooperation with Unidroit, with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session, including the possible need for supplementing existing instruments in that field. The Secretariat indicated that, for lack of resources, it had not been able to engage in the activities requested but had co-sponsored a symposium entitled “Assessing the CISG and other international endeavours to unify international contract law” at the Villanova University School of Law, United States, in January 2013; held an expert meeting on contract law at the UNCITRAL Regional Centre for Asia and the Pacific in February 2013; and had included relevant documents in the bibliography on its website. It was noted that the Secretariat would continue reviewing the situation and report to the Commission as necessary.

315. In the light of that discussion and having heard an oral presentation of the subject as set out in document A/CN.9/789, the Commission also requested the Secretariat to commence planning for a colloquium to celebrate the thirty-fifth anniversary of the United Nations Sales Convention, to take place on a date after the forty-seventh Commission session, to be held in 2014. The Commission agreed that the scope of that colloquium could include looking at the Convention broadly and include some of the issues raised by an earlier proposal submitted at its forty-fifth session (A/CN.9/758),⁸⁹ as well as other developments in the field, such as the Unidroit Principles of International Commercial Contracts, and explore the need for further work in that area.

Microfinance and the formalization of micro-, small- and medium-sized enterprises

316. The Commission heard a summary of the work undertaken by the Secretariat in the area of microfinance and the formalization of micro-, small- and medium-sized enterprises, and the results of a colloquium held in that field on 16-18 January 2013, further to the request of the Commission at its forty-fifth session, in 2012.⁹⁰

317. The Commission took note of the broad consensus among participants at the colloquium to recommend that a UNCITRAL working group be entrusted with addressing the legal aspects of an enabling legal environment for micro-, small- and medium-sized enterprises. Participants identified five broad areas where the Commission could provide guidance, to be articulated so as to address the business cycle of such enterprises. The starting point would be guidance that allowed for simplified business start-up and operation procedures. Other topics to be taken up subsequently included the following: (a) a system for resolving disputes between borrowers and lenders, including taking into account possibilities for the use of online

⁸⁸ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, paras. 127-132.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, para. 126.

dispute resolution; (b) effective access to financial services for micro-, small- and medium-sized enterprises, including consideration of broadening the scope of existing UNCITRAL instruments on e-commerce and international credit transfers to accommodate mobile payment systems; (c) guidance on ensuring access to credit, addressing issues such as transparency in lending and enforcement in a range of lending transactions; and (d) insolvency of micro-, small- and medium-sized enterprises, focusing on fast-track procedures and business rescue options so as to develop workable alternatives to formal insolvency processes in line with both the key characteristics of an effective insolvency system and the needs of such enterprises. Existing UNCITRAL instruments as well as guidance already developed by international organizations were said to be suitable building blocks for work in those areas. As to the form the Commission guidance could take, the Commission was further advised that a flexible tool, such as a legislative guide or a model law according to the topics, would contribute to harmonizing efforts in that sector and provide momentum for reforms that would further encourage micro-business participation in the economy.

318. The Commission also heard a proposal from the Government of Colombia (A/CN.9/790), suggesting that the Commission should create a new mandate for a working group focused on the enterprise life cycle, particularly in relation to micro-, small- and medium-sized enterprises. The working group should begin with the facilitation of simplified business incorporation and registration and follow on to other matters, such as those discussed at the 2013 colloquium, in order to create an enabling legal environment for that type of business activity. The proposal was broadly supported.

319. It was pointed out that in many economies, both developing and developed, the informal sector contributed a significant share of national income and employment. However, informality could perpetuate non-compliance with the law and work against strengthening the rule of law. It could increase the risk of non-payment of taxes, increase corruption and constitute a negative environment for foreign investment and trade. Several delegations indicated that micro-, small- and medium-sized enterprises needed a legal basis on which to engage in trade at the international level and that there was a need for greater harmonization in the area of creating an enabling legal environment for such enterprises, which it was said would contribute to an increase in international and regional cross-border trade.

320. Views were expressed on the question of whether the tests for assignment of a matter to a working group (see paras. 303 and 304 above) were met in that case. It was questioned whether certain topics, such as insolvency, dispute resolution and secured transactions, relating to matters already being addressed by other working groups, might better be dealt with by those working groups rather than by another working group. Some delegations questioned whether the subject matter was sufficiently developed for consideration by a working group and stressed that the necessary groundwork needed to be prepared by the Secretariat in advance of the working group's first meeting.

321. After discussion, the Commission agreed that work on international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies should be added to the work programme of the Commission. The Commission also agreed that such work should start with a focus on the legal

questions surrounding the simplification of incorporation and that the Secretariat should prepare documentation as a prerequisite to the early convening of the session of a working group. The Commission agreed that the Secretariat should include in its preparatory documentation to the working group (a) empirical information demonstrating how that work affected sustainable development and inclusive finance and (b) information on how that work was complementary to the work of other international and intergovernmental organizations — both within and outside the United Nations — having a mandate in those fields.

322. The Commission also agreed to discontinue the use of the term “microfinance” when referring to the new subject matter to be allocated to a working group, namely, Working Group I.

Online dispute resolution

323. The Commission recalled the summary of its discussion on planned and future work in the area of online dispute resolution (see paras. 218 to 222 above) and agreed that the work on online dispute resolution would continue accordingly at two one-week sessions of Working Group III in the year to June 2014.

Insolvency

324. The Commission recalled the summary of its discussion on planned and future work in the area of insolvency law (see paras. 210-213 above), noting that the current mandate of Working Group V (Insolvency Law) had not been exhausted but that the Working Group was not yet clear on how best to proceed with that work.

325. After discussion, the Commission decided that Working Group V (Insolvency Law) should hold a colloquium in the first few days of the working group session scheduled for the second half of 2013 to clarify how it would proceed with the enterprise group issues and other parts of its current mandate and to consider topics for possible future work, including insolvency issues specific to micro-, small- and medium-sized enterprises. The conclusions of that colloquium would not be determinative but should be considered and evaluated by the Working Group in the remaining days of that session, in the context of the existing mandate. Topics identified for possible future work should be reported to the Commission in 2014.

326. With respect to the insolvency of micro-, small- and medium-sized enterprises, the Commission requested Working Group V to conduct, at its session to be held in the first half of 2014, a preliminary examination of relevant issues, and in particular to consider whether the UNCITRAL Legislative Guide on Insolvency Law⁹¹ provided sufficient and adequate solutions for such enterprises. If it did not, the Working Group was requested to consider what further work and potential work product might be required to streamline and simplify insolvency procedures for such enterprises. Its conclusions on those issues related to micro-, small- and medium-sized enterprises should be included in its progress report to the Commission in 2014 in sufficient detail to enable the Commission to consider what future work might be required, if any.

⁹¹ Available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

Public-private partnerships

327. The Commission heard a summary of the results of the colloquium organized by the Secretariat in May 2013 pursuant to the Commission's instruction to the Secretariat at its forty-fifth session, in 2012⁹² (the report of the colloquium is contained in document A/CN.9/779). The Commission noted the agreed importance of the topic in securing resources for infrastructure and other development, at the international and regional levels and for States at all stages of development.

328. As regards the four tests set out in paragraphs 303 and 304 above, the Commission noted that the topic of public-private partnerships was amenable to harmonization and the consensual development of a legislative text, given developments in public-private partnerships since the issue of the UNCITRAL texts on privately-financed infrastructure projects.⁹³ The Commission also heard the colloquium's conclusion that there was a lack of a universally accepted and acceptable standard on public-private partnerships.

329. As regards the mandate of UNCITRAL, it was recalled that the topic had already been the subject of legislative development within UNCITRAL, and it was noted that the work of other agencies in the field had been taken into account to avoid duplication of effort. It was observed that the instruments on privately-financed infrastructure projects, although recognized as comprehensive and accurate when they were issued, were not always used as the source of choice when enacting legislation on public-private partnerships. There was also agreement that the instruments on privately-financed infrastructure projects might be in need of some updating and revision, given the development in the market for public-private partnerships, and that the key elements of a legislative text on public-private partnerships — drawing in large part on the instruments — were agreed.

330. However, noting the wide variation in terminology, scope and contents of existing texts at the national level, as reported at the colloquium, and some divergence of views as to whether a model law or other legislative text should be developed, it was considered that further preparatory work on the topic would be required so as to set a precise scope for any mandate to be given for development in a working group. In that regard, it was emphasized that any legislative text should ultimately be developed through a working group and that the preparatory work should be undertaken in an inclusive and transparent manner that took account of the experience in all regions, the need to include both the public and private sectors in consultations and multilingualism.

331. The view was expressed that minimal resources were required to carry out the necessary preparatory work, including consultations with experts. After discussion, the Commission agreed that the Secretariat would organize that preparatory work through studies and consultations with experts, and use up to one week of conference time previously allocated to Working Group I in the year to June 2014 for one or more colloquiums in cooperation with relevant international and regional bodies

⁹² *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 120.

⁹³ The *UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects* (2000) and the *UNCITRAL Model Legislative Provisions on Privately Financed Infrastructure Projects* (2003), available from www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

active in the field. Thereafter, a further report would be made to the Commission at its forty-seventh session.

Security interests

332. The Commission recalled the summary of its discussion on planned and future work in the area of security interests (paras. 192-194 above) and agreed that the continuation of work towards developing a model law on secured transactions would be undertaken in two one-week sessions of Working Group VI (Security Interests) in the year to June 2014, and that whether that work would include security interests in non-intermediated securities would be assessed at a future time.

XVI. Relevant General Assembly resolutions

333. The Commission took note of the following two General Assembly resolutions adopted on the recommendation of the Sixth Committee: resolution 67/89 on the report of the United Nations Commission on International Trade Law on the work of its forty-fifth session, and resolution 67/90 on recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as revised in 2010. (See paras. 270, 276 and 291 above for consideration by the Commission of two other General Assembly resolutions related to the work of the Commission (resolutions 67/1 and 67/97).)

XVII. Other business

A. Entitlement to summary records

334. The Commission recalled that at its forty-fifth session, in 2012, it decided, while not relinquishing its entitlement to summary records under General Assembly resolution 49/221, to request that digital recordings continue to be provided at its forty-sixth and forty-seventh sessions, in 2013 and 2014, on a trial basis, in addition to summary records, as was done for the forty-fifth session. At that session, the Commission agreed that at its forty-seventh session, in 2014, it would assess the experience of using digital recordings and, on the basis of that assessment, take a decision regarding the possible replacement of summary records by digital recording. The Commission requested the Secretariat to report to the Commission on a regular basis on measures taken in the United Nations system to address possible problems with the use of digital recordings. It also requested the Secretariat to assess the possibility of providing digital recordings at sessions of UNCITRAL working groups, at their request, and to report to the Commission at its forty-seventh session, in 2014.⁹⁴

335. At its current session, the Commission heard a presentation about updates to the digital recording system available in the United Nations and saw the demonstration of the website through which the digital recordings of the forty-fifth and forty-sixth sessions of the Commission were made available. It was

⁹⁴ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 249.

explained that (a) during the meeting, all interpretation channels and the floor sound were recorded digitally; (b) an electronic log showing the list of speakers was also created; (c) those recordings and the list of speakers were available shortly after the meeting; (d) the files were accessible through both the global meetings management system (gMeets), for the Secretariat, and the UNCITRAL website, for the public; (e) searching by date or title of the meeting was technically possible; and (f) there was an online tutorial explaining for users the main features of the system. The current digital recording system offered the user two options: to listen immediately to a particular intervention; and/or download a full meeting in MP3 format in any language of interpretation or the floor recording. The Secretariat could upload additional material to enrich the meeting archives and assist searching the audio files, for example by preparing a transcript of the meeting, which was currently produced by the Secretariat in English shortly after the meeting, for some United Nations bodies, from savings gained by no longer providing written records in all six official languages, the purpose of the transcription being to assist in finding the relevant information in the digital recording. Any electronically available material, such as written statements or presentations, could also be added.

336. It was explained that the digital system producing audio files for archival purposes was part of the gMeets platform and that platform enabled any intergovernmental body, if the body so decided, to replace or supplement their written meeting records or benefit from records of meetings where none was currently provided, such as in the case of UNCITRAL working groups. At the same time, the Commission was informed about General Assembly resolution 67/237, in which the Assembly noted the pilot project undertaken by the Committee on the Peaceful Uses of Outer Space at the United Nations Office at Vienna to make a transition to digital recordings of meetings in the six official languages of the Organization as a cost-saving measure, and emphasized that the further expansion of that measure would require consideration, including of its legal, financial and human resources implications, by the General Assembly and full compliance with the relevant resolutions of the Assembly, and requested the Secretary-General to report thereon and on the evaluation of the pilot project mentioned above to the Assembly at its sixty-eighth session.

337. The Commission noted problems with uploading on the UNCITRAL website the digital recordings of the forty-fifth session of the Commission on time and in all six official languages of the United Nations. The Commission was informed of steps taken and possible additional steps to ensure that digital recordings would be made available immediately in all six languages, regardless of where a session was held.

338. Questions were raised about sustainability of the system, in particular because of the need to archive the large volume of data and ensure that the data remained usable in future, regardless of changes in technology. In response, the Secretariat explained that, in order to ensure preservation of the data for an extended duration, measures had been put in place, such as multiple server and back-up services in various duty stations to prevent the data from being lost due to unprecedented events in one of the duty stations, such as the 2012 storm Sandy affecting New York.

339. In response to a query as regards citations of digital recordings in written materials, it was explained that the relevant practice had already developed: the speaker, the subject of his or her statement, the date, time and agenda item under which the statement was made were cited, and a hyperlink to the relevant digital

recording was provided, thus allowing a reader of the document to instantaneously listen to the cited statement. At the same time, it was emphasized that digital recordings should not be treated as the official records of an intergovernmental body; they were only a recording tool. An appropriate decision of the relevant body in the United Nations system would be needed to upgrade their status to those of official records.

340. Support was expressed for the digital recordings as a viable alternative to summary records, taking into account their obvious advantages, such as (a) savings (as the digital recording system was inexpensive, and savings from eliminating the production of written summary records were significant); (b) efficiency (as digital recordings were immediately available, unlike the summary records or verbatim records which were sometimes produced months or even years after the meeting); (c) accuracy (as the floor language version of the digital audio files presented a fully authentic audio recording); and (d) environmental considerations.

341. The Commission expressed appreciation to the Secretariat for updating the Commission on the developments made in the digital recordings system. The Commission agreed that the UNCITRAL trial use of digital recordings, in parallel with summary records, should continue. The Commission also confirmed its agreement that at its next session, in 2014, it would assess the experience of using digital recordings and, on the basis of that assessment, would take a decision regarding the possible replacement of summary records by digital recordings.

342. The Commission agreed that, taking into account the Secretariat's confirmation that digital recordings could be easily provided at sessions of UNCITRAL working groups, such recordings should be provided by default. As was done by the Chair at the present session, the working group concerned should be reminded that the digital recordings of the session would be made publicly available. It was the understanding that an intergovernmental body could always request that no audio recording be taken during its particular session and thus opt out of the digital recordings services. The view was expressed that the Commission might decide at a future session whether digital recordings of working groups should be accompanied by a script.

B. Internship programme

343. The Commission recalled the considerations taken into account by its secretariat in selecting candidates for internship.⁹⁵ The Commission was informed that, since the Secretariat's oral report to the Commission at its forty-fifth session, in July 2012, 23 new interns had undertaken an internship with the UNCITRAL secretariat, 7 of whom in the UNCITRAL Regional Centre for Asia and the Pacific. Most interns came from developing countries and countries in transition and were female. The Commission was informed that, while during the period under review the situation with finding eligible and qualified candidates for internship from Latin American and Caribbean States had improved, the Secretariat continued facing difficulties in finding such candidates from African States, as well as candidates with Arabic language skills.

344. The Commission was also informed that the procedure for selecting interns had changed since 1 July 2013. Before that date, interns had been selected from among candidates listed in the roster maintained and administered by the United Nations

⁹⁵ Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 329.

Office at Vienna, while currently interns were selected by the UNCITRAL secretariat directly from among candidates who had applied to the job opening posted at the United Nations career portal (careers.un.org). States and observer organizations were requested to bring that substantial change in the procedure for selecting interns to the attention of interested persons.

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

345. The Commission recalled that at its fortieth session, in 2007,⁹⁶ it had been informed of the programme budget for the biennium 2008-2009, which listed among the expected accomplishments of the Secretariat “facilitating the work of UNCITRAL”. The performance measure for that expected accomplishment was the level of satisfaction of UNCITRAL with the services provided, as evidenced by a rating on a scale ranging from 1 to 5 (5 being the highest rating).⁹⁷ At that session, the Commission had agreed to provide feedback to the Secretariat. From that session until the forty-fifth session of the Commission, in 2012, the Secretariat had circulated to delegates and representatives of observer States attending the annual sessions of UNCITRAL by the end of the session a questionnaire with the request to evaluate the quality of services provided by the Secretariat in facilitating the work of the Commission. The Commission noted that the Secretariat had not been receiving much feedback in response to that request; feedback received indicated a generally high level of satisfaction.

346. The Commission further took note that no such questionnaire had been circulated during the forty-fifth session of the Commission, in 2012; instead the Secretariat circulated to all States a note verbale on 22 March 2013 with the request that they indicate, by filling in the evaluation form enclosed to the note verbale, their level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat since the start of the forty-fifth session of UNCITRAL (held in New York from 25 June to 6 July 2012). The deadline for submission of the evaluation had been 7 July 2013, the day before the opening of the current session of the Commission.

347. The Commission was informed that the request had elicited an unusually high number of responses (15) and that the level of satisfaction with the services provided to UNCITRAL by the UNCITRAL secretariat remained high (an average of 4.8 out of 5). In the light of the higher number of replies received in the present year in response to the circulated note verbale, the Secretariat would continue the practice of soliciting the relevant feedback from States by means of a note verbale that would be circulated closer to the start of an annual session of the Commission, as had been done the present year, and reporting to the Commission at its annual sessions on the results of evaluation on the basis of the responses received.

XVIII. Date and place of future meetings

348. The Commission recalled that, at its thirty-sixth session, in 2003, it had agreed that (a) its working groups should normally meet for a one-week session twice a year;

⁹⁶ Ibid., *Sixty-second Session, Supplement No. 17* (A/62/17), part one, para. 243.

⁹⁷ A/62/6 (Sect. 8) and Corr.1, table 8.19 (d).

(b) extra time, if required, could be allocated to a working group provided that such arrangement would not result in an increase in the total number of 12 weeks of conference services per year currently allotted to sessions of all six working groups of the Commission; and (c) if any request by a working group for extra time would result in an increase in the 12-week allotment, the request should be reviewed by the Commission, with proper justification being given by that working group regarding the reasons for which a change in the meeting pattern was needed.⁹⁸

349. The Commission also recalled that, at its forty-fifth session, in 2012, it took note of paragraph 48 of General Assembly resolution 66/246 on questions relating to the proposed programme budget for the biennium 2012-2013, by which the Assembly had decided to increase non-post resources in order to provide sufficient funding for servicing the work of the Commission for 14 weeks and to retain the rotation scheme between Vienna and New York. In the light of that decision, the Commission noted at that session that the total number of 12 weeks of conference services per year could continue being allotted to six working groups of the Commission meeting twice a year for one week if annual sessions of the Commission were no longer than two weeks. Otherwise, adjustments would need to be made within the current 14-week allotment for all sessions of the Commission and its working groups.⁹⁹

350. At the current session, the Commission emphasized the need for flexibility in allocation of conference time (see para. 298 above).

A. Forty-seventh session of the Commission

351. In the light of the considerations set out above, the Commission approved the holding of its forty-seventh session in New York from 7 to 25 July 2014. The Secretariat was requested to consider shortening the duration of the session by one week if the expected workload of the session justified doing so.

B. Sessions of working groups

1. Sessions of working groups between the forty-sixth and the forty-seventh sessions of the Commission

352. In the light of the considerations set out above, the Commission approved the following schedule of meetings for its working groups:

(a) Working Group I would hold its twenty-second session in Vienna from 23 to 27 September 2013 and its twenty-third session in New York from 10 to 14 February 2014;

(b) Working Group II (Arbitration and Conciliation) would hold its fifty-ninth session in Vienna from 16 to 20 September 2013 and its sixtieth session in New York from 3 to 7 February 2014;

⁹⁸ *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 275.

⁹⁹ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 258.

(c) Working Group III (Online Dispute Resolution) would hold its twenty-eighth session in Vienna from 18 to 22 November 2013 and its twenty-ninth session in New York from 24 to 28 March 2014;

(d) Working Group IV (Electronic Commerce) would hold its forty-eighth session in Vienna from 9 to 13 December 2013 and its forty-ninth session in New York from 28 April to 2 May 2014;

(e) Working Group V (Insolvency Law) would hold its forty-fourth session in Vienna from 16 to 20 December 2013 and its forty-fifth session in New York from 21 to 25 April 2014;

(f) Working Group VI (Security Interests) would hold its twenty-fourth session in Vienna from 7 to 11 October or 2 to 6 December 2013 and its twenty-fifth session in New York from 31 March to 4 April 2014.

353. The Commission authorized the Secretariat to adjust the schedule of working group meetings according to the needs of the working groups and the need to hold colloquiums as agreed by the Commission at the current session (see paras. 325 and 331 above). The Secretariat was requested to post on the UNCITRAL website the final schedule of the working group meetings once the dates had been confirmed.

2. Sessions of working groups in 2014 after the forty-seventh session of the Commission

354. The Commission noted that the following dates were allocated for UNCITRAL meetings in 2014 after its forty-seventh session: (a) 8-12 September 2014 or 20-24 October 2014; (b) 22-26 September 2014; (c) 10-14 November 2014; (d) 17-21 November 2014; (e) 8-12 December 2014; and (f) 15-19 December 2014.

Annex I

UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration

Article 1. Scope of application

Applicability of the Rules

1. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”) shall apply to investor-State arbitration initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”)* concluded on or after 1 April 2014 unless the Parties to the treaty** have agreed otherwise.

2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before 1 April 2014, these Rules shall apply only when:

(a) The parties to an arbitration (the “disputing parties”) agree to their application in respect of that arbitration; or

(b) The Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State, have agreed after 1 April 2014 to their application.

Application of the Rules

3. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty:

(a) The disputing parties may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

(b) The arbitral tribunal shall have the power, besides its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case, after consultation with the disputing parties, if such adaptation is necessary to conduct the arbitration in a practical manner and is consistent with the transparency objective of these Rules.

Discretion and authority of the arbitral tribunal

4. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account:

(a) The public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings; and

(b) The disputing parties’ interest in a fair and efficient resolution of their dispute.

5. These Rules shall not affect any authority that the arbitral tribunal may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in

such a manner as to promote transparency, for example by accepting submissions from third persons.

6. In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

Applicable instrument in case of conflict

7. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

8. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Application in non-UNCITRAL arbitrations

9. These Rules are available for use in investor-State arbitrations initiated under rules other than the UNCITRAL Arbitration Rules or in ad hoc proceedings.

Footnotes to article 1, paragraph 1:

* For the purposes of the Rules on Transparency, a “treaty” shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including any treaty commonly referred to as a free trade agreement, economic integration agreement, trade and investment framework or cooperation agreement, or bilateral investment treaty.

** For the purposes of the Rules on Transparency, any reference to a “Party to the treaty” or a “State” includes, for example, a regional economic integration organization where it is a Party to the treaty.

Article 2. Publication of information at the commencement of arbitral proceedings

Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved and the treaty under which the claim is being made.

Article 3. Publication of documents

1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration, the response to the notice of arbitration, the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid

documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves; any written submissions by the non-disputing Party (or Parties) to the treaty and by third persons, transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto, shall be made available to the public, upon request by any person to the arbitral tribunal.

3. Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available exhibits and any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

5. A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the costs of photocopying or shipping documents to that person, but not the costs of making those documents available to the public through the repository.

Article 4. Submission by a third person

1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party, and not a non-disputing Party to the treaty ("third person(s)"), to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any page limits set by the arbitral tribunal:

(a) Describe the third person, including, where relevant, its membership and legal status (e.g., trade association or other non-governmental organization), its general objectives, the nature of its activities and any parent organization (including any organization that directly or indirectly controls the third person);

(b) Disclose any connection, direct or indirect, which the third person has with any disputing party;

(c) Provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the application by the third person under this article (e.g. funding around 20 per cent of its overall operations annually);

(d) Describe the nature of the interest that the third person has in the arbitration; and

(e) Identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant:

(a) Whether the third person has a significant interest in the arbitral proceedings; and

(b) The extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

4. The submission filed by the third person shall:

(a) Be dated and signed by the person filing the submission on behalf of the third person;

(b) Be concise, and in no case longer than as authorized by the arbitral tribunal;

(c) Set out a precise statement of the third person's position on issues; and

(d) Address only matters within the scope of the dispute.

5. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by the third person.

Article 5. Submission by a non-disputing Party to the treaty

1. The arbitral tribunal shall, subject to paragraph 4, allow, or, after consultation with the disputing parties, may invite, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a non-disputing Party to the treaty. In determining whether to allow such submissions, the arbitral tribunal shall take into consideration, among other factors it determines to be relevant, the factors referred to in article 4, paragraph 3, and, for greater certainty, the need to avoid submissions which would support the claim of the investor in a manner tantamount to diplomatic protection.

3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.

Article 6. Hearings

1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public.

2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

3. The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate). However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

Article 7. Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public pursuant to articles 2 to 6.

2. Confidential or protected information consists of:

(a) Confidential business information;

(b) Information that is protected against being made available to the public under the treaty;

(c) Information that is protected against being made available to the public, in the case of the information of the respondent State, under the law of the respondent State, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or

(d) Information the disclosure of which would impede law enforcement.

3. The arbitral tribunal, after consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate:

(a) Time limits in which a disputing party, non-disputing Party to the treaty or third person shall give notice that it seeks protection for such information in documents;

(b) Procedures for the prompt designation and redaction of the particular confidential or protected information in such documents; and

(c) Procedures for holding hearings in private to the extent required by article 6, paragraph 2.

Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

5. Nothing in these Rules requires a respondent State to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

Integrity of the arbitral process

6. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardize the integrity of the arbitral process as determined pursuant to paragraph 7.

7. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardize the integrity of the arbitral process because it could hamper the collection or production of evidence, lead to the intimidation of witnesses, lawyers acting for disputing parties or members of the arbitral tribunal, or in comparably exceptional circumstances.

Article 8. Repository of published information

The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations or an institution named by UNCITRAL.

Annex II

Amendment to article 1 of the UNCITRAL Arbitration Rules

UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013)

Scope of application

Article 1

4. For investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors, these Rules include the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (“Rules on Transparency”), subject to article 1 of the Rules on Transparency.

Annex III

List of documents before the Commission at its forty-sixth session

| <i>Symbol</i> | <i>Title or description</i> |
|---------------|---|
| A/CN.9/759 | Provisional agenda, annotations thereto and scheduling of meetings of the forty-sixth session |
| A/CN.9/760 | Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session |
| A/CN.9/761 | Report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session |
| A/CN.9/762 | Report of Working Group III (Online Dispute Resolution) on the work of its twenty-sixth session |
| A/CN.9/763 | Report of Working Group V (Insolvency Law) on the work of its forty-second session |
| A/CN.9/764 | Report of Working Group VI (Security Interests) on the work of its twenty-second session |
| A/CN.9/765 | Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session |
| A/CN.9/766 | Report of Working Group V (Insolvency Law) on the work of its forty-third session |
| A/CN.9/767 | Report of Working Group VI (Security Interests) on the work of its twenty-third session |
| A/CN.9/768 | Report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session |
| A/CN.9/769 | Report of Working Group III (Online Dispute Resolution) on the work of its twenty-seventh session |
| A/CN.9/770 | Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement |
| A/CN.9/771 | Glossary of procurement-related terms used in the UNCITRAL Model Law on Public Procurement |
| A/CN.9/772 | Note by the Secretariat on bibliography of recent writings related to the work of UNCITRAL |
| A/CN.9/773 | Note by the Secretariat on status of conventions and model laws |
| A/CN.9/774 | Note by the Secretariat on planned and possible future work |
| A/CN.9/775 | Note by the Secretariat on technical cooperation and assistance |
| A/CN.9/776 | Note by the Secretariat on coordination activities |
| A/CN.9/777 | Note by the Secretariat on promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts |

| <i>Symbol</i> | <i>Title or description</i> |
|---|--|
| A/CN.9/778 | The UNCITRAL Model Law on Cross-Border Insolvency: the Judicial Perspective |
| A/CN.9/779 | Note by the Secretariat on possible future work in the area of public-private partnerships: report of the UNCITRAL colloquium on public-private partnerships |
| A/CN.9/780 | Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises |
| A/CN.9/781 and Add.1-2 | Draft UNCITRAL Guide on the Implementation of a Security Rights Registry |
| A/CN.9/782 | Discussion paper on the International Colloquium on Public-Private Partnerships |
| A/CN.9/783 | Settlement of commercial disputes: draft UNCITRAL rules on transparency in treaty-based investor-State arbitration |
| A/CN.9/784 | Settlement of commercial disputes: applicability of the UNCITRAL rules on transparency to the settlement of disputes arising under existing investment treaties |
| A/CN.9/785 | Settlement of commercial disputes: possible future work in the field of settlement of commercial disputes |
| A/CN.9/786 | Settlement of commercial disputes: UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958): excerpt, guide on article VII |
| A/CN.9/787 and Add.1-3 and Add.1/Corr.1 | Settlement of commercial disputes: draft UNCITRAL rules on transparency in treaty-based investor-State arbitration: compilation of comments by Governments |
| A/CN.9/788 | Note by the Secretariat on commercial fraud |
| A/CN.9/789 | Proposal by the Government of the United States regarding UNCITRAL future work: provisional agenda item 16 |
| A/CN.9/790 | Proposal by the Government of Colombia |
| A/CN.9/791 | Settlement of commercial disputes: draft UNCITRAL rules on transparency in treaty-based investor-State arbitration: repository of published information under article 8 of the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration |
| A/CN.9/792 and Add.1-3 | Revised Guide to Enactment of the Model Law and draft part four of the Legislative Guide on Insolvency Law: compilation of comments by Governments |

**B. United Nations Conference on Trade and Development (UNCTAD):
extract from the report of the Trade and Development Board on its
sixtieth session
(TD/B/60/11)**

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

At its 1107th plenary meeting, the Board took note of the annual report of the United Nations Commission on International Trade Law at its forty-sixth session (A/68/17), held in New York, the United States of America, from 8 to 26 July 2013.

C. General Assembly: report of the Sixth Committee on the report of the United Nations Commission on International Trade Law on the work of its forty-sixth session (A/68/462)

[Original: English]

Rapporteur: Mr. Tofiq **Musayev** (Azerbaijan)

I. Introduction

1. At its 2nd plenary meeting, on 20 September 2013, the General Assembly, on the recommendation of the General Committee, decided to include in the agenda of its sixty-eighth session the item entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session” and to allocate it to the Sixth Committee.
2. The Sixth Committee considered the item at its 9th, 10th, 28th and 29th meetings, on 14 and 16 October and on 8 and 15 November 2013. The views of the representatives who spoke during the Committee’s consideration of the item are reflected in the relevant summary records (A/C.6/68/SR.9, 10, 28 and 29).
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 forty-sixth session (A/68/17).
4. At the 9th meeting, on 14 October, the Chair of the United Nations Commission on International Trade Law at its forty-sixth session introduced the report of the Commission on the work of its forty-sixth session.

II. Consideration of proposals

A. Draft resolution A/C.6/68/L.9

5. At the 28th meeting, on 8 November, the representative of Austria, on behalf of Argentina, Armenia, Australia, Austria, Belarus, Belgium, Brazil, Bulgaria, Chile, Croatia, Cyprus, the Czech Republic, Estonia, Finland, France, Gabon, Georgia, Greece, Guatemala, Hungary, India, Ireland, Israel, Italy, Japan, Jordan, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mauritius, Mexico, Montenegro, the Netherlands, New Zealand, Nigeria, Norway, the Philippines, Portugal, the Republic of Korea, Romania, the Russian Federation, Serbia, Singapore, Slovakia, Slovenia, Spain, Switzerland, Thailand, the former Yugoslav Republic of Macedonia, Trinidad and Tobago, Turkey, Uganda, Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela (Bolivarian Republic of), introduced a draft resolution entitled “Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session” (A/C.6/68/L.9).
6. At the 29th meeting, on 15 November, Denmark, Germany and Malta joined in sponsoring the draft resolution.
7. At the same meeting, the Committee adopted draft resolution A/C.6/68/L.9 without a vote (see para. 14, draft resolution I).

B. Draft resolution A/C.6/68/L.10

8. At the 28th meeting, on 8 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “Revision of the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and part four of the UNCITRAL Legislative Guide on Insolvency Law” (A/C.6/68/L.10).

9. At its 29th meeting, on 15 November, the Committee adopted draft resolution A/C.6/68/L.10 without a vote (see para. 14, draft resolution II).

C. Draft resolution A/C.6/68/L.11

10. At the 28th meeting, on 8 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “UNCITRAL Guide on the Implementation of a Security Rights Registry” (A/C.6/68/L.11).

11. At its 29th meeting, on 15 November, the Committee adopted draft resolution A/C.6/68/L.11 without a vote (see para. 14, draft resolution III).

D. Draft resolution A/C.6/68/L.12

12. At the 28th meeting, on 8 November, the representative of Austria, on behalf of the Bureau, introduced a draft resolution entitled “United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)” (A/C.6/68/L.12).

13. At its 29th meeting, on 15 November, the Committee adopted draft resolution A/C.6/68/L.12 without a vote (see para. 14, draft resolution IV).

III. Recommendations of the Sixth Committee

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

Draft resolution I

Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session

The General Assembly,

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

Reaffirming its belief that the progressive modernization and harmonization of international trade law, in reducing or removing legal obstacles to the flow of

international trade, especially those affecting developing countries, would contribute significantly to universal economic cooperation among all States on a basis of equality, equity, common interest and respect for the rule of law, to the elimination of discrimination in international trade and, thereby, to peace, stability and the well-being of all peoples,

Having considered the report of the Commission,¹

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

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

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;¹

2. *Commends* the Commission for the finalization and adoption of the Rules on Transparency in Treaty-based Investor-State Arbitration,² the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),³ the Guide on the Implementation of a Security Rights Registry,⁴ the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency,⁵ part four of the *Legislative Guide on Insolvency Law*, on the obligations of directors in the period approaching insolvency,⁶ the guidance on procurement regulations to be promulgated in accordance with article 4 of the Model Law on Public Procurement⁷ and the glossary of procurement-related terms used in the Model Law on Public Procurement,⁷ as well as for the updating of the Model Law on Cross-Border Insolvency: The Judicial Perspective;⁸

3. *Recognizes* the opinion expressed by the Commission that the secretariat of the Commission should fulfil the role of a repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration (“transparency repository”),⁹ invites the Secretary-General to consider performing, in accordance with article 8 of the Rules on Transparency, the role of the transparency repository through the secretariat of the Commission, and requests the Secretary-General to report to the General Assembly and the Commission in this regard;

¹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17).*

² *Ibid.*, chap. III and annex I.

³ *Ibid.*, chap. III and annex II.

⁴ *Ibid.*, chap. IV.

⁵ *Ibid.*, chap. V, sect. A.

⁶ *Ibid.*, sect. B.

⁷ *Ibid.*, chap. VI.

⁸ *Ibid.*, chap. V, sect. C.

⁹ *Ibid.*, para. 80.

4. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law, security interests, international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and public-private partnerships, and commends in particular the efforts undertaken by the Commission to improve the management of its resources while maintaining and increasing its current levels of activity, including through the use of informal working methods where appropriate, with due regard to the formal negotiation process;¹⁰

5. *Notes with appreciation* the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), done at New York on 10 June 1958,¹¹ including the preparation of a guide on the Convention, in close cooperation with international experts, to be submitted to the Commission at a future session for its consideration;¹²

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

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

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, and in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

(c) Expresses its appreciation to the Governments whose contributions enabled the technical cooperation and assistance activities to take place, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the United Nations Commission on International Trade Law Trust Fund for Symposia and, where

¹⁰ Ibid., chaps. III-V, VII, VIII and XV.

¹¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

¹² See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. III, sect. E.

appropriate, for the financing of special projects and otherwise to assist the secretariat of the Commission in carrying out technical cooperation and assistance activities, in particular in developing countries;

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the Millennium Development Goals;

8. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,¹³ requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, and in this regard recalls its previous resolutions related to this matter;

9. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region, notes with satisfaction expressions of interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;¹⁴

10. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in those countries to put in place a regulatory and enabling environment for business, trade and investment;

11. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-eighth 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;

¹³ Ibid., *Sixty-fifth Session, Supplement No. 17 (A/65/17)*.

¹⁴ Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. XIII.

12. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

13. *Notes* the rule of law panel discussion held at the forty-sixth session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law and the peaceful settlement of international disputes through its work in the areas of arbitration and conciliation, transparency in investor-State dispute resolution and online dispute resolution and its work towards achieving universal accession to, and the effective implementation and uniform interpretation and application of, the New York Convention;¹⁵

14. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

15. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,¹⁶ which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;¹⁷

16. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the Commission's decision to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing at its forty-seventh session, in 2014, the experience of using digital recordings and, on the basis of that

¹⁵ Ibid., chap. XIV, sect. C.

¹⁶ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

¹⁷ Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 124-128.

assessment, taking a decision regarding the possible replacement of summary records by digital recordings;¹⁸

17. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

18. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

19. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

20. *Welcomes* the continued work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade.

¹⁸ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 341.

Draft resolution II
Revision of the Guide to Enactment of the Model Law on
Cross-Border Insolvency and part four of the Legislative Guide
on Insolvency Law of the United Nations Commission on
International Trade Law

A. Revision of the Guide to Enactment of the Model Law on
Cross-Border Insolvency

The General Assembly,

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

Recalling also its resolution 52/158 of 15 December 1997, in which it recommended the use of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, contained in the annex thereto,

Noting that legislation based upon the Model Law on Cross-Border Insolvency has been enacted in some 20 States,

Noting also the widespread increase in the incidence of cross-border insolvency proceedings and, accordingly, the growing opportunities for use and application of the Model Law on Cross-Border Insolvency in cross-border insolvency proceedings and the development of international jurisprudence interpreting its provisions,

Noting further that courts frequently have reference to the Guide to Enactment of the Model Law on Cross-Border Insolvency for guidance on the background to the drafting and interpretation of its provisions,

Recognizing that some uncertainty with respect to the interpretation of certain provisions of the Model Law on Cross-Border Insolvency has emerged in the jurisprudence arising from its application in practice,

Convinced of the desirability, in the interpretation of those provisions, of regard to the international origin of the Model Law on Cross-Border Insolvency and the need to promote uniformity in its application,

Convinced also of the desirability of providing additional guidance through revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency with respect to the interpretation and application of selected aspects of the Model Law to facilitate uniform interpretation,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for revising the Guide to Enactment of the Model Law on Cross-Border Insolvency;

2. *Requests* the Secretary-General to publish, including electronically, the text of the Guide to Enactment and Interpretation of the Model Law on Cross-Border

Insolvency, together with the text of the Model Law on Cross-Border Insolvency,¹ and to transmit it to Governments and interested bodies, so that it becomes widely known and available;

3. *Recommends* that the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency be given due consideration, as appropriate, by legislators, policymakers, judges, insolvency practitioners and other individuals concerned with cross-border insolvency laws and proceedings;

4. *Also recommends* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency, and invites States that have enacted legislation based upon the Model Law to advise the Commission accordingly.

B. Part four of the Legislative Guide on Insolvency Law

The General Assembly,

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

Recalling also its resolutions 59/40 of 2 December 2004, in which it recommended the use of the *Legislative Guide on Insolvency Law* of the United Nations Commission on International Trade Law,² and 65/24 of 6 December 2010, in which it recommended the use of part three of the *Guide*, on the treatment of enterprise groups in insolvency,

Considering that effective insolvency regimes, in addition to providing a predictable legal process for addressing the financial difficulties of troubled enterprises and the necessary framework for their efficient reorganization or orderly liquidation, should also permit an examination to be made of the circumstances giving rise to insolvency and, in particular, of the conduct of directors of such an enterprise in the period before insolvency proceedings commence,

Noting that the *Legislative Guide*, while addressing the obligations of directors of an enterprise once insolvency proceedings commence, does not address the conduct of directors in the period approaching insolvency and the obligations that might be applicable to directors in that period,

Considering that the provision of incentives for directors to take timely action to address the effects of financial distress experienced by an enterprise may be key to its successful reorganization or liquidation and that such incentives should be part of an effective insolvency regime,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for developing and adopting part four of the *Legislative*

¹ Resolution 52/158, annex.

² United Nations publication, Sales No. E.05.V.10.

Guide on Insolvency Law, addressing the obligations of directors of an enterprise in the period approaching the insolvency of that enterprise;³

2. *Requests* the Secretary-General to publish, including electronically, the text of part four of the *Legislative Guide* and to transmit it to Governments and other interested bodies;

3. *Recommends* that all States utilize the *Legislative Guide* to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the *Guide* when revising or adopting legislation relevant to insolvency, and invites States that have used the *Guide* to advise the Commission accordingly.

³ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. V, sect. B.

Draft resolution III

United Nations Commission on International Trade Law Guide on the Implementation of a Security Rights Registry

The General Assembly,

Recognizing the importance to all States of efficient secured transactions regimes in promoting access to affordable secured credit,

Recognizing also that access to affordable secured credit is likely to assist all countries, in particular developing countries and countries with economies in transition, in their efforts to achieve economic growth, sustainable development, the rule of law and financial inclusion,

Recalling its resolution 63/121 of 11 December 2008, in which it recommended that all States give favourable consideration to the *Legislative Guide on Secured Transactions* of the United Nations Commission on International Trade Law¹ when revising or adopting legislation relevant to secured transactions,

Recognizing that an efficient secured transactions regime with a publicly accessible security rights registry of the kind recommended in the *Legislative Guide on Secured Transactions* is likely to increase access to affordable secured credit,

Noting with satisfaction that the United Nations Commission on International Trade Law Guide on the Implementation of a Security Rights Registry² is consistent with and usefully supplements the *Legislative Guide on Secured Transactions* and that the two Guides, together, will provide comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

Noting that secured transactions law reform could not be effectively implemented without the establishment of an efficient, publicly accessible security rights registry where information about the potential existence of a security right in movable assets may be registered and that States urgently need guidance with respect to the establishment and operation of such registries,

Taking into account that the harmonization of national security rights registries on the basis of the Guide on the Implementation of a Security Rights Registry is likely to increase the availability of credit across national borders and thus facilitate the development of international trade, which, if achieved on the basis of equality and mutual benefit to all States, is an important element in promoting friendly relations among States,

Expressing its appreciation to intergovernmental and international non-governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the Guide on the Implementation of a Security Rights Registry,

¹ United Nations publication, Sales No. E.09.V.12.

² See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. IV.

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the Guide on the Implementation of a Security Rights Registry;²
2. *Requests* the Secretary-General to publish the Guide on the Implementation of a Security Rights Registry, including through electronic means, and to disseminate it broadly to Governments and other interested bodies such as national and international financial institutions and chambers of commerce;
3. *Recommends* that all States give favourable consideration to the Guide on the Implementation of a Security Rights Registry when revising relevant legislation, administrative regulations or guidelines and to the *Legislative Guide on Secured Transactions* of the Commission¹ when revising or adopting legislation relevant to secured transactions, and invites States that have used the Guides to advise the Commission accordingly;
4. *Also recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade,³ the principles of which are reflected in the *Legislative Guide on Secured Transactions* and the optional annex to which refers to the registration of data with regard to assignments.

³ Resolution 56/81, annex.

Draft resolution IV
United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)

The General Assembly,

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

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations and the wide use of arbitration for the settlement of treaty-based investor-State disputes,

Recalling its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

Bearing in mind that the Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

Noting that the Commission, at its forty-sixth session, adopted the Rules on Transparency in Treaty-based Investor-State Arbitration² and amended the Arbitration Rules as revised in 2010 to include, in a new article 1, paragraph 4, a reference to the Rules on Transparency,³

Noting also that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the Arbitration Rules or in ad hoc proceedings,

Noting further that the preparation of the Rules on Transparency was the subject of due deliberation in the Commission and that they benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17)*, chap. V, sect. C; and *ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, chap. III and annex I.

² *Ibid.*, *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. III and annex I.

³ *Ibid.*, chap. III and annex II.

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having prepared and adopted the Rules on Transparency in Treaty-based Investor-State Arbitration² and the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),³ as annexed to the report of the Commission on the work of its forty-sixth session;⁴

2. *Requests* the Secretary-General to publish, including electronically, and disseminate broadly the text of the Rules on Transparency, both together with the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) and as a stand-alone text, and to transmit them to Governments and organizations interested in the field of dispute settlement;

3. *Recommends* the use of the Rules on Transparency in relation to the settlement of investment disputes within the scope of their application as defined in article 1 of the Rules, and invites Member States that have chosen to include the Rules in their treaties to inform the Commission accordingly;

4. *Also recommends* that, subject to any provision in relevant treaties that may require a higher degree of transparency than that provided in the Rules on Transparency, the Rules be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to treaties providing for the protection of investors or investments concluded before the date of coming into effect of the Rules, to the extent that such application is consistent with those treaties.

⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17).*

D. General Assembly resolutions 68/106, 68/107, 68/108, 68/109, and 68/116

68/106. Report of the United Nations Commission on International Trade Law on the work of its forty-sixth session

The General Assembly,

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

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

Having considered the report of the Commission,¹

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

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

1. *Takes note with appreciation* of the report of the United Nations Commission on International Trade Law;¹

2. *Commends* the Commission for the finalization and adoption of the Rules on Transparency in Treaty-based Investor-State Arbitration,² the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013),³ the Guide on the Implementation of a Security Rights Registry,⁴ the Guide to Enactment and

¹ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17).*

² *Ibid.*, chap. III and annex I.

³ *Ibid.*, chap. III and annex II.

⁴ *Ibid.*, chap. IV.

Interpretation of the Model Law on Cross-Border Insolvency,⁵ part four of the *Legislative Guide on Insolvency Law*, on the obligations of directors in the period approaching insolvency,⁶ the guidance on procurement regulations to be promulgated in accordance with article 4 of the Model Law on Public Procurement⁷ and the glossary of procurement-related terms used in the Model Law on Public Procurement,⁷ as well as for the updating of the Model Law on Cross-Border Insolvency: The Judicial Perspective;⁸

3. *Recognizes* the opinion expressed by the Commission that the secretariat of the Commission should fulfil the role of a repository of published information under the Rules on Transparency in Treaty-based Investor-State Arbitration (“transparency repository”),⁹ invites the Secretary-General to consider performing, in accordance with article 8 of the Rules on Transparency, the role of the transparency repository through the secretariat of the Commission, and requests the Secretary-General to report to the General Assembly and the Commission in this regard;

4. *Takes note with interest* of the decisions taken by the Commission as regards its future work and the progress made by the Commission in its work in the areas of arbitration and conciliation, online dispute resolution, electronic commerce, insolvency law, security interests, international trade law aimed at reducing the legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and public-private partnerships, and commends in particular the efforts undertaken by the Commission to improve the management of its resources while maintaining and increasing its current levels of activity, including through the use of informal working methods where appropriate, with due regard to the formal negotiation process;¹⁰

5. *Notes with appreciation* the projects of the Commission aimed at promoting the uniform and effective application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), done at New York on 10 June 1958,¹¹ including the preparation of a guide on the Convention, in close cooperation with international experts, to be submitted to the Commission at a future session for its consideration;¹²

6. *Endorses* the efforts and initiatives of the Commission, as the core legal body within the United Nations system in the field of international trade law, aimed at increasing coordination of and cooperation on legal activities of international and regional organizations active in the field of international trade law and at promoting the rule of law at the national and international levels in this field, and in this regard appeals to relevant international and regional organizations to coordinate their legal activities with those of the Commission, to avoid duplication of efforts and to promote

⁵ Ibid., chap. V, sect. A.

⁶ Ibid., sect. B.

⁷ Ibid., chap. VI.

⁸ Ibid., chap. V, sect. C.

⁹ Ibid., para. 80.

¹⁰ Ibid., chaps. III-V, VII, VIII and XV.

¹¹ United Nations, *Treaty Series*, vol. 330, No. 4739.

¹² See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17* (A/68/17), chap. III, sect. E.

efficiency, consistency and coherence in the modernization and harmonization of international trade law;

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

(a) Welcomes the initiatives of the Commission towards expanding, through its secretariat, its technical cooperation and assistance programme, and in that respect encourages the Secretary-General to seek partnerships with State and non-State actors to increase awareness about the work of the Commission and facilitate the effective implementation of legal standards resulting from its work;

(b) Expresses its appreciation to the Commission for carrying out technical cooperation and assistance activities and for providing assistance with legislative drafting in the field of international trade law, and draws the attention of the Secretary-General to the limited resources that are made available in this field;

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

(d) Reiterates its appeal to the United Nations Development Programme and other bodies responsible for development assistance, such as the World Bank and regional development banks, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate with the Commission and coordinate their activities with those of the Commission in the light of the relevance and importance of the work and programmes of the Commission for the promotion of the rule of law at the national and international levels and for the implementation of the international development agenda, including the achievement of the Millennium Development Goals;

8. *Recalls* the importance of adherence to the rules of procedure and methods of work of the Commission, including transparent and inclusive deliberations, taking into account the summary of conclusions as reproduced in annex III to the report on the work of its forty-third session,¹³ requests the Secretariat to issue, prior to meetings of the Commission and of its working groups, a reminder of those rules of procedure and methods of work with a view to ensuring the high quality of the work of the Commission and encouraging the assessment of its instruments, and in this regard recalls its previous resolutions related to this matter;

9. *Welcomes* the activities of the United Nations Commission on International Trade Law Regional Centre for Asia and the Pacific, in the Republic of Korea, towards reaching out and providing technical assistance with international trade law reforms to developing countries in the region, notes with satisfaction expressions of

¹³ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17).

interest from other States in hosting regional centres of the Commission, and requests the Secretary-General to keep the General Assembly informed of developments regarding the establishment of regional centres, in particular their funding and budgetary situation;¹⁴

10. *Appeals* to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission, at their request and in consultation with the Secretary-General, in order to enable renewal of the provision of that assistance and to increase expert representation from developing countries at sessions of the Commission and its working groups, necessary to build local expertise and capacities in those countries to put in place a regulatory and enabling environment for business, trade and investment;

11. *Decides*, in order to ensure full participation of all Member States in the sessions of the Commission and its working groups, to continue, in the competent Main Committee during the sixty-eighth 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. *Endorses* the conviction of the Commission that the implementation and effective use of modern private law standards in international trade are essential for advancing good governance, sustained economic development and the eradication of poverty and hunger and that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels, including through the Rule of Law Coordination and Resource Group, supported by the Rule of Law Unit in the Executive Office of the Secretary-General;

13. *Notes* the rule of law panel discussion held at the forty-sixth session of the Commission and the comments transmitted by the Commission highlighting its role in promoting the rule of law and the peaceful settlement of international disputes through its work in the areas of arbitration and conciliation, transparency in investor-State dispute resolution and online dispute resolution and its work towards achieving universal accession to, and the effective implementation and uniform interpretation and application of, the New York Convention;¹⁵

14. *Notes with satisfaction* that, in paragraph 8 of the declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels, adopted by consensus as resolution 67/1 of 24 September 2012, Member States recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship and, in this regard, commended the work of the Commission in modernizing and harmonizing international trade law and that, in paragraph 7 of the declaration, Member States expressed their conviction that the rule of law and development were strongly interrelated and mutually reinforcing;

¹⁴ Ibid., *Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. XIII.

¹⁵ Ibid., chap. XIV, sect. C.

15. *Reiterates its request* to the Secretary-General, in conformity with resolutions of the General Assembly on documentation-related matters,¹⁶ which, in particular, emphasize that any invitation to limit, where appropriate, the length of documents should not adversely affect either the quality of the presentation or the substance of the documents, to bear in mind the particular characteristics of the mandate and functions of the Commission in the progressive development and codification of international trade law when implementing page limits with respect to the documentation of the Commission;¹⁷

16. *Requests* the Secretary-General to continue the publication of Commission standards and the provision of summary records of the meetings of the Commission, including committees of the whole established by the Commission for the duration of its annual session, relating to the formulation of normative texts, and takes note of the Commission's decision to continue the trial use of digital recordings, in parallel with summary records where applicable, with a view to assessing at its forty-seventh session, in 2014, the experience of using digital recordings and, on the basis of that assessment, taking a decision regarding the possible replacement of summary records by digital recordings;¹⁸

17. *Recalls* paragraph 48 of its resolution 66/246 of 24 December 2011 regarding the rotation scheme of meetings between Vienna and New York;

18. *Notes with appreciation* the work of the Secretariat on the system for the collection and dissemination of case law on Commission texts in the six official languages of the United Nations (the CLOUT system), notes the resource-intensive nature of the system, acknowledges the need for further resources to sustain and expand it, and in this regard welcomes efforts by the Secretariat towards building partnerships with interested institutions, and appeals to Governments, the relevant bodies of the United Nations system, organizations, institutions and individuals to assist the secretariat of the Commission in raising awareness as to the availability and usefulness of the CLOUT system in professional, academic and judiciary circles and in securing the funding required for the coordination and expansion of the system and the establishment, within the secretariat of the Commission, of a pillar focused on the promotion of ways and means of interpreting Commission texts in a uniform manner;

19. *Stresses* the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urges States that have not yet done so to consider signing, ratifying or acceding to conventions, enacting model laws and encouraging the use of other relevant texts;

20. *Welcomes* the continued work of the Secretariat on digests of case law related to Commission texts, including their wide dissemination, as well as the continuing increase in the number of abstracts available through the CLOUT system, in view of the role of the digests and the CLOUT system as important tools for the promotion of the uniform interpretation of international trade law, in particular by building local capacity of judges, arbitrators and other legal practitioners to interpret

¹⁶ Resolutions 52/214, sect. B, 57/283 B, sect. III, and 58/250, sect. III.

¹⁷ Resolutions 59/39, para. 9, and 65/21, para. 18; see also *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17 (A/59/17)*, paras. 124-128.

¹⁸ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, para. 341.

those standards in the light of their international character and the need to promote uniformity in their application and the observance of good faith in international trade.

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68/107. Revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency and part four of the Legislative Guide on Insolvency Law of the United Nations Commission on International Trade Law

A

REVISION OF THE GUIDE TO ENACTMENT OF THE MODEL LAW
ON CROSS-BORDER INSOLVENCY

The General Assembly,

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

Recalling also its resolution 52/158 of 15 December 1997, in which it recommended the use of the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law, contained in the annex thereto,

Noting that legislation based upon the Model Law on Cross-Border Insolvency has been enacted in some 20 States,

Noting also the widespread increase in the incidence of cross-border insolvency proceedings and, accordingly, the growing opportunities for use and application of the Model Law on Cross-Border Insolvency in cross-border insolvency proceedings and the development of international jurisprudence interpreting its provisions,

Noting further that courts frequently have reference to the Guide to Enactment of the Model Law on Cross-Border Insolvency¹ for guidance on the background to the drafting and interpretation of its provisions,

Recognizing that some uncertainty with respect to the interpretation of certain provisions of the Model Law on Cross-Border Insolvency has emerged in the jurisprudence arising from its application in practice,

Convinced of the desirability, in the interpretation of those provisions, of regard to the international origin of the Model Law on Cross-Border Insolvency and the need to promote uniformity in its application,

Convinced also of the desirability of providing additional guidance through revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency with respect to the interpretation and application of selected aspects of the Model Law to facilitate uniform interpretation,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for revising the Guide to Enactment of the Model Law on Cross-Border Insolvency;¹

2. *Requests* the Secretary-General to publish, including electronically, the text of the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency, together with the text of the Model Law on Cross-Border Insolvency,² and

¹ A/CN.9/442, annex.

² Resolution 52/158, annex.

to transmit it to Governments and interested bodies, so that it becomes widely known and available;

3. *Recommends* that the Guide to Enactment and Interpretation of the Model Law on Cross-Border Insolvency be given due consideration, as appropriate, by legislators, policymakers, judges, insolvency practitioners and other individuals concerned with cross-border insolvency laws and proceedings;

4. *Also recommends* that all States continue to consider implementation of the Model Law on Cross-Border Insolvency, and invites States that have enacted legislation based upon the Model Law to advise the Commission accordingly.

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B

PART FOUR OF THE LEGISLATIVE GUIDE ON INSOLVENCY LAW

The General Assembly,

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

Recalling also its resolutions 59/40 of 2 December 2004, in which it recommended the use of the *Legislative Guide on Insolvency Law* of the United Nations Commission on International Trade Law,³ and 65/24 of 6 December 2010, in which it recommended the use of part three of the *Guide*, on the treatment of enterprise groups in insolvency,

Considering that effective insolvency regimes, in addition to providing a predictable legal process for addressing the financial difficulties of troubled enterprises and the necessary framework for their efficient reorganization or orderly liquidation, should also permit an examination to be made of the circumstances giving rise to insolvency and, in particular, of the conduct of directors of such an enterprise in the period before insolvency proceedings commence,

Noting that the *Legislative Guide*, while addressing the obligations of directors of an enterprise once insolvency proceedings commence, does not address the conduct of directors in the period approaching insolvency and the obligations that might be applicable to directors in that period,

Considering that the provision of incentives for directors to take timely action to address the effects of financial distress experienced by an enterprise may be key to its successful reorganization or liquidation and that such incentives should be part of an effective insolvency regime,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for developing and adopting part four of the *Legislative*

³ United Nations publication, Sales No. E.05.V.10.

Guide on Insolvency Law, addressing the obligations of directors of an enterprise in the period approaching the insolvency of that enterprise;⁴

2. *Requests* the Secretary-General to publish, including electronically, the text of part four of the *Legislative Guide* and to transmit it to Governments and other interested bodies;

3. *Recommends* that all States utilize the *Legislative Guide* to assess the economic efficiency of their insolvency law regimes and give favourable consideration to the *Guide* when revising or adopting legislation relevant to insolvency, and invites States that have used the *Guide* to advise the Commission accordingly.

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⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. V, sect. B.

68/108. United Nations Commission on International Trade Law Guide on the Implementation of a Security Rights Registry

The General Assembly,

Recognizing the importance to all States of efficient secured transactions regimes in promoting access to affordable secured credit,

Recognizing also that access to affordable secured credit is likely to assist all countries, in particular developing countries and countries with economies in transition, in their efforts to achieve economic growth, sustainable development, the rule of law and financial inclusion,

Recalling its resolution 63/121 of 11 December 2008, in which it recommended that all States give favourable consideration to the *Legislative Guide on Secured Transactions* of the United Nations Commission on International Trade Law¹ when revising or adopting legislation relevant to secured transactions,

Recognizing that an efficient secured transactions regime with a publicly accessible security rights registry of the kind recommended in the *Legislative Guide on Secured Transactions* is likely to increase access to affordable secured credit,

Noting with satisfaction that the United Nations Commission on International Trade Law Guide on the Implementation of a Security Rights Registry² is consistent with and usefully supplements the *Legislative Guide on Secured Transactions* and that the two Guides, together, will provide comprehensive guidance to States with respect to legal and practical issues that need to be addressed when implementing a modern secured transactions regime,

Noting that secured transactions law reform could not be effectively implemented without the establishment of an efficient, publicly accessible security rights registry where information about the potential existence of a security right in movable assets may be registered and that States urgently need guidance with respect to the establishment and operation of such registries,

Taking into account that the harmonization of national security rights registries on the basis of the Guide on the Implementation of a Security Rights Registry is likely to increase the availability of credit across national borders and thus facilitate the development of international trade, which, if achieved on the basis of equality and mutual benefit to all States, is an important element in promoting friendly relations among States,

Expressing its appreciation to intergovernmental and international non-governmental organizations active in the field of secured transactions law reform for their participation in and support for the development of the Guide on the Implementation of a Security Rights Registry,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for the completion and adoption of the Guide on the Implementation of a Security Rights Registry;²

¹ United Nations publication, Sales No. E.09.V.12.

² See *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17)*, chap. IV.

2. *Requests* the Secretary-General to publish the Guide on the Implementation of a Security Rights Registry, including through electronic means, and to disseminate it broadly to Governments and other interested bodies such as national and international financial institutions and chambers of commerce;

3. *Recommends* that all States give favourable consideration to the Guide on the Implementation of a Security Rights Registry when revising relevant legislation, administrative regulations or guidelines and to the *Legislative Guide on Secured Transactions* of the Commission¹ when revising or adopting legislation relevant to secured transactions, and invites States that have used the Guides to advise the Commission accordingly;

4. *Also recommends* that all States continue to consider becoming parties to the United Nations Convention on the Assignment of Receivables in International Trade,³ the principles of which are reflected in the *Legislative Guide on Secured Transactions* and the optional annex to which refers to the registration of data with regard to assignments.

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³ Resolution 56/81, annex.

68/109. United Nations Commission on International Trade Law Rules on Transparency in Treaty-based Investor-State Arbitration and Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)

The General Assembly,

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

Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations and the wide use of arbitration for the settlement of treaty-based investor-State disputes,

Recalling its resolutions 31/98 of 15 December 1976 and 65/22 of 6 December 2010, in which it recommended the use of the Arbitration Rules of the United Nations Commission on International Trade Law,¹

Bearing in mind that the Arbitration Rules are widely used for the settlement of treaty-based investor-State disputes,

Recognizing the need for provisions on transparency in the settlement of such treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

Believing that rules on transparency in treaty-based investor-State arbitration would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international investment disputes, increase transparency and accountability and promote good governance,

Noting that the Commission, at its forty-sixth session, adopted the Rules on Transparency in Treaty-based Investor-State Arbitration² and amended the Arbitration Rules as revised in 2010 to include, in a new article 1, paragraph 4, a reference to the Rules on Transparency,³

Noting also that the Rules on Transparency are available for use in investor-State arbitrations initiated under rules other than the Arbitration Rules or in ad hoc proceedings,

Noting further that the preparation of the Rules on Transparency was the subject of due deliberation in the Commission and that they benefited from consultations with Governments and interested intergovernmental and international non-governmental organizations,

1. *Expresses its appreciation* to the United Nations Commission on International Trade Law for having prepared and adopted the Rules on Transparency in Treaty-based Investor-State Arbitration² and the Arbitration Rules (as revised in

¹ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17 (A/31/17), chap. V, sect. C; and ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), chap. III and annex I.*

² *Ibid., Sixty-eighth Session, Supplement No. 17 (A/68/17), chap. III and annex I.*

³ *Ibid., chap. III and annex II.*

2010, with new article 1, paragraph 4, as adopted in 2013),³ as annexed to the report of the Commission on the work of its forty-sixth session;⁴

2. *Requests* the Secretary-General to publish, including electronically, and disseminate broadly the text of the Rules on Transparency, both together with the Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013) and as a stand-alone text, and to transmit them to Governments and organizations interested in the field of dispute settlement;

3. *Recommends* the use of the Rules on Transparency in relation to the settlement of investment disputes within the scope of their application as defined in article 1 of the Rules, and invites Member States that have chosen to include the Rules in their treaties to inform the Commission accordingly;

4. *Also recommends* that, subject to any provision in relevant treaties that may require a higher degree of transparency than that provided in the Rules on Transparency, the Rules be applied through appropriate mechanisms to investor-State arbitration initiated pursuant to treaties providing for the protection of investors or investments concluded before the date of coming into effect of the Rules, to the extent that such application is consistent with those treaties.

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⁴ *Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 17 (A/68/17).*

68/116. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 67/97 of 14 December 2012,

Reaffirming its commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

Reaffirming also the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

Convinced that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

Reaffirming the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

Convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and its Member States,

Recalling paragraph 134 (e) of the 2005 World Summit Outcome,¹

1. *Recalls* the high-level meeting of the General Assembly on the rule of law at the national and international levels, held during the high-level segment of its sixty-seventh session, and the declaration adopted at that meeting;²

2. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;³

3. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law;

¹ Resolution 60/1.

² Resolution 67/1.

³ A/68/213.

4. *Also reaffirms* the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter of the United Nations;
5. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit in the Executive Office of the Secretary-General with Member States on the topic “Promoting the rule of law at the international level”, and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;
6. *Stresses* the importance of adherence to the rule of law at the national level and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building;
7. *Reiterates its request* to the Secretary-General to ensure greater coordination and coherence among the United Nations entities and with donors and recipients, and reiterates its call for greater evaluation of the effectiveness of such activities, including possible measures to improve the effectiveness of those capacity-building activities;
8. *Calls*, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership;
9. *Calls upon* the Secretary-General and the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, including the participation of women in rule of law-related activities, recognizing the importance of the rule of law to virtually all areas of United Nations engagement;
10. *Expresses full support* for the overall coordination and coherence role of the Rule of Law Coordination and Resource Group within the United Nations system within existing mandates, supported by the Rule of Law Unit, under the leadership of the Deputy Secretary-General;
11. *Requests* the Secretary-General to submit, in a timely manner, his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of its resolution 63/128 of 11 December 2008;
12. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;
13. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;
14. *Invites* the International Court of Justice, the United Nations Commission on International Trade Law and the International Law Commission to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law;
15. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States on a regular basis, in particular in informal briefings;

16. *Stresses* the need to provide the Rule of Law Unit with the necessary funding and staff in order to enable it to carry out its tasks in an effective and sustainable manner, and urges the Secretary-General and Member States to continue to support the functioning of the Unit;

17. *Decides* to include in the provisional agenda of its sixty-ninth session the item entitled “The rule of law at the national and international levels”, and invites Member States to focus their comments in the upcoming Sixth Committee debate on the subtopic “Sharing States’ national practices in strengthening the rule of law through access to justice”.

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Part Two

STUDIES AND REPORTS ON SPECIFIC SUBJECTS

I. ARBITRATION AND CONCILIATION

A. Report of the Working Group on Arbitration and Conciliation on the work of its fifty-seventh session (Vienna, 1-5 October 2012)

(A/CN.9/760)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)¹ that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.²

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.³ Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention, should be left for further consideration by the Working Group.⁴

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011,⁵ and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.⁶

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.171, paragraphs 5-14.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-seventh session in Vienna, from 1-5 October 2012. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, Egypt, El Salvador, France, Germany, India, Iran (Islamic Republic of), Italy, Japan,

¹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 314.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

³ *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200.

⁴ *Ibid.*, para. 202.

⁵ *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 314; *ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200.

⁶ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 69.

Malaysia, Mauritius, Mexico, Norway, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Singapore, South Africa, Spain, Thailand, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Belarus, Belgium, Cuba, Cyprus, Dominican Republic, Ecuador, Finland, Guatemala, Indonesia, Liberia, Netherlands, Panama, Poland, Portugal, Romania, Slovakia, Sweden and Switzerland.

7. The session was also attended by observers from the European Union.

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

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

(b) *Intergovernmental organizations*: Corte Centroamericana de Justicia (CCJ), League of Arab States, Organization for Economic Cooperation and Development (OECD) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association (AAA), American Bar Association (ABA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association for the Promotion of Arbitration in Africa (APAA), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), Center for International Legal Studies (CILS), China International Economic and Trade Arbitration Commission (CIETAC), Comité Français de l'Arbitrage (CFA), Construction Industry Arbitration Council (CIAC), European Law Institute (ELI), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), International Bar Association (IBA), International Council for Commercial Arbitration (ICCA), International Insolvency Institute (III), Korean Commercial Arbitration Board (KCAB), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Moot Alumni Association (MAA), New York State Bar Association (NYSBA), Pakistan Business Council (PBC), Queen Mary University of London School of International Arbitration (QMUL), Vale Columbia Center on Sustainable International Investment (VCC) and Vienna International Arbitral Centre (VIAC).

9. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. Muhammad Mustaqeem De Gama (South Africa)

10. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.171); (b) notes by the secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.172 and its addendum; and A/CN.9/WG.II/WP.169 and its addendum); (c) a note by the secretariat reproducing comments of arbitral institutions on the interplay between the draft rules on transparency and their institutional rules (A/CN.9/WG.II/WP.173); and (d) a note by the secretariat containing a proposal by the Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America regarding the determination

of the scope of application of the draft rules on transparency (A/CN.9/WG.II/WP.174).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Organization of future work.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the secretariat (A/CN.9/WG.II/WP.169 and its addendum; A/CN.9/WG.II/WP.172 and its addendum; A/CN.9/WG.II/WP.173; and A/CN.9/WG.II/WP.174). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The secretariat was requested to prepare (i) a revised draft of the rules on transparency, based on the deliberations and decisions of the Working Group, as well as (ii) wording for a convention on transparency in treaty-based investor-State arbitration and for a unilateral declaration (see below, para. 141).

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

A. Draft rules on transparency in treaty-based investor-State arbitration

1. Article 3 — Publication of [documents][information]

13. The Working Group considered article 3, as contained in paragraph 29 of document A/CN.9/WG.II/WP.169, which reflected a proposal made at its fifty-fifth session that the provision on publication of documents or information should provide: (i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents or information; (iii) a right for third persons to request access to additional documents or information; and (iv) the publication of documents or information (see A/CN.9/736, paras. 54-66; A/CN.9/741, para. 111).

*Paragraph (1)**List of exhibits and exhibits*

14. It was noted that paragraph (1) included, in the list of information to be “automatically” disclosed (that is, subject only to the exceptions set out in article 8), two square-bracketed categories of documents: (i) a table listing all exhibits to the documents required to be disclosed under paragraph (1), and (ii) the exhibits themselves.

15. Some delegations expressed the concern that the “automatic” production of the exhibits themselves under article 3(1) would be unduly cumbersome, bearing in mind the potentially voluminous nature of exhibits and additionally that redactions may be required. It was agreed that exhibits would be deleted from article 3(1), but would be subject to disclosure on a discretionary basis under other provisions of article 3. The view was expressed that the publication of a table of exhibits would be less onerous; and furthermore, that the disclosure of the submissions under article 3(1) would be sufficient to ensure that the existence of exhibits was made known to the public, and therefore subject to request under the provisions of article 3. Another view was expressed that the creation and disclosure of a table of exhibits would itself be burdensome, particularly for parties from developing countries or countries with fewer resources.

16. A suggestion was made to the effect that, in circumstances where a table of exhibits had been prepared in the course of proceedings, there would be little burden on parties to make such a document available pursuant to article 3(1). After discussion, the Working Group agreed that, where a table of exhibits already existed, there would be an obligation to produce it pursuant to article 3(1), but if a list of exhibits had not been produced in the course of proceedings, there would not be a requirement to create one for the purposes of disclosure under article 3. The secretariat was requested to undertake drafting to reflect that agreement.

Expert reports and witness statements

17. The Working Group considered whether expert reports and witness statements should be included in the list of documents in article 3(1). Views were expressed that these documents formed a critical part of the factual background of a case and should be publicly available in order to promote fully the goal of enhancing transparency in investor-State disputes.

18. Some delegations stated that removing expert reports and witness statements from paragraph (1) would not obstruct the goal of transparency, because both a disputing party or any other person could still request their publication under other provisions of article 3. It was also said that reasonably detailed information could be offered to the public in relation to the subject of the dispute, but the public should not be put on the same footing as the parties.

19. Another view was expressed that the other provisions of article 3 under which such documents would be requested (paragraphs (2) and (3)) did not provide for “automatic” production upon request, but rather, required the exercise of discretion and consultation in relation to their publication. A further comment was made that adding a discretionary element to the determination of whether witness statements or expert reports should be disclosed would impose a significant burden on the

arbitral tribunal and consequently — because of the consequential delay in proceedings as well as the need for relevant submissions by the parties — on the parties as well.

20. It was proposed that expert reports and witness statements be taken out of the ambit of article 3(1), and a separate category created under the provision dealing with publication. Specifically, it was proposed that these documents should be subject neither to “automatic” disclosure under paragraph (1), nor to a decision by the arbitral tribunal under paragraphs (2) or (3). Rather, the proposal was made that expert reports and witness statements should be made available “automatically” — that is, with no discretion or decision-making on the part of the arbitral tribunal — upon request by any person, subject to the exceptions set out in article 8. Under that proposal, it was clarified that, as with the Working Group’s consensus set out in paragraphs 15-16 above in relation to exhibits to pleadings or submissions, expert reports and witness statements disclosed on this basis would be disclosed without exhibits, which would need to be requested separately.

21. After discussion, consensus was reached in relation to the proposal set out in paragraph 20 above. The delegations that did not favour this solution requested that it be recorded that they objected to the “automatic” publication of witness statements and expert reports upon request, and in particular, queried how this would reduce the burden on an arbitral tribunal.

22. The secretariat was mandated to draft a new article 3(2), reflecting the agreement set out in paragraph 20 above, for consideration during the third reading of the draft rules.

Transcripts

23. The Working Group also considered whether transcripts should be included in the list of documents in article 3(1). The Working Group recalled its previous discussion, and agreement, recorded in paragraphs 107 to 109 of document A/CN.9/736, to include transcripts in article 3(1), on the basis, inter alia, that confidential information in transcripts could be redacted and that therefore transcripts should be treated in the same fashion as the other documents listed in paragraph (1).

24. The Working Group affirmed this conclusion, and agreed that transcripts should be contained within the list of documents in article 3(1). The secretariat was mandated to make minor drafting modifications if appropriate to clarify that the article did not impose a requirement that transcripts be produced where none had been made in the course of proceedings.

Paragraphs (2) and (3)

25. It was noted that paragraphs (2) and (3) (as set out in A/CN.9/WG.II/WP.169) created a distinction in relation to the person making the request (disputing parties and other persons), rather than in relation to the type of document itself. A suggestion was made that expert reports and witness statements should only be made accessible to the person making the request, in order, inter alia, to protect the intellectual property of experts and provide protection to witnesses. That suggestion was opposed, on the bases that (i) there was no practical mechanism for limiting the broader publication of a document or information once it had been disclosed to a

third party; and (ii) any provision limiting access to a restricted audience would be inconsistent with the notion of transparency and might in any event be discriminatory.

26. It was stated that where a person had requested a document or information under article 3, and the tribunal had in the exercise of its discretion granted access to that document or information, it was difficult to anticipate a basis on which the tribunal would subsequently refuse access to another person requesting the same material. It was said that in order to facilitate a coherent standard on transparency, disclosure of or access to documents or information must not be limited to specific groups of persons. It was recalled that article 8 would limit the provision of information on the basis of confidentiality concerns.

27. A distinction was then made in relation to publication versus access. It was said that the original reason for the division between paragraphs (2) and (3) was not because the Working Group considered that access should be limited to a selective group of persons, but because the Working Group considered that there were some categories of documents or information which would not lend themselves to publication, such that a right of access, rather than publication per se, would be more appropriate.

28. A proposal was made to consolidate paragraphs (2) and (3) into a single paragraph, in order to establish one uniform provision for an application to the tribunal in respect of “other documents” not falling within paragraph (1) or the newly proposed paragraph (2) (dealing with expert reports and witness statements, as set out in paragraph 21 above). Such a proposal would function on the bases that: (i) it would remain subject to article 8; and (ii) the arbitral tribunal, on its own initiative or upon request from a disputing party or a person who is not a disputing party, would have the discretion to decide whether and how to make available to the public any other documents not falling within paragraphs (1) or (2).

29. Views were expressed that a tribunal should not have the initiative to publish documents and that third persons should not have a right of request, in the interest of the manageability of proceedings. A suggestion was also made to the effect that rules on requests made after the final award had been rendered, also be included in the rules on transparency.

30. The Working Group reached consensus on the proposal set out in paragraph 28 above, and mandated the secretariat to draft language reflecting that agreement and taking into account the considerations raised in paragraph 28.

Paragraph (4)

31. In relation to paragraph (4), it was noted that consequential amendments would be required from the amalgamation of paragraphs (2) and (3). The question was raised how “other documents”, as used in paragraph 28 above, would be made available to the public. The Working Group otherwise expressed agreement on the substance of paragraph (4).

Paragraphs (1) to (4) — Relationship with article 8

32. Concerns were expressed that paragraphs (1) to (4) of article 3 (as set out in A/CN.9/WG.II/WP.169, and including the amendments set out in paragraphs 14 to

31 above) only referred to the exceptions in article 8, rather than to article 8 as a whole, which left scope for doubt as to how the mechanics of the linkage between article 3 and article 8 would work in practice. In response to these concerns, the Working Group agreed to modify article 3, paragraphs (1) to (4), and article 8, paragraph (3).

33. Specifically, in relation to paragraphs (1) to (3) of article 3 (as set out in A/CN.9/WG.II/WP.169, and including the amendments set out in paragraphs 14 to 31 above), it was agreed to delete the words “to the exceptions set out in” in the respective first lines, so that these paragraphs would now commence, “Subject to article 8 (...)”.

34. On the basis of the concerns set out in paragraph 32 above, the Working Group also considered a revised draft of article 3(4) (corresponding to article 3(4) as set out in A/CN.9/WG.II/WP.169) as follows: “4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 9 as soon as possible in accordance with the arrangements referred to in article 8(3). The documents made available [to the public] [to the person requesting access to them] pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 9 as they become available and, if applicable, in a redacted form in accordance with article 8. The repository shall make the documents available in a timely manner, in the form and in the language in which it receives them.”

35. The Working Group agreed that the draft text contained in paragraph 34 above was acceptable and should be retained.

2. Article 4 — Publication of arbitral awards

36. The Working Group considered article 4, as contained in paragraph 33 of document A/CN.9/WG.II/WP.169, which concerned the publication of arbitral awards. The Working Group recalled that, at its fifty-fifth session, it had expressed broad support for article 4 (A/CN.9/736, para. 67).

37. A suggestion was made that arbitral awards, the “automatic” disclosure of which was currently provided for in article 4, be included instead in the list of documents in article 3(1), given that the same “automatic” procedure of disclosure applied to the documents in that article, including orders and decisions of the arbitral tribunal. In response, a suggestion was made to grant the arbitral tribunal discretion, upon request from a party, to order the delay of publication of an arbitral award where other proceedings were pending in which that party was involved and which dealt with similar factual or legal issues, in order to avoid prejudicing the outcome of those other proceedings. That suggestion did not receive support, as being in potential conflict with an important policy objective of the work of this Working Group, and it was stated that such a provision would unduly delay publication of numerous awards, given the similarity of factual and legal issues raised in various proceedings.

38. Following discussion, it was agreed to amend article 3(1) by replacing the words “and orders and decisions” in the last line with the words “and orders, decisions and awards”. It was clarified that article 3(4) would satisfy the communication requirement currently set out in article 4(2). As a result, it was agreed that article 4 was no longer necessary and should be deleted.

3. Article 5 — Submission by a third person

39. The Working Group considered article 5, as contained in paragraph 35 of document A/CN.9/WG.II/WP.169, which provided for submission by a third person.

Paragraph (1)

40. A question was raised as to whether the word “may” in paragraph (1) was intended as a reference to the balancing procedure under article 1(5). If that was the intention, it was suggested that this be made clear by adding the words “in the exercise of its discretion” between the words “may” and “allow” in the first line of paragraph (1). It was said that these words were used in other parts of the rules when it was being made clear that the tribunal was to have regard to the balancing exercise referred to in draft article 1(5) of the rules. In response, it was said that article 5 was somewhat different because draft articles 5(3) and 5(5) contained specific guidance on the way in which the tribunal should approach the exercise of its discretion under article 5. This understanding was shared by the Working Group.

41. A proposal was made that submissions by third parties should be subject to the mandatory requirement of consultation with the disputing parties. That proposal did not receive support.

42. Following discussion, the Working Group decided to retain the substance of article 5(1), as contained in paragraph 35 of document A/CN.9/WG.II/WP.169.

Paragraph (2)

43. In light of concerns raised in relation, inter alia, to the meaning and scope of the term “financial and other assistance” and to the fact that disclosure was limited to assistance in the preparation of the submission and not more generally, the Working Group agreed to consider a proposal to modify article 5(2). That proposal was submitted jointly by a number of delegations (the “draft proposal”), and read as follows: “(2) A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any such page limits as may be set by the arbitral tribunal: (a) describe the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclose whether or not the third person has any affiliation, direct or indirect, with any disputing party; (c) provide information on any government, person or organization that has provided any financial or other assistance in preparing the submission or has provided more than 25 per cent of the third person’s income in the two-year period preceding the request; (d) describe the nature of the interest that the third person has in the arbitration; and (e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.”

Subparagraphs (a), (d) and (e) of the draft proposal

44. Subparagraphs (a), (d) and (e) as contained in paragraph 35 of document A/CN.9/WG.II/WP.169 were agreed in substance, with no objections to the minor consequential changes thereto contained in the draft proposal.

Subparagraph (b) of the draft proposal

45. The Working Group considered subparagraph (b) of the draft proposal. Some delegations expressed the view that, in addition to addressing whether a relationship existed between the third party and a disputing party, subparagraph (b) should also require the nature of that relationship to be specified.

46. That suggestion received broad support, and consequently it was agreed to amend the draft of subparagraph (b) of the draft proposal, to read: “(b) disclose any connection, direct or indirect, which the third person has with any disputing party;”

Subparagraph (c) of the draft proposal

47. In relation to subparagraph (c), the Working Group considered whether a percentage threshold would sufficiently capture the type and extent of assistance the rules intended to address.

48. It was said that a percentage would not adequately reflect whether the assistance had in fact been substantial, particularly in the case of a large third-party recipient entity, to which a high absolute figure of financial assistance might not amount to a high percentage of total revenue. Furthermore, it was said that expressing assistance as a percentage of income might preclude reporting in circumstances where assistance, even of a significant nature, had been given “in kind”, or where the assistance fell just below the threshold. Other views were expressed that the percentage would, as a proportion of overall turnover, provide a relevant indication of whether the influence had been significant, and that moreover third parties might benefit from guidance in order to better understand the requirements of a rule which broadly amounted to a self-reporting obligation.

49. Further to that discussion, a compromise proposal was put forward, which sought to promote more effectively the objective of the provision, characterized by some as a requirement for third parties to disclose substantial financial assistance provided by any government, person or other organization. That proposal replaced the words “provided more than 25 per cent of the third person’s income in the two-year period preceding the request” with “provided substantial assistance over the previous two years”. In addition, it was proposed that third parties be given guidance as to what might constitute substantial assistance, by including immediately thereafter the words “such as, for instance, funding 20 per cent of the third party’s overall operations annually”. The use of the words “overall operations” in lieu of “income” was said to address circumstances where the provision of assistance to the third party was broader than income per se. A proposal to use the figure of 20 per cent rather than the originally proposed 25 per cent received no objection.

50. Some delegations reiterated concerns relating to the use of a percentage, even when expressed as guidance, on the basis that it might be seen as a threshold amount under which disclosure was not required. In response, it was said that the 20 per cent figure was provided by way of illustrative example, and whether assistance was substantial would always depend on the particular facts; a suggestion was made on this basis to modify the proposal set out in paragraph 43 above to replace the words “more than” with “approximately”, or “around”, before the figure of 20 per cent, to indicate that it was not a definitive threshold. After discussion, that proposal was agreed, and the secretariat was given the mandate to use suitable

language in that respect. The secretariat was also given the mandate to consider moving the word “annually” within the subparagraph, should that clarify the draft, it being made clear that the intention was that the figure of 20 per cent related to operations in one year, not two years.

51. The agreed form of subparagraph (c) would therefore read, subject to any minor wording modifications to be made by the secretariat: “(c) provide information on any government, person or organization that has provided to the third party (i) any financial or other assistance in preparing the submission; or (ii) substantial assistance in either of the two years preceding the request, such as, for instance, funding [approximately][around] 20 per cent of its overall operations annually.”

Paragraph (3)

52. It was suggested to remove the words “factual or” from part (b) of paragraph 3, on the grounds that submissions of third parties should relate only to the determination of legal issues in the proceedings, and not to factual matters. In response, it was said that third parties frequently provide important factual information which satisfies the requirement expressed in paragraph (3) to bring “a perspective, particular knowledge or insight that is different from that of the disputing parties” and that to exclude such a role would do a disservice to the tribunal, which retains under article 5 the discretion to determine what is of assistance to it.

53. Following discussion, the Working Group decided to retain the substance of article 5(3), as contained in paragraph 35 of document A/CN.9/WG.II/WP.169.

Paragraph (4)

54. The Working Group considered article 5(4). It was proposed that a “catch-all” subparagraph be added, to the effect that a submission filed by a third party must comply, in addition to the criteria set out in paragraph (4), subparagraphs (a)-(d), with any other condition set by the arbitral tribunal.

55. Views were expressed that such a discretionary authority was inherent to the arbitral tribunal, and that addressing a tribunal’s right to impose conditions on submissions might unnecessarily create a need for such authority to be made explicit elsewhere in the rules, for the avoidance of doubt. After discussion, it was agreed that article 5(4) should be retained in its current form, as contained in paragraph 35 of A/CN.9/WG.II/WP.169.

Paragraph (5)

56. After consideration, the Working Group decided to retain the substance of article 5(5), as contained in paragraph 35 of document A/CN.9/WG.II/WP.169.

Paragraph (6)

57. A proposal to modify slightly paragraph (6) by removing the word “also” from the draft text was agreed. The Working Group further mandated the secretariat to make consequential changes for the sake of consistency to other relevant paragraphs of the rules, including article 6(5).

4. Article 6 — Submission by a non-disputing Party to the treaty

58. The Working Group considered article 6, as contained in paragraph 37 of document A/CN.9/WG.II/WP.169.

Paragraph (1)

59. Opinion was divided on whether the tribunal was required (“shall accept”) or should have a discretion (“may accept”) to accept submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

60. Views were offered in support of the “shall accept” option, namely: that since the non-disputing Party had concluded the treaty, the interpretation thereof might affect its rights thereunder in future proceedings; that the Party’s interventions could be helpful to the tribunal’s understanding of the treaty; and that arbitral experience showed that a non-disputing Party to a treaty rarely intervened simply to protect its investor’s interests. It was stated that some treaties provided that the non-disputing party was entitled to submit its opinion on treaty interpretation to the tribunal.

61. In support of the “may accept” option, it was said that the provisions of article 6 appeared unrelated to transparency and would have the effect of facilitating diplomatic protection of an investor by a State; that discretion should be given to the tribunal, in order to be consistent with that set out in article 6(2); and that requiring acceptance of such submissions in all cases could lead to the politicization of the proceedings.

62. Opinion was also divided on the question of whether the tribunal should have the discretion to invite, on its own initiative, submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

63. Article 6(1) was left open for further deliberation. The Working Group invited States to review their treaties to identify if they contained provisions giving the non-disputing Party the right to submit its opinion on treaty interpretation to the tribunal.

Paragraph (2)

Questions of law; questions of fact; or matters within the scope of dispute

64. The square-bracketed language within article 6(2) was considered, specifically in regard to whether that paragraph should address submissions by a non-disputing Party to the treaty concerning “questions of law”; “questions of law or fact”; or alternatively, “matters within the scope of the dispute”. It was clarified that to the extent article 6(2) was intended to address issues of law, these should be in addition to those addressed in relation to treaty interpretation in paragraph (1).

65. Some delegations expressed the view that that provision should be limited to matters of law. In response, views were expressed that it was difficult to differentiate between matters of law and fact in practice. It was said that the language “matters within the scope of the dispute” would address both legal and factual matters, and that the arbitral tribunal’s discretion would serve as a filter to determine which submissions would be useful to it.

66. Views were expressed that article 6(2) should be deleted, as there was uncertainty over what “questions of law and/or fact,” and “matters within the scope

of the dispute” meant, and also a danger of opening the door to diplomatic protection.

67. After discussion, the Working Group agreed to replace the square-bracketed language with the words “matters within the scope of the dispute”, which was consistent with the language used in article 5(1), and to add the word “further” (thus reading “further matters within the scope of the dispute”), which was seen usefully to connote a difference between the scope of paragraph (2), and the preceding paragraph (1) in relation to issues of treaty interpretation.

Invitation to non-disputing Parties to a treaty

68. A separate issue was raised in relation to whether the tribunal should be permitted on its own initiative to invite non-disputing Parties to a treaty to make further submissions on matters within the scope of the dispute, which invitation was currently provided for in the draft of paragraph (2) as contained in paragraph 37 of document A/CN.9/WG.II/WP.169.

69. It was suggested that under article 6(2), the ability of the tribunal to invite submissions should be removed, on two primary bases: (i) that such invitation could risk a politicization of disputes and might introduce aspects of diplomatic protection; and (ii) that moreover such invitation would put the non-disputing Party to a treaty in a more privileged position than any third person to the dispute, which was said not to be justified in relation to issues outside the scope of treaty interpretation. A distinction was made with paragraph (1), under which it was said that a non-disputing Party to a treaty was potentially directly affected by issues of treaty interpretation and thus the arbitral tribunal should, under that paragraph, maintain the power to invite submissions from non-disputing Parties.

70. After discussion, the Working Group agreed to eliminate the faculty, currently expressed in paragraph (2), of the arbitral tribunal to invite submissions from non-disputing Parties to a treaty. The secretariat was mandated to draft new language reflecting that agreement. It was clarified that the decision to eliminate the wording dealing with that point was not meant to have an impact on any power the tribunal might otherwise have under the arbitration rules or otherwise.

Other points

71. The Working Group also agreed that the word “accept”, which was used both in articles 6(1) and 6(2), could be changed to “allow”, in order to achieve clarity and furthermore to maintain consistency with the wording in article 5(3).

Paragraph (3)

72. Article 6(3) was considered by the Working Group and was adopted without amendment in the form set out in paragraph 37 of document A/CN.9/WG.II/WP.169.

Paragraph (4)

73. Article 6(4) was considered by the Working Group and adopted without amendment in the form set out in paragraph 37 of document A/CN.9/WG.II/WP.169.

Paragraph (5)

74. Consistent with the proposal agreed in relation to article 5, set out in paragraph 57 above, the Working Group agreed to delete the word “also” from the text of this paragraph. It furthermore agreed on a suggestion to insert the word “reasonable” before the word opportunity, and instructed the secretariat to ensure that consistent consequential changes were made elsewhere in the draft where the term “opportunity” was used, where applicable.

75. It was agreed that the secretariat would provide a new draft of article 6(5), reflecting these agreements.

5. Article 7 — Hearings

76. The Working Group considered article 7 as contained in paragraph 41 of document A/CN.9/WG.II/WP.169.

77. In connection with article 7(1) the following question arose: should the permitted grounds for holding hearings or portions of hearings in private rather than in public extend beyond those set out in paragraphs 7(2) or 7(3)? In that regard, the Working Group also considered whether public hearings should be the rule, rather than the exception.

78. The following views were expressed in support of limiting the tribunal’s discretion to the matters set out in paragraphs (2) and (3): that any further discretion risked being ambiguous and open-ended, leaving the tribunal open to pressure from the parties and thus jeopardizing the principle of transparency; that paragraph (2) made provision for the exceptions to transparency set out in article 8 and, other than article 7(3), there were no grounds for granting the tribunal any wider discretion; that United Nations instruments should reflect the values of human rights and freedom of expression, and consequently that any exceptions to transparency should be narrowly drawn so as not to create an open-ended discretion that would violate those principles. After discussion, it was agreed that there should not be an open-ended discretion; and the discussions centred on whether public hearings should be the rule, rather than the exception.

79. Some support was expressed for the proposition that a disputing party to the arbitration could unilaterally veto a public hearing should it so wish. In support, it was stated that adequate protection of national security and confidential information, as well problems associated with politicization of disputes, required a veto power to be available. It was further stated that open hearings might become logistically unworkable and that paragraphs (2) and (3) did nothing to allay this concern, and also that issues of the possible cost implications of a public hearing should be taken into account.

80. Some delegations expressed a preference for relying on article 28(3) of the UNCITRAL Arbitration Rules as the default rule, pursuant to which commercial arbitrations were held in private unless the parties otherwise agreed. It was stated that it would be difficult to see how this would advance the Working Group’s mandate to promote transparency.

81. One suggestion was to revisit the issues raised by article 7(1) after the Working Group had considered article 8, which was intended to deal with exceptions to transparency.

82. After discussion, there was very significant support for the principle that the default would remain that hearings would be public under the rules, subject only to the exceptions in paragraphs (2) and (3), with some delegations supporting the view that a party should have a unilateral right to hearings being closed. A question arose as to whether the very significant support expressed for the principle above amounted to consensus. In order to progress the second reading, it was ultimately agreed to leave article 7(1) open for further deliberation.

Paragraph (2)

83. Following discussion, the Working Group agreed that the square brackets around “confidential or sensitive” be removed, and, subject to discussion on article 8, as set out in paragraph 90 below, that the words “or sensitive” be deleted. The Working Group otherwise agreed that article 7(2), as contained in paragraph 41 of document A/CN.9/WG.II/WP.169, be retained in its current form.

Paragraph (3)

84. There was broad agreement to delete the words “right of” from line 2 of paragraph (3) as the logistical arrangements concerned access rather than the right to access.

85. A further suggestion was made to insert the word “unexpected” before “logistical reasons” at the end of the paragraph, to preclude the possibility of an arrangement in advance to hold hearings in private solely on logistical grounds which could or should have been foreseen. The suggestion was not supported.

86. A question was raised in relation to the definition of “hearings”, in order to ensure that paragraph (3) was sufficiently clear in respect of the types of hearings to which public access, and the tribunal’s facilitation thereof, was intended to apply. It was said that as a matter of principle, hearings should always be open where they were substantive (including jurisdictional hearings and hearings in which evidence by witnesses or experts, or oral arguments, were presented), but not where mere matters of procedure were to be addressed.

87. It was stated that the term “hearing” might properly have to be used only in the sense of not including mere procedural discussions. It was stated that article 17(3) of the UNCITRAL Arbitration Rules and article 24(1) of the UNCITRAL Model Law on International Commercial Arbitration, respectively, contained language that could be included in the draft rules in order to link the meaning of hearings therein with the meaning in the draft rules.

88. The Working Group agreed that article 7(3), as contained in paragraph 41 of document A/CN.9/WG.II/WP.169, be retained, with the modification in paragraph 84 above, and the addition of language to reflect the point in paragraph 87 above.

6. Article 8 — Exceptions to transparency

First subheading

89. The Working Group considered article 8 as contained in paragraph 45 of document A/CN.9/WG.II/WP.169.

90. Various views were advanced as to which of the square-bracketed words modifying “information” were most appropriate to be retained in the first subheading. Following discussion, it was agreed that the first subheading of article 8 would be “Confidential or protected information”, as best reflecting the contents of the provision. It was further agreed that the secretariat should make the necessary consequential changes elsewhere in the text of the draft rules to be consistent with this wording.

Paragraphs (1) to (9)

91. A view was expressed that the drafting approach in article 3 was too detailed and risked over-regulating the powers of an arbitral tribunal, while at the same time failing to enumerate every circumstance that may arise.

92. Accordingly a more flexible and simplified drafting approach was suggested, in order to permit an arbitral tribunal to adjust its procedures to individual situations. On this basis, a revised draft of article 8 was put before the Working Group (the “draft proposal”).

93. The Working Group considered whether the draft proposal should form the basis of its further consideration of article 8, paragraphs (1) to (9). A suggestion was made that the Working Group revert instead to the draft of article 8 as set out in A/CN.9/WG.II/WP.169. This proposal did not receive support. Consequently the draft proposal formed the basis of the Working Group’s subsequent consideration of article 8, paragraphs (1) to (9) (with the exception of paragraph (2)(c), which was considered separately, in the form set out in A/CN.9/WG.II/WP.169).

94. The draft proposal read as follows:

“Draft article 8 — Exceptions to transparency

Confidential or protected information

1. Confidential or protected information, as defined in paragraph 2 below and as identified pursuant to the arrangements referred to in paragraphs 3 and 4 below, shall not be made available to the public or to non-disputing Parties pursuant to articles 2 to 7.
2. Confidential or protected information consists of:
 - (a) Confidential business information;
 - (b) Information that is protected against being made available to the public under the treaty;
 - (c) Information that is protected against being made available to the public under any law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.
3. The arbitral tribunal shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, in consultation with the parties, procedures for designating and redacting confidential or protected information or holding hearings in private pursuant to Article 7, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the parties.

4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, the disputing party, non-disputing Party or third person that submitted the document shall be permitted either (i) to resubmit the document in a form that complies with the tribunal's determination or (ii) to withdraw all or part of the document from the record of the arbitral proceedings instead."

Paragraph (1) of the draft proposal

95. It was suggested that the cross-references in paragraph (1) should be updated and the secretariat was mandated to undertake this task, in addition to any other cross-referencing or consequential numbering changes.

96. In all other respects, it was agreed that paragraph (1) as contained in the draft proposal was acceptable and should be retained in the form therein.

Paragraph (2) of the draft proposal

97. Following discussion, it was agreed that the chapeau in paragraph (2) was to retain its current form, subject to the consequential changes required to accord with the amended title of article 8, as set out in paragraph 91 above.

Paragraphs (2)(a) and (2)(b) of the draft proposal

98. It was agreed to add the word "or" after subparagraph (b) in order to clarify that the categories listed in paragraph (2) were alternatives.

99. A question was raised as to the meaning of the term "confidential business information" in paragraph (2)(a), and a suggestion made that a definition of the term in the rules, or an illustrative list setting out examples, was required. There was also a suggestion to add the word "sensitive" between "confidential" and "business". Following discussion, the Working Group agreed to retain article 8(2)(a) as drafted.

100. It was further agreed that subparagraph (b) as contained in the draft proposal was acceptable and should be retained in the form therein.

Paragraph (2)(c) of document A/CN.9/WG.II/WP.169

101. The Working Group considered article 8(2)(c), as contained in paragraph 45 of A/CN.9/WG.II/WP.169.

102. A proposal was made to delete any reference to the law of the disputing party, which was said to infringe upon the discretion of the arbitral tribunal to determine the applicable law. In response, concerns were expressed that such a proposal did not provide sufficient guidance, in particular to a respondent, as to whether decisions of the arbitral tribunal might put it in breach of its own law. After discussion, a compromise was proposed, which would make mandatory the application of the law of the respondent to the disclosure of information by that respondent, and to make all other information subject to a conflict of law determination by the tribunal. In that regard, the Working Group considered a proposal made jointly by a number of delegations concerning article 8(2)(c) (the "draft proposal"): "Information which is protected against being made available to the public, in the case of the information of the respondent, under the law of the

respondent, and in the case of other information, under any law or rules determined to be applicable to the disclosure of such information by the arbitral tribunal.”.

103. The Working Group did not reach agreement in relation to the draft proposal. A view was expressed that the law of the party providing information should mandatorily apply to that information. That view did not receive support. Views were expressed that the draft proposal would give comfort to developing countries which had concerns regarding, inter alia, whether national security interests would be sufficiently protected. Other views were expressed that the provision was open to abuse and would dilute the objective of the rules; and specifically, that providing for mandatory application by a State of its national law in relation to information provided by it would permit a State to circumvent the object of the rules by introducing legislation precluding the disclosure of all information in investor-State disputes. In response, unanimous support was expressed for the proposition that it was not permissible for a State to adopt UNCITRAL rules on transparency and then use its domestic law to undermine the spirit (or the letter) of such rules.

104. After further discussion, it was said that three views had been expressed, in the form of distinct proposals: (i) a proposal under which the tribunal be given discretion to conduct a conflict of law analysis for all information (set out in paragraph 102 above); (ii) the “draft proposal” set out in paragraph 102 above under which the tribunal was directed to the law of the respondent for the respondent’s information, and a conflict of law analysis for all other information; and (iii) a proposal under which the tribunal be given guidance for its conflict of law analysis that on issues of respondent information, it should take respondent law particularly into account. The secretariat was asked to include these three options in its subsequent drafts for further consideration by the Working Group.

Paragraph (2)(bis)

105. The following new language, proposed as an article 8(2)(bis), was placed before the Working Group: “Nothing in these rules shall require a party to make available information [to the public] the disclosure of which it considers would impede law enforcement or would be contrary to the public interest or its essential security interests.”

106. It was said that that provision was not intended as a further exception under article 8, but was a matter which a State could determine for itself. Several delegations indicated support for the proposed text. Several delegations voiced opposition to the proposed text on the grounds that it would negate the very goal of transparency on which the rules were predicated, and would run counter to the direction given to the Working Group by the Commission. It was said that expressions such as “would impede law enforcement” and “would be contrary to the public interest” were overly broad and that practically any meaning could be ascribed to them in order to justify withholding information. In this regard, it was stated that the mandate of the Working Group was premised on transparency itself being in the public interest.

107. It was further stated that protection of such information should and often does appear in national laws, as well as in treaties entered into by the State, and that there was no justification for the rules to offer in effect an extra layer of protection. Several delegations objected to the notion that the State itself would decide what

information to withhold, which was regarded as being within the purview of the tribunal.

108. It was suggested that, since the information in question would be subject to a State's domestic law, the matter should be dealt with under article 8(2)(c).

109. In response it was stated that treaties concluded before the date of adoption of the rules on transparency ("existing treaties") do not always contain provisions protecting such information and that it was important to have balance in the rules on transparency. It was also stated that, including for the reason that deliberations on article 8(2)(c) had not yet been concluded, it was not clear that the law of a disputing State party would afford the necessary protection.

Paragraph (3)

110. The Working Group considered a second draft proposal on article 8(3), further to its agreement that the mechanics of the linkage between article 3 and article 8 should be more clearly set out (see paragraph 32 above), and that the question of the promptness of making documents available be addressed (the "second draft proposal" on article 8). The second draft proposal read as follows: "3. The arbitral tribunal, in consultation with the parties, shall make arrangements to prevent any confidential or protected information from being made available to the public, including by putting in place, as appropriate (i) time limits in which a party, non-disputing Party, or third person shall give notice that a document contains confidential or protected information, (ii) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents, and (iii) procedures for holding hearings in private to the extent provided by Article 7, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the parties."

111. Broad support was expressed for the second draft proposal, with several minor modifications agreed as follows. It was agreed that:

(a) In (i), the words "a document contains confidential or protected information" should be replaced by the words "it seeks protection for such information in a document";

(b) In the last sentence, the word "decision" should be substituted for the word "determination", and the secretariat should ensure the appropriate word was used consistently throughout the draft rules;

(c) The secretariat should ensure that the terms "parties" and "disputing parties" were used correctly and consistently throughout the draft;

(d) The words "or to non-disputing parties" should be inserted after "to the public" to ensure consistency with paragraph (1); and

(e) The word "provided" in the penultimate sentence ("provided by Article 7") should be replaced by the word "required".

112. The Working Group agreed to retain the second draft proposal as set out in paragraph 110 above with the modifications set out in paragraph 111 above.

Paragraph (4)

113. Concerns were expressed in relation to the paragraph (4) of the draft proposal in paragraph 94 above, and specifically that this draft proposal overlooked the circumstance whereby a party compelled to produce a document by the arbitral tribunal could subsequently withdraw that document on grounds of confidentiality. It was agreed that paragraph (4) was only intended to apply in circumstances where a party had voluntarily submitted a document.

114. The following wording was proposed in order to clarify that intention: “4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.”

115. That language was broadly agreed, subject to two separate concerns. First, it was said that wording would permit a party introducing a document into the record to withdraw a self-determined confidential part of the document (for legitimate or abusive reasons), and that this might distort the meaning of the document as a whole. In response it was stated that while that wording did not directly address the point, the arbitral tribunal could address such conduct within the context of the proceedings, for example, by drawing adverse inferences, or, in the case of exhibits, exercising its discretion not to publish the document. Second, it was said that where both parties agreed on a document’s confidentiality, the parties, rather than the tribunal, should have the ultimate discretion to determine whether to withhold that document from the public. That suggestion did not receive support within the context of paragraph (4), and it was stated that such an approach would undermine the tribunal’s guardianship of the rules.

116. After discussion, it was agreed to retain paragraph (4) in the form set out in paragraph 114 above.

117. With respect to the second point in paragraph 115 above, a proposal was then made to include a new subparagraph (d) in article 8(2) as follows: “information that both disputing parties agree not be made available to the public unless it constitutes a breach of the public interest”. Some support was expressed for the proposal, while other delegations expressed strong disagreement with the suggestion, and it was agreed to further consider this proposal during the third reading of the rules.

*Paragraphs (10) and (11) — Integrity of the arbitral process**Paragraph (10)*

118. Following discussion, it was agreed that this paragraph would retain its current form, as contained in paragraph 45 of document A/CN.9/WG.II/WP.169, subject to consequential numbering changes required as a result of the amendments to article 8 set out above.

Paragraph (11)

119. It was agreed that this paragraph would retain its current form, as contained in paragraph 45 of document A/CN.9/WG.II/WP.169, subject to consequential numbering changes required as a result of the amendments to article 8 set out above.

7. Article 9 — Repository of published information

120. The Working Group considered article 9, as contained in paragraph 1 of document A/CN.9/WG.II/WP.169/Add.1. Views were expressed in favour of option 2, on the basis that it would result in a single administrative body in a given arbitral procedure for the application of the rules on transparency as well as for the application of the arbitral procedure. The Working Group did not reach consensus on which of the two options set out therein would be preferable, which decision was left for consideration at a future session.

121. It was nonetheless agreed in principle that if the Working Group ultimately proceeded with option 1, then UNCITRAL would be the preferred repository institution, if it had the capacity to so act. It was also agreed that if multiple institutions were to be designated as repositories under option 2, then a central website should be established, preferably by UNCITRAL, to serve as a hub of information linking to such institutions' repository function.

122. Moreover, a mandate was given to UNCITRAL to liaise with other arbitral institutions to assess better the cost and other implications of acting as a repository, and to report back to the Working Group at its next session.

8. General remarks on the second reading of the draft rules on transparency

123. At the beginning of the fourth day of the session, the remaining issues outstanding for the Working Group's consideration on its second reading of the draft rules on transparency were summarized as follows: (i) a new draft proposal for articles 3(4) and 8(3), which were said to be interrelated; (ii) a new draft proposal for article 8(2)(c); (iii) a draft proposal for a new paragraph, presumptively entitled article 8(2)(bis); (iv) article 8(4); (v) article 9; and (vi) two discrete points regarding (a) whether there ought to be a time window under which applications by third persons (both for documents, and as the author of documents) under articles 3 and 5 should be time-limited and (b) how the costs of transparency provisions should be borne.

124. This would leave for the third reading the consideration of outstanding issues in article 1 (scope of application); article 6 (1), in particular whether the word "may" or "shall" should be used; and article 7(1), regarding the question of open hearings.

Submissions by third parties and requests for access to documents by third parties

125. As set out in paragraph 123 above, the Working Group agreed to consider the number and timing of third-party submissions under articles 3 and 5. A proposal to create a specific rule to set time frames under which parties could access documents under article 3 and make submissions under article 5 was not supported. Nor did a proposal to limit the number of submissions from third parties receive support.

Instead, it was agreed that the management of proceedings should remain at the discretion of the arbitral tribunal.

Costs

126. In response to a number of general queries in relation to how costs of transparency procedures should be borne, the Working Group considered the issue of costs in separate discussions.

127. It was said that there were at least four categories of costs associated with transparency measures: (i) the cost of making documents available on the registry website; (ii) the cost relating to open hearings; (iii) costs relating to third-person participation (i.e. legal expenses in responding to submissions); and (iv) the costs of arbitrators.

128. Moreover, the view was expressed that such costs were a necessary part of implementing transparency proceedings in furtherance of the mandate given by the Commission to the Working Group.

129. A suggestion was made that the rules provided for the possibility of the tribunal ordering costs against third persons making frivolous submissions to an arbitral proceedings. It was said that a third person could submit itself to the jurisdiction of a tribunal when it was accepted as a “third person” (as defined under article 5). In response, it was said that an arbitral tribunal and parties would be unlikely to respond to a frivolous submission (thereby avoiding costs) but that moreover, the possibility of a cost order against a non-profit third party would likely have a chilling effect on their participation in the arbitral process, thereby undermining the public interest of transparency.

130. A further suggestion was made that the costs associated with providing third persons access to exhibits should be addressed in the rules as that it was thought to be fair that the requesting party bear such costs, and not the disputing parties. After discussion it was clarified that costs in this sense were restricted to the provision of the documents to the party (i.e. photocopying, shipping etc.) and not to the process of preparing the documents (i.e. redacting documents) for release. It was noted that costs of these processes were legitimate concerns but there may be tension with the overall objectives of transparency as costs should not act as a deterrence to the public’s participation in proceedings. It was questioned whether it would be fair to impose costs on the first person requesting access to documents, when those documents would then also be available to the general public. After discussion, it was agreed that third parties requesting access to documents would only be required to meet the administrative costs of such access (such as photocopying, shipping etc.) and the secretariat was given a mandate to draft language reflecting that agreement for consideration by the Working Group.

9. Article 1 — Scope of application

131. The Working Group considered article 1, in relation to the scope of application of the transparency rules, for the purpose of advancing the discussions of the Working Group on article 1 prior to its next session. Two new proposed drafts were put before the Working Group, with the express objective of encapsulating the approach set out in paragraph 54 of document A/CN.9/741.

132. It was agreed to amalgamate those two proposals by including square-bracketed text on wording that diverged, so that these two proposals could be considered as one proposal, at a future session. The amalgamated proposal read as follows: “Article 1 — Scope of application of the transparency rules 1. These Rules shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”) concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise. 2. In respect of (i) investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency] and of (ii) investor-State arbitrations initiated under other arbitration rules or ad hoc, these Rules shall [only] apply [if][provided that]: a) the disputing parties agree to their application in respect of that arbitration; or, b) the Parties to the treaty, or in the case of a multilateral treaty, the home State of the Investor and the Respondent, have agreed [in an instrument adopted][to the application of these Rules] after [date of coming into effect of the Rules on Transparency][in an instrument adopted].”

133. That proposal also contained a proposed new article 1(4) of the UNCITRAL Arbitration Rules 2010, in order to articulate the link between the existing UNCITRAL Arbitration Rules and the draft transparency rules, without formally making the transparency rules part of, or an annex to, the UNCITRAL Arbitration Rules, thus making the transparency rules accessible to arbitrations conducted under rules other than the UNCITRAL Arbitration Rules. The proposed new article 1(4) of the UNCITRAL Arbitration Rules 2010 read as follows: “4. For investor-State arbitrations initiated pursuant to a treaty providing for the protection of investments or investors, these Rules of Arbitration include the UNCITRAL Rules on Transparency [as amended from time to time] subject to the provision of Article 1 of the UNCITRAL Rules on Transparency.”

134. It was agreed that the proposal set out in paragraphs 132 and 133 above would be tabled for consideration by the Working Group at its next session. The proposal also included, for reference, a flow-chart illustrating the manner in which the proposal would affect UNCITRAL-related arbitration (but not other institutional arbitration).

135. Views were expressed that delegations should not be forced to accept transparency rules either via a dynamic interpretation or otherwise, but that consent should always be clearly given. Other views were expressed that where dynamic interpretation of treaties was recognized and even accepted as standard practice, States should not be deprived of that interpretation, especially as it might have the effect of facilitating the objectives of transparency.

136. In this respect it was agreed that any solution offered under article 1 should not undermine any discretion which tribunals otherwise have under the UNCITRAL Arbitration Rules 2010.

137. The Working Group invited States to review their treaties in order to identify if they contained specific references to UNCITRAL Arbitration Rules, such as “UNCITRAL Arbitration Rules as then in force”, or “UNCITRAL Arbitration Rules as may be amended from time to time”.

138. It was stated that those in favour of the language on scope of application set out in paragraphs 132 and 133 above also recognized the importance of ensuring the application of the transparency rules to existing treaties, and therefore urged the Working Group, at the same time as examining the language set out in paragraphs 132 and 133 above, to move without delay to an examination of potential mechanisms permitting application to existing treaties.

139. It was also emphasized that the rules themselves must provide clear and robust standards on transparency and that article 1 would be the mechanism by which parties could agree whether or not to apply the rules on transparency.

140. With regard to existing treaties, it was noted that several delegations had submitted a proposal (contained in document A/CN.9/WG.II/WP.174) that no rule or presumption be established in the transparency rules regarding the application of those rules under existing treaties, but rather that such application be left to be determined in accordance with internationally accepted rules of treaty interpretation. It was said, in support of that approach, that applying the rules to existing treaties only where the parties expressly “opted-in” to the rules by a subsequent agreement (as proposed in paragraph 132 above) would thwart the reasonable expectations of those countries who intended to benefit from dynamic clauses in their treaties, and that it would send a negative message regarding the virtues of transparency. By contrast, the presumptive application of the transparency rules under the “opt-out” approach for future treaties would send a powerful pro-transparency message and would promote widespread use of the transparency rules.

141. It was furthermore agreed to give the secretariat the mandate to prepare wording for (i) a convention on transparency in treaty-based investor-State arbitration, to include a draft clause permitting a reservation thereto, and (ii) for a unilateral declaration, both of which to be considered at the fifty-eighth session of the Working Group.

**B. Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based
investor-State arbitration, submitted to the Working Group on
Arbitration and Conciliation at its fifty-seventh session**

(A/CN.9/WGII/WP.172)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)¹ that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.²

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of such treaties already concluded.³

3. At its forty-fifth session (25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011,⁴

¹ *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1), para. 314.*

² *Ibid., Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 190.*

³ *Ibid., Sixty-sixth Session, Supplement No. 17 (A/66/17), para. 200.*

⁴ *Ibid., Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1), para. 314; ibid., Sixty-sixth Session, Supplement No. 17 (A/66/17), para. 200.*

and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.⁵

4. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.⁶ At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed a first reading of the draft rules on transparency in treaty-based investor-State arbitration (as contained in document A/CN.9/WG.II/WP.166 and its addendum).⁷ At its fifty-sixth session (New York, 6-10 February 2012), the Working Group commenced a second reading of the draft rules on transparency (as contained in document A/CN.9/WG.II/WP.169 and its addendum).⁸

5. In accordance with the decisions of the Working Group at its fifty-sixth session,⁹ part II of this note contains a revised draft of articles 1 and 2 of the rules on transparency. Articles 3 to 8 of the draft rules on transparency are dealt with in document A/CN.9/WG.II/WP.169 and article 9 on the establishment of a repository of published information is dealt with in document A/CN.9/WG.II/WP.169/Add.1. Comments received from arbitral institutions on the interplay between the draft rules on transparency and their institutional rules can be found in document A/CN.9/WG.II/WP.173. A proposal by Governments on article 1 (1) of the draft rules on transparency is reproduced in document A/CN.9/WG.II/WP.174.

II. Draft rules on transparency in treaty-based investor-State arbitration

A. Content of draft rules on transparency in treaty-based investor-State arbitration

Article 1. Scope of application

6. Draft article 1 — Scope of application

Paragraph (1) — Applicability of the legal standard on transparency

“1. These Rules shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors (“treaty”) when the Parties to the treaty [or all parties to the arbitration (the “disputing parties”)] have agreed to their application. In a treaty concluded after [date of coming into effect of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration*

⁵ Report of the Commission on the work of its forty-fifth session (*under preparation*).

⁶ Reports of the Working Group on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions.

⁷ Report of the Working Group on the work of its fifty-fifth session (A/CN.9/736).

⁸ Report of the Working Group on the work of its fifty-sixth session (A/CN.9/741).

⁹ *Ibid.*

Rules shall be presumed to incorporate the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules [that does not refer to the Rules on Transparency].

Paragraph (2) — Application of the rules on transparency by the disputing parties

“2. In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty,

(a) the [disputing parties] [the parties to that arbitration (the “disputing parties”)] may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

(b) in the application of the Rules on Transparency, the arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision to the particular circumstances of the case if this is necessary to achieve the transparency objectives of these Rules in a practical manner.

Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration rules

“3. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is any conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail.

Paragraph (4) — Relationship between the rules on transparency and the applicable law

“4. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Paragraph (5) — Discretion of the arbitral tribunal

“5. Where these Rules provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

Footnote to article 1, paragraph 1:

*“*For the purpose of these Rules, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any agreement concluded between or among States or regional integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, that contain provisions relating to the protection of investments or investors and their right to resort to investor-State arbitration.”*

Remarks

Paragraph (1) — Applicability of the legal standard on transparency

7. At its fifty-sixth session, the Working Group entrusted the secretariat with the preparation of a revised version of article 1 (1) (A/CN.9/741, paras. 54 and 57). At that session, the Working Group had considered two options for the applicability of the rules on transparency. Under the first option, the opt-out solution, the rules on transparency would be incorporated in the UNCITRAL Arbitration Rules (as revised in 2010) (the “2010 UNCITRAL Arbitration Rules”) and would apply as an extension of the UNCITRAL Arbitration Rules under investment treaties providing for arbitration under the UNCITRAL Arbitration Rules, unless the investment treaty provided that the rules on transparency did not apply (A/CN.9/741, para. 14). Under that option, it was discussed whether the rules on transparency would also apply to arbitrations arising under existing treaties on the basis of a “dynamic reference”, referred to in the discussion by the Working Group as “dynamic interpretation”, meaning that any reference to the UNCITRAL Arbitration Rules from the date of adoption of the rules on transparency in an investment treaty, including existing investment treaties, would also incorporate the rules on transparency (A/CN.9/741, paras. 20 and 42). Under the second option, the opt-in solution, the rules on transparency would only apply when the High Contracting parties (referred to as “Parties”) to an investment treaty expressly consent to their application (A/CN.9/741, para. 14).

8. At that session, views expressed differed on (i) whether an opt-in or opt-out approach was preferable and (ii) whether the possibility of dynamic interpretation for existing treaties should be left open. Views were expressed in favour of both options with a majority view for the first option (A/CN.9/741, para. 55).

9. Pursuant with the instructions from the Working Group to redraft article 1 (1) based on the deliberations at its fifty-sixth session (A/CN.9/741, paras. 54 and 57), the first sentence of draft paragraph 1 states the general principle of public international law that Parties can only be bound by an external set of rules if they have so agreed. In order to clarify that no dynamic interpretation of investment treaties could make the rules on transparency applicable in the context of such existing treaties, an expression of agreement is required for the rules to apply. The second sentence of paragraph (1) refers to treaties concluded after the date of coming into effect of the rules on transparency. It establishes a presumption in favour of the applicability of the rules on transparency. Delegations that found it difficult to agree with that approach (A/CN.9/741, para. 59) were invited to coordinate their efforts and to communicate drafting suggestions in that respect to the secretariat for consideration by the Working Group (see A/CN.9/WG.II/WP.174).

10. The Working Group may wish to consider whether to include a reference to “all disputing parties” in article 1 (1), in order to clarify that the disputing parties are permitted to apply the rules on transparency.

Effect of the rules on transparency as stand-alone rules and as appendix on the 2010 UNCITRAL Arbitration Rules and on existing treaties

11. At its fifty-sixth session, the Working Group requested the secretariat to provide an analysis of the implications of presenting the transparency rules in the

form of an appendix to the UNCITRAL Arbitration Rules or as a stand-alone text. If the rules on transparency were to become an appendix to the UNCITRAL Arbitration Rules, there would be three sets of UNCITRAL Arbitration Rules: 1976 UNCITRAL Arbitration Rules, 2010 UNCITRAL Arbitration Rules and the 2013 or 2014 UNCITRAL Arbitration Rules (the “new UNCITRAL Arbitration Rules”).

a. UNCITRAL Arbitration Rules

12. If the rules on transparency became an appendix to the 2010 UNCITRAL Arbitration Rules, it would constitute a modification to the Rules and result in a new set of UNCITRAL Arbitration Rules (see above, paragraph 11). For example, article 1 (2) of the 2010 UNCITRAL Arbitration Rules would need to be modified in order to clarify the relationship between the rules on transparency and the UNCITRAL Arbitration Rules. Other provisions of the 2010 UNCITRAL Arbitration Rules that would be affected, i.e. modified or supplemented by the application of the rules on transparency, would be articles 3, 4, 17 (1), 28 (3), 34 (5) (see also A/CN.9/WG.II/WP.169, paras. 25-34).

13. The Working Group may further wish to consider whether including the rules on transparency in an appendix to the 2010 UNCITRAL Arbitration Rules would modify their generic applicability, as the modification of the 2010 UNCITRAL Arbitration Rules would, in fact, constitute a specific set of arbitration rules for treaty-based investor-State arbitration. If the 2010 UNCITRAL Arbitration Rules would be so modified, the question would arise whether other investment specific provisions should be added to this new set of rules. Confusion might arise between the 1976 and 2010 UNCITRAL Arbitration Rules as generic arbitration rules and the new UNCITRAL Arbitration Rules.

14. Another factor the Working Group may wish to consider in forming its decision on the form of the rules on transparency is the risk that arbitral institutions might not be encouraged to promote the application of the rules on transparency, if such rules were included in an appendix to the 2010 UNCITRAL Arbitration Rules. In such case, the arbitral institutions would have to apply as a prerequisite a set of arbitration rules different from their own rules for the application of the rules on transparency. This might run counter to the objective of achieving the widest possible application of the rules.

15. If the rules on transparency were stand-alone rules, they could be applied to any other arbitration rules thus providing a wider application of the rules on transparency. The application of the rules on transparency to other arbitration rules would be possible, as parties are free to agree to modify the applicable arbitration rules (see also document A/CN.9/WG.II/WP.173). Arbitral institutions have applied a higher standard of transparency in arbitral proceedings if so wished by the parties (see document A/CN.9/736, para. 28). The Working Group may wish to take note that, at its fifty-sixth session, arbitral institutions referred to in document A/CN.9/WG.II/WP.170 and Add.1 had commented that the rules on transparency in the form of a stand-alone text could operate in conjunction with their own institutional rules (A/CN.9/741, para. 29; see also document A/CN.9/WG.II/WP.173).

16. The presumption on the application of the rules on transparency contained in article 1 (1) of the draft rules on transparency would apply to the same extent if the rules on transparency were to take the form of stand-alone rules or an appendix.

b. Existing treaties

17. At the fifty-sixth session of the Working Group, concerns had been expressed that it might be difficult to exclude a dynamic interpretation as was sought to be done if the transparency rules were presented as an appendix to the UNCITRAL Arbitration Rules (A/CN.9/741, para. 57). In the deliberations of the Working Group, a “dynamic interpretation” was referred to when an investment treaty permitted application of the most up-to-date version of the UNCITRAL Arbitration Rules (A/CN.9/741, para. 42). If the rules became an appendix to the 2010 UNCITRAL Rules and, as a consequence, such rules were updated as a set of rules specific to investment arbitration (see above, paragraph 13), it might be particularly difficult to avoid their application to existing treaties through a dynamic interpretation relying on the most up-to-date version of the UNCITRAL Arbitration Rules. If the rules on transparency were to take the form of stand-alone rules, the possibility of a dynamic interpretation would be more limited.

18. Regarding the various instruments to make the rules on transparency applicable to existing treaties to be further considered by the Working Group (A/CN.9/736, paras. 134-135, and A/CN.9/WG.II/WP.166/Add.1, paragraphs 10-23), the form of the rules on transparency, either stand-alone or an appendix, would result in no difference. Those instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31 (3) (a) Vienna Convention on the Law of Treaties (the “Vienna Convention”) with regard to existing investment treaties or (iv) amendment or modification pursuant to articles 39-41 Vienna Convention of existing investment treaties.

Paragraph (2) — Application of the rules on transparency by the disputing parties

19. Article 1 (2) as contained in paragraph 6 reflects the modifications found acceptable at the fifty-sixth session of the Working Group (A/CN.9/741, paras. 74, 78 and 81). Article 1 (2) reflects the principle that the disputing parties could not derogate from the rules on transparency unless permitted do so by the treaty. The policy reason is that it would not be appropriate for the disputing parties to reverse a decision made by the State Parties to the investment treaty on that matter and that the rules on transparency were meant to benefit not only the investor and the host State but also the general public (A/CN.9/741, para. 61). Pursuant to the decision made by the Working Group at its fifty-sixth session, article 1 (2) provides, in addition, for the possibility that the arbitral tribunal could adapt the rules on transparency to ensure efficiency of arbitral proceedings without allowing derogation from them (A/CN.9/741, para. 73, 74, 78 and 81). The Working Group may further wish to consider which circumstances might give rise to such adaptation (A/CN.9/741, para. 73). As a matter of drafting, the Working Group may wish to note that if the reference to the disputing parties is retained under paragraph 1, the definition of disputing parties in article 1 (2)(a) would be deleted.

Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration rules

20. At the fifty-sixth session of the Working Group, a large majority was in favour of including a provision on the relationship between the rules on transparency and the applicable arbitration rules in the rules on transparency. The Working Group may wish to note that reference in the current provision on the relationship between the rules on transparency and the applicable arbitration rules contained in article 1 (3) is only made to the applicable “arbitration rules”, as it captures the applicable version of the UNCITRAL Arbitration Rules and any other arbitration rules.

Paragraph (4) — Relationship between the rules on transparency and the applicable law

21. At its fifty-sixth session, the Working Group mandated the secretariat to complement the provision on the relationship between the rules on transparency and the applicable arbitration rules with a provision on the relationship between the rules on transparency and the applicable law pursuant to the provision contained in article 1 (3) of the 2010 UNCITRAL Arbitration Rules (A/CN.9/741, para. 97). The Working Group may wish to consider article 1 (4) as contained in paragraph 6 above, which closely follows the wording of article 1 (3) of the 2010 UNCITRAL Arbitration Rules. The Working Group may wish to note that there is the possibility that, depending on the applicable domestic law in relation to treaty law and transparency, parties could derogate from the rules on transparency.

Paragraph (5) — Discretion of the arbitral tribunal

22. At its fifty-sixth session, the Working Group adopted the substance of the paragraph on discretion of the arbitral tribunal (A/CN.9/741, para. 85), which provides for the exercise of discretion by the arbitral tribunal where so permitted under the rules on transparency, taking into account the need to balance (a) the public interest in transparency in treaty-based investor-State arbitration and of the particular arbitral proceedings and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

Footnote to article 1 (1)

23. The Working Group may wish to consider the footnote to article 1(1) providing for a definition of the term “a treaty providing for the protection of investments or investors” under the rules on transparency, which reflects the drafting proposals made at the fifty-sixth session of the Working Group. The footnote aims at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in a broad sense (A/CN.9/741, paras. 101-102). At that session, the Working Group adopted the footnote subject to the deletion of the word “intergovernmental” after the word “integration” and the use of reference to the “protection of investments and investors” in a consistent manner.

Article 2. Publication of information at the commencement of arbitral proceedings

24. Draft article 2 — Publication of information at the commencement of arbitral proceedings.

“Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 9. Upon its receipt of the notice of arbitration from either party, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.”

Remarks

25. At its fifty-sixth session, the Working Group adopted draft article 2 in the version that left the publication of the notice of arbitration (and of the response thereto) to be dealt with under article 3, after the constitution of the arbitral tribunal with some drafting modifications (A/CN.9/741, para. 109).

26. Draft article 2 encapsulates the drafting modifications agreed to by the Working Group (A/CN.9/741, para. 109) in order to clarify that all disputing parties should have the obligation to send the notice of arbitration to the repository. The repository in turn should publish the information once it receives the notice of arbitration from either party.

27. The Working Group may wish to consider how to deal with the situation where a notice of arbitration would be sent by a claimant to the repository before the arbitral proceedings had commenced, i.e., before the notice of arbitration had been received by the respondent (A/CN.9/741, para. 107). The Working Group may further wish to consider whether the opening words “once the notice of arbitration has been received by the respondent” sufficiently address that matter. The Working Group may also wish to consider the difficulties of fulfilling the administrative functions involved for the repository in that regard.

28. At the fifty-sixth session of the Working Group, it was suggested to harmonize the language used in the rules with regard to publication of information or documents as, for instance, the words “published” or “made available to the public” were used. The Working Group further requested the secretariat to examine whether a different meaning was intended in the use of the various terms referring to publication and to further examine how a consistent approach could be achieved. The Working Group may wish to note that the word “publish” occurs in the current draft of the Rules on Transparency only in the title of draft article 9 “Repository of published information” (draft articles 1-2 as contained in document A/CN.9/WG.II/WP.172 and draft articles 3-9 as contained in document A/CN.9/WG.II/WP.169 and Add.1). The draft rules use the noun “publication” and the verb “make available to the public” with no different meaning intended.

**C. Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based
investor-State arbitration — Comments of arbitral institutions on the
interplay between the draft rules on transparency and their
institutional rules, submitted to the Working Group on Arbitration and
Conciliation at its
fifty-seventh session**

(A/CN.9/WG.II/WP.173)

[Original: English]

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I. Introduction

1. Arbitral institutions that had expressed an interest in being associated with the current work of the Working Group regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration have provided comments on issues that could arise in connection with the application of the UNCITRAL rules on transparency currently under preparation by the Working Group to arbitration cases administered under their arbitration rules (A/CN.9/736, under para. 28). Comments received from arbitral institutions are reproduced below (see also A/CN.9/WG.II/WP.169/Add.1, para. 35).

II. Comments received from arbitral institutions

A. The Permanent Court of Arbitration (“PCA”)

Reply by the Deputy Secretary-General

Date: 11 January 2012

Currently parties may choose among the following sets of the Permanent Court of Arbitration (“PCA”) Arbitration Rules: Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two States; Permanent Court of Arbitration Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State; Permanent Court of Arbitration Optional Rules for Arbitration Involving International Organizations and States; Permanent Court of Arbitration Optional Rules for Arbitration between International Organizations and Private Parties;

Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and the Environment; and Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities.

Our prima facie review indicates that the above sets of PCA Rules, which are based on either the 1976 or the 2010 UNCITRAL Arbitration Rules, can operate in tandem with the rules on transparency as currently drafted.¹ The PCA reserves the right to amend or supplement its response, subject to future modifications of the draft transparency rules.

B. International Centre for Settlement of Investment Disputes (“ICSID”)

Reply by the Secretary-General

Date: 18 January 2012

1. The International Centre for Settlement of Investment Disputes (ICSID) herein provides comments on the possible interplay between the ICSID Arbitration Rules and the draft rules on transparency as currently stated in documents A/CN.9/WG.II/WP.169 and A/CN.9/WG.II/WP.169/Add.1.

2. ICSID administers arbitration proceedings governed by the UNCITRAL Arbitration Rules on an ad hoc basis, such as in the context of NAFTA and various BITs. The comments made by the UNCITRAL Secretariat in document A/CN.9/WG.II/WP.169/Add.1 at paragraphs 13 to 34 would apply to UNCITRAL cases administered by ICSID. As a result, any transparency provisions adopted by the Commission could be applied in UNCITRAL cases administered by ICSID.

3. Under the ICSID Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The ICSID Administrative Council also adopted Additional Facility Rules (AF Rules) authorizing the ICSID Secretariat to administer proceedings that fall outside the scope of the ICSID Convention, such as when one of the parties is not a Contracting State or a national of a Contracting State (e.g., Canada or Mexico) or when the proceedings are between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

4. The interplay between the draft UNCITRAL rules on transparency and the ICSID Convention and the Centre’s Arbitration Rules would assume that the UNCITRAL rules could apply in an ICSID arbitration proceeding. On the basis of the discussion of the Working Group so far, and the discussions that have yet to take place regarding the scope of application of the rules, the Centre is not in a position to offer further comment at this stage.

¹ Previously, parties to arbitration under PCA Rules have agreed to very broad disclosure requirements. For example, in the *Abyei* arbitration (PCA Case No. 2008-5), which was conducted under the PCA Optional Rules for Arbitrating Disputes between Two Parties of Which Only One Is a State, the Parties agreed to make public the oral and written pleadings as well as the final award.

C. London Court of International Arbitration (“LCIA”)

Reply by the Director General

Date: 20 January 2012

Introduction

The LCIA has been requested to comment on the interplay between LCIA rules, practice and procedure, and the proposed UNCITRAL rules on transparency in treaty-based investor-State arbitration, were the two to be applied together.

The comments below relate only to practical matters arising from the LCIA’s role as administrator, or designated “repository”/registry, and do not extend to the roles, rights and responsibilities of the parties and of the tribunal.

References to “the LCIA” may relate to the LCIA secretariat and/or to the LCIA Court. However, the LCIA Court is the final authority for the application of rules, practice and procedure adopted by the LCIA for the administration of arbitrations, whether applied by the secretariat on behalf of the Court, or by the Court itself, in the person of its President, Vice-Presidents, or Divisions.

UNCITRAL rules on transparency

Draft Article 1. Scope of application

Paragraph 1: As currently drafted, Option 2, Variant 1 [of paragraph 1 of article 1 as contained in document A/CN.9/WG.II/WP.169, paragraph 8], is the only version by which the rules on transparency may come to be applied in arbitration proceedings under rules other than the UNCITRAL arbitration rules.

Paragraph 2: The mandatory nature of the rules on transparency is noted.

Paragraphs 3-5: The precedence taken by the rules on transparency over the applicable arbitration rules, in the event of conflict, is noted. The LCIA joins with ICSID, PCA, SCC and ICC in confirming that, as a matter of principle, the application of the rules on transparency in conjunction with the LCIA arbitration rules is unlikely to cause problems.

The LCIA’s position may, however, change as the draft rules on transparency evolve.

Draft Article 2. Publication of information at the commencement of arbitral proceedings

By Article 30.1 of the LCIA arbitration rules, unless they expressly agree in writing to the contrary, the parties undertake, as a general principle, to keep confidential all materials in the proceedings, created and produced for the purpose of the arbitration. The adoption by the parties, in writing, of the rules on transparency would constitute their agreement that such materials need not be kept confidential.

Were the LCIA required to act as a registry for the purposes of the rules on transparency, it would set up a dedicated website, with dedicated server; operated and maintained separately from its own website, to ensure greater efficiency and ease of operation and access; and to safeguard the confidentiality of other

arbitrations pending before the LCIA, to which the confidentiality provisions of Article 30 of the LCIA arbitration rules did apply.

Draft Article 3. Publication of documents

See comments relating to Article 2, above.

The exceptions to publication covered by Article 8 are noted, as is the responsibility of the tribunal, under Article 3.4 to ensure that documents that are not to be made publicly available are withheld from the registry, or are suitably redacted.

In the event that an arbitral institution were not only acting as registry, but also administering under its own rules in conjunction with the rules on transparency, the institution itself would presumably receive documents that were not to be made publicly available. In which case, the institution would expect to be advised by the tribunal of which of these documents were to be excluded from the public record or redacted.

Draft Article 4. Publication of arbitral awards

As above, the adoption of the rules on transparency would constitute an agreement in writing that the award should not be kept confidential, for the purposes of Article 30.1 of the LCIA arbitration rules.

Also as above, were the institution administering the arbitration under its own rules, and not merely acting as registry, it would be privy to non-redacted awards, although only redacted versions (if applicable) would be made publicly available.

I note the use, in Articles 2, 3 and 4, of the words, “*promptly*”, and “*in a timely manner*” relating to the registry’s duty to make materials available to the public. It would be helpful if there were guidance as to how these words should be interpreted.

Draft Article 5. Submission by a third person

That there is no provision in the LCIA rules for the intervention of amici curiae does not prohibit the express agreement of the parties that such intervention should be permitted in accordance with the procedures set out in this article.

Draft Article 6. Submission by a non-disputing Party to the treaty

I note that the Working Group has yet to settle whether the tribunal should have the discretion to accept or to decline submissions by non-disputing parties to the treaty. Similarly, that there is to be further discussion as to whether a non-disputing party should be entitled to make submissions not only on matters of treaty interpretation, but also on questions of law or fact, or on matters within the scope of the dispute. It would seem, however, that these matters affect the parties and the tribunal, but not the administering institution or registry.

It is noted, however, that documents submitted pursuant to Articles 5 and 6 of the rules on transparency are to be made available to the public in accordance with Article 3.

Draft Article 7. Hearings

Article 19.4 of the LCIA arbitration rules provides that all meetings and hearings shall be in private unless the parties agree otherwise in writing, or the arbitral tribunal directs otherwise. The adoption of the rules on transparency would constitute an agreement in writing that hearings need not be held in private.

On a minor housekeeping matter, with reference to Article 7.3, the LCIA secretariat would be at the disposal of the tribunal for the purposes of making the logistical arrangements referred to in that article, were the arbitration being conducted under the LCIA arbitration rules.

Draft Article 8. Exceptions to transparency

The question of what information is not to be made available to the public or to non-disputing parties, is for the tribunal and the parties. It is, however, essential that the mechanisms, designed to ensure that the administrator and/or registry does not make such materials public, are effective, having in mind the registry's obligation to publish "*promptly*" or "*in a timely manner*".

D. Cairo Regional Centre for International Commercial Arbitration ("CRCICA")

Reply by the Director
Date: 20 January 2012

I. General Remarks

Since its establishment CRCICA adopted, with minor modifications, the Arbitration Rules of UNCITRAL of 1976 ("UNCITRAL Rules"). CRCICA has amended its Arbitration Rules in 1998, 2000, 2002 and 2007 to ensure that they continue to meet the needs of their users, reflecting best practice in the field of international institutional arbitration.

The present CRCICA Arbitration Rules were enforced as of March 2011 ("Rules"). They are based upon the new UNCITRAL Arbitration Rules, as revised in 2010, with minor modifications emanating mainly from the Centre's role as an arbitral institution and an appointing authority.

The Rules are equally applicable to commercial and investment arbitration proceedings.

Article 40 of the Rules provides for confidentiality as a general principle, however, the parties could deviate from such rule should they so agree.

II. Treaty and UNCITRAL Rules vis-à-vis the Rules

In this section, we shall provide our comments regarding the interplay between the Treaty and UNCITRAL Rules which are contained in the UNCITRAL document A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, which are also applicable for the Rules. We will keep the same sequence as contained in the said document for ease of reference.

a. Modifying

Publication of arbitral awards

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 16.

Relevant article from the CRCICA Arbitration Rules: Article 40, paragraphs 1 and 3.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Confidentiality is regulated by Article 40 of which the parties may opt out.

Hearings

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 17.

Relevant article from the CRCICA Arbitration Rules: Article 28, paragraph 3.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Same paragraph is found in the Rules.

b. Supplementing

Scope of application — article 1 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 19-23.

Relevant article from the CRCICA Arbitration Rules: Article 1, paragraph 2.

Comments: Article 1, paragraph 2, of the Rules stipulates that the applicable version of the rules shall be the rules in effect on the date of commencement of the arbitration proceedings, unless agreed otherwise.

Therefore, the Rules will be applicable to disputes commencing after March 2011 even if the investment treaty was signed before the said date. However, this is relevant only in the event that the final draft of the Treaty includes the variant stipulating for its applicability with rules different than the UNCITRAL Rules.

Article 1, paragraph (3), of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 24.

Relevant article from the CRCICA Arbitration Rules: Article 17, paragraph 1.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Same paragraph is contained in the Rules and therefore the same effect applicable on the UNCITRAL Rules exists.

Initiation of arbitration proceedings — article 2 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 25.

Relevant article from the CRCICA Arbitration Rules: Article 4

Comments: Article 4 provides that all documents are to be submitted to CRCICA which will cover the event where CRCICA shall be acting as a Registry and/or will provide CRCICA with copies to forward to the relevant Registry should it be bound to do so.

Publication of documents — article 3 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 26.

Comment: As the arbitral institute administering the case, all documents are to be communicated via CRCICA.

Submission by third persons — article 5 of the rules on transparency;

Submission by non-disputing Party to the treaty — article 6 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 27-28.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: CRCICA is also silent as to submissions by non-disputing parties. Therefore the same effect applicable on the UNCITRAL Rules exists.

c. No effect

Exceptions to transparency — article 8 of the rules on transparency

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 29-30.

Relevant article from the CRCICA Arbitration Rules: Article 40.

Same implication on the Rules as to the UNCITRAL Rules? No.

Comments: Again, Article 40 regulating confidentiality stipulates that the whole process is confidential unless the parties agree otherwise. Therefore, Article 8 of the Treaty shall have a “modifying” effect on the Rules unlike the case with the UNCITRAL Rules.

Repository of published information — article 9 of the rules on transparency, and appointing authorities

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraphs 31-33.

Comments: These functions are already exercised by CRCICA as an arbitral institution, with the exception of publishing documents. Should the Registry be a different unit other than CRCICA, the articles providing for CRCICA’s role as an appointing authority would therefore be modified.

Allocation of costs

Text from A/CN.9/WG.II/WP.169/Add.1: Paragraph 34.

Relevant article from the CRCICA Arbitration Rules: Article 46.

Same implication on the Rules as to the UNCITRAL Rules? Yes.

Comments: Although the Rules differ from the UNCITRAL Rules when it comes to regulating the arbitration costs, both rules make the unsuccessful party liable for the costs in principle. Section V of the Rules regulates the costs of the arbitration.

III. Treaty and the Rules, possibilities that do not exist with the UNCITRAL Rules

As stated above, the Rules contain an article regulating confidentiality which does not exist in the UNCITRAL Rules. The parties to the arbitration may however agree to deviate from such rule. Accordingly, the Treaty shall have a modifying effect on the Rules in connection thereto.

Since, unlike the UNCITRAL Rules, the CRCICA Rules are applicable to institutional arbitrations, the role of CRCICA is reflected therein. Depending on the functions of the Registry, the role played by CRCICA may be of use to it should the Treaty stipulate for regulations regarding the interplay between the role of the institution administering the proceedings and the Registry.

E. Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”)

Reply by the Secretary-General
Date: 23 January 2012

We have reviewed the report of the Working Group on Arbitration on the work of its fifty-fifth session, A/CN.9/736, the draft rules on transparency,

A/CN.9/WG.II/WP.169, the comments on the interplay between the UNCITRAL Arbitration Rules and the draft rules on transparency, A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, and the question in your letter of 14 December 2011.

The below represents a preliminary assessment of the possible interplay between the SCC Rules and the draft rules on transparency.

In summary, the SCC does not foresee that the draft rules on transparency would create any problems for treaty-based investor-State arbitrations under the SCC Rules where the draft rules on transparency would be applied.

For the sake of clarity, the SCC would like to underline that none of the below should be interpreted as the SCC advocating a specific standard on transparency. The objective has been to outline how the SCC Rules would work in conjunction with the draft rules on transparency. The SCC recognizes that the rules on transparency have not yet been finalized, and this reply is thus presented with the caveat that a different analysis may be necessary as a result of the final version of the text.

This document outlines the possible interplay between the SCC Rules and the draft rules on transparency in the context of treaty-based investor-State arbitration. The SCC Rules apply equally in commercial and treaty-based investor-State arbitral proceedings.

These comments first provide some general remarks on the interplay between the SCC Rules and the draft rules on transparency. The comments then follow the format of the Secretariat's note on the interplay between the draft rules of transparency and the UNCITRAL Arbitration Rules, A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, to provide specific comments on how provisions of the draft rules would modify, supplement or have no effect on the SCC Rules.

THE SCC RULES AND THE DRAFT RULES ON TRANSPARENCY

The rules on transparency may be applied as a result of the different options as described in Article 1 — Scope of Application. Arbitrations that take place under both the SCC Rules and the draft rules on transparency may only occur under Option 2, Variant 1 of Article 1(1) of the draft rules on transparency, for the obvious reason that Option 1 and Option 2, Variant 2 refer to arbitrations conducted under the UNCITRAL Arbitration Rules. For the rules on transparency to be applied to arbitrations conducted under the SCC Rules, the agreement to arbitrate the treaty-based investor-State dispute must (i) refer to the SCC Rules, and (ii) incorporate the rules on transparency.

The SCC Rules consist of many provisions that may be modified by party agreement. Article 19(1) of the SCC Rules provides that “[s]ubject to these Rules and any agreement between the parties, the Arbitral Tribunal may conduct the arbitration in such manner as it considers appropriate”. Application of the draft rules on transparency therefore does not likely present any conflict with the SCC Rules where the rules on transparency, under Option 2, Variant 1 of Article 1(1), would form part of the parties’ arbitration agreement.

In the report of the Working Group on Arbitration on the work of its fifty-fifth session, A/CN.9/736, the Secretariat noted that the Working Group agreed to amend the language of the draft rules on transparency to use terminology that is

consistent with the 2010 UNCITRAL Arbitration Rules (see, e.g., paras. 15, 39, 61). In some instances, the terminology in the draft rules on transparency differs from the terminology used in the SCC Rules. For example, Article 2 of the draft rules on transparency refers to the “notice of arbitration”, while Article 2 of the SCC Rules refers to this document as the “Request for Arbitration”. As a general comment regarding differing terminology, the SCC does not anticipate that differing terminology in the draft rules on transparency and the SCC Rules will affect the interplay between the two rules.

While differing terminology will likely not affect the interplay between the two rules, the SCC would like to highlight that the SCC Rules and the draft rules on transparency appear to differ in regards to when the arbitration is deemed to “commence”. Under Article 4 of the SCC Rules, the arbitration is commenced on the date that the SCC receives the Request for Arbitration. Article 2 of the draft rules on transparency, entitled “Publication of information at the commencement of arbitral proceedings” does not reference an institution’s role under either Option 1 or Option 2 as relevant in determining the date of “commencement of arbitral proceedings”. Rather, the SCC understands that Article 2 of the draft rules on transparency considers that the arbitration commences “[o]nce the notice of arbitration has been received by the respondent”, similar to Article 3(2) of the 2010 UNCITRAL Arbitration Rules. While the effect of this difference is not known at this time, the SCC would like to highlight the difference.

As a final general comment, the SCC notes that several provisions of the draft rules on transparency require the arbitral tribunal to exercise its discretion in implementing the rules (see, e.g., Article 5 on allowing submission by third parties and Article 8(7) on exceptions to transparency). Should the arbitral tribunal be unable to reach unanimous decision on these discretionary issues, Article 35 of the SCC Rules will apply to resolve the issue. Article 35 of the SCC Rules states that where an arbitral tribunal consists of more than one arbitrator, decisions shall be made by majority vote or by the chairperson, failing a majority. The arbitral tribunal may also decide that the chairperson alone has the authority to make procedural rulings.

Following the format of the Secretariat’s note on the interplay between the rules on transparency and the UNCITRAL Arbitration Rules, A/CN.9/WG.II/WP.169/Add.1, paragraphs 13 to 34, the SCC’s comments on the specific interplay between provisions of the SCC Rules and the draft rules on transparency are threefold: provisions of the draft rules on transparency that would modify the SCC Rules (a); provisions of the draft rules on transparency that would supplement the SCC Rules (b); and provisions of the draft rules on transparency that would have no effect on the SCC Rules (c).

a. Modifications to provisions of the SCC Rules

Articles 3, 4, 7 and 9 (Option 2, para. 1) of the draft rules on transparency would constitute party agreements that modify the default provisions of the SCC Rules.

Publication of documents — Article 3 of the draft rules on transparency, modifying Article 46 of the SCC Rules

Article 3 of the draft rules on transparency requires the arbitral tribunal to communicate documents to the repository for publication. Article 46 of the SCC Rules requires the arbitral tribunal to maintain the confidentiality of the arbitration. The confidentiality provision in the SCC Rules is subject to party agreement to the contrary, and the adoption of the draft rules on transparency would constitute party agreement to modify the provisions in the SCC Rules.

Publication of arbitral awards — Article 4 of the draft rules on transparency, modifying Article 46 of the SCC Rules

Article 4 of the draft rules on transparency requires the arbitral tribunal to communicate the arbitral award to the repository. Article 46 of the SCC Rules requires the arbitral tribunal to maintain the confidentiality of the award. The confidentiality provision in the SCC Rules is subject to party agreement, and the adoption of the draft rules on transparency would constitute a party agreement that modifies the provisions in the SCC Rules.

Hearings — Article 7 of the draft rules on transparency, modifying Article 27(3) of the SCC Rules

Article 7(1) of the draft rules on transparency requires hearings to be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties. Article 27(3) of the SCC Rules states that hearings will be held in private, unless otherwise agreed by the parties. The adoption of the draft rules on transparency would constitute a party agreement to modify the default provisions in the SCC Rules, requiring hearings to be public.

Repository of published information — Article 9 (Option 2, para. 1) of the draft rules on transparency, modifying Article 46 of the SCC Rules

Article 9 (Option 2, para. 1) of the draft rules on transparency requires that the arbitral institution administering the arbitral proceedings be responsible for making information publicly available pursuant to the rules. Article 46 of the SCC Rules requires the SCC to maintain the confidentiality of the arbitration and the award, and is expressly subject to party agreement to the contrary. The adoption of the draft rules on transparency would constitute a party agreement to modify the default provisions in the SCC Rules, requiring the SCC to publish certain information throughout the arbitration.

This explanation is presented with the caveat that the SCC would be hesitant to disclose information in situations where one party objects to the applicability of the rules on transparency prior to the constitution of the arbitral tribunal.

b. Supplement to the SCC Rules

Articles 1-8 of the draft rules on transparency would supplement provisions of the SCC Rules.

Scope of application — Article 1

Article 1(1) (Option 2, Variant 1), (2), (4), (5) of the draft rules on transparency, supplementing the SCC Rules generally under Article 19(1) of the SCC Rules

Under Article 19(1) of the SCC Rules, the arbitration shall be conducted in accordance with the agreement of the parties. Article 1(1) (Option 2, Variant 1) of the draft rules on transparency states the rules will be applied when expressly provided for in the relevant treaty, and the draft rules on transparency would be part of the agreement between the parties that instructs the arbitral tribunal how the arbitration shall be conducted. The draft rules on transparency therefore would supplement the SCC Rules.

Article 1(3) of the draft rules on transparency, supplementing Article 19 of the SCC Rules

Article 1(3) of the draft rules on transparency requires the arbitral tribunal to balance the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitration with the parties' interest in a fair and efficient resolution of their dispute. Article 19 of the SCC Rules requires the arbitral tribunal to exercise its discretion as "appropriate", while ensuring the arbitration is impartial, practical and expeditious. By requiring the arbitral tribunal to take the public interest in transparency into account when exercising its discretion, the draft rules on transparency would supplement the SCC Rules.

Publication of information at the commencement of arbitral proceedings — Article 2 of the draft rules on transparency, supplementing Article 2 and Article 5 of the SCC Rules

Article 2 of the draft rules on transparency places an obligation on the disputing parties to provide information to the repository once the notice of arbitration has been received. This obligation supplements the obligations on the disputing parties in commencing the arbitral proceedings under Article 2 and Article 5 of the SCC Rules.

Publication of documents — Article 3 of the draft rules on transparency, supplementing Articles 18-34 ("The proceedings before the Arbitral Tribunal") of the SCC Rules

Article 3 of the draft rules on transparency requires the arbitral tribunal to communicate documents to the repository for publication. Such an obligation is not included in Articles 18-34 ("The proceedings before the Arbitral Tribunal") of the SCC Rules. Article 3 of the draft rules on transparency would therefore supplement this provision of the SCC Rules.

Publication of arbitral awards — Article 4 of the draft rules on transparency, supplementing Article 36(4) of the SCC Rules

Article 4 of the draft rules on transparency requires the arbitral tribunal to communicate the arbitral award to the repository. Article 36(4) of the SCC Rules obliges the arbitral tribunal to communicate the award to the parties and the SCC. In the event of the SCC acting as both the administering institution and the repository (as under Article 9 (Option 2, para. 1) of the draft rules on transparency), Article 4

of the draft rules on transparency would have no effect on the communication requirements in the SCC Rules, as the SCC would already be in possession of the award. In all other cases, however, Article 4 of the draft rules on transparency would supplement the communication requirements in Article 36(4) of the SCC Rules by requiring the arbitral tribunal to communicate the award to an additional body.

Submission by a third party — Article 5 of the draft rules on transparency, supplementing Article 24 and Article 26 of the SCC Rules

Article 5 of the draft rules on transparency allows the arbitral tribunal to accept submissions from third parties, after consultation with the disputing parties. The SCC Rules are silent on submissions by third parties. The SCC Rules in Article 24 on Written submissions and Article 26 on Evidence refer to the claimant, respondent and, collectively as, the parties, but do not expressly contemplate submissions by third parties.

To date, there are no known arbitrations, treaty-based investor-State or other, under the SCC Rules in which third parties either successfully made or attempted to make submissions to the arbitral tribunal.

The SCC Rules do not present a bar to submissions by third parties. Under Article 19(1) of the SCC Rules, the arbitral tribunal has broad discretion to “conduct the arbitration in such manner as it considers appropriate”. Article 5 of the draft rules on transparency would supplement the SCC Rules.

Submission by a non-disputing Party to the treaty — Article 6 of the draft rules on transparency, supplementing Article 24 and Article 26 of the SCC Rules

Article 6 of the draft rules on transparency either requires or allows the arbitral tribunal to invite submissions on treaty interpretation and questions of law or fact from a non-disputing party to the treaty, after consultation with the disputing parties. The SCC Rules are also silent on submissions by a non-disputing party to the treaty, and there are no known treaty-based investor-State arbitrations to this date under the SCC’s administration in which a non-disputing party to the treaty either made successfully or attempted to make a submission to the arbitral tribunal.

Article 19(1) of the SCC Rules grants the arbitral tribunal broad discretion to “conduct the arbitration in such manner as it considers appropriate”. Article 6 of the draft rules on transparency would supplement the SCC Rules.

Exceptions to transparency — Article 8 of the draft rules on transparency

Article 8 of the draft rules on transparency provides exceptions to transparency requirements and contains definitions for confidential, sensitive and protected information and protective measures for the integrity of the arbitral process. The SCC Rules contain no similar provisions. Article 8 of the draft rules on transparency, which apply only to the implementation of these rules, would therefore supplement the SCC Rules.

c. No effect on the SCC Rules

The SCC does not anticipate that the draft rules on transparency will affect the general framework for deciding costs, as defined in Article 43 and Appendix III of the SCC Rules.

Additional comments on costs

The SCC anticipates that costs incurred as a result of repository services will be assumed by the parties, but recognizes that principal issues relating to the treatment of costs remain yet to be addressed. The SCC is therefore not able to foresee at this point the exact implication, if any, of these costs on the application of the SCC Rules.

Article 43(5) of the SCC Rules provides that the arbitral tribunal shall apportion the costs of the arbitration between the parties, having regard to the outcome of the case and other relevant circumstances. Under Article 43(1) of the SCC Rules, these costs include the fees of the arbitral tribunal, the administrative fee of the SCC and the expenses of the arbitral tribunal and the SCC. “Expenses”, as explained in Appendix III, Article 4 of the SCC Rules, include “any reasonable expenses incurred by the arbitrator(s) and the SCC”.

The SCC appreciates the opportunity offered by UNCITRAL to contribute to its mission and looks forward to continue the discussion with the Working Group.

**D. Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based
investor-State arbitration — Proposal by Governments of Argentina,
Australia, Canada, Mexico, Norway, South Africa, and the United States
of America, submitted to the Working Group on Arbitration and
Conciliation at its fifty-seventh session**

(A/CN.9/WG.II/WP.174)

[Original: English]

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I. Introduction

1. At the fifty-sixth session of Working Group II (Arbitration and Conciliation), delegations were invited to coordinate their efforts to propose alternative solutions for the determination of the scope of application of the draft rules on transparency to the proposal contained in paragraph 54 of document A/CN.9/741 and to communicate drafting suggestions in that respect to the secretariat for consideration by the Working Group (A/CN.9/741, para. 59). The Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa and the United States of America submitted a proposal, the text of which is reproduced below in the form in which it was received by the secretariat.

II. Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America

Original: English
Date: 1 August 2012

Application of the Rules on Transparency to Existing Investment Treaties

The Report of the Fifty-sixth Session of Working Group II (A/CN.9/741), held in New York February 6-10, 2012, addresses the question of the applicability of the new rules on transparency under existing investment treaties, i.e., those investment treaties concluded before the [date of adoption] [effective date] of the rules on transparency. See, e.g., paragraphs 50-53 of A/CN.9/741, which demonstrate that there were differing views within the Working Group on this question.

Paragraph 54 of A/CN.9/741 states that “the Working Group was invited to consider the following approach For existing investment treaties, the rules on

transparency would only apply where the parties had expressly consented thereto, with wording being used to make it clear that there could be no dynamic interpretation of existing investment treaties which would make the transparency rules applicable to them.”

“Dynamic interpretation” of an investment treaty could arise in cases where the treaty, interpreted in accordance with applicable rules of treaty interpretation, provides for the application of the UNCITRAL Arbitration Rules as they might evolve over time, and thus a version of the UNCITRAL Arbitration Rules [adopted] [that becomes effective] on a date after the conclusion of the treaty could apply under that treaty, e.g., “the UNCITRAL Arbitration Rules in effect on the date of the notice of arbitration.”

The Report makes clear that a number of delegations did not agree with the approach proposed in paragraph 54. Paragraph 56, for example, states: “Some diverging views were reiterated as follows: on the one hand that article 1(1) should leave open the possibility of legal application of the transparency rules to existing investment treaties, or that nothing in the rules should prohibit such an application ...” Additionally, paragraph 58 includes this language: “A few delegations reiterated that dynamic interpretation was legally possible and that they were not ready to accept a ‘blanket prohibition’ that would preclude the effective implementation of provisions in investment treaties that envisaged the Parties benefiting from the most up-to-date provisions of the UNCITRAL Arbitration Rules in arbitrations under those treaties, which in that case would be the rules on transparency.”

Paragraph 59 of A/CN.9/741 provides, in its entirety:

It was clarified that it would be open to those delegations, who would find it difficult to agree with the proposal articulated above in paragraph 54 and still wished to propose another solution (whether in favour of an opt-in or in favour of a dynamic interpretation), to do so at the next session of the Working Group on the basis of the proposals in paragraph 8 of document A/CN.9/WGII/WP.169. It was noted that some delegations had indicated that it might be possible to find wording which would give those States that wished to exclude any possibility of dynamic interpretation of their treaties certainty in that respect, while preserving the possibility of such dynamic interpretation for other States. Those delegations were invited to coordinate their efforts and to communicate drafting suggestions in that respect to the Secretariat for consideration by the Working Group.

This paper is provided in response to that invitation.

In preparing this paper, the co-sponsors identified above have been guided by certain fundamental principles:

1. The Commission, at its forty-fourth and forty-fifth sessions, reaffirmed its commitment regarding the importance of ensuring transparency in treaty-based investor-State arbitration.¹

¹ See, e.g., *General Assembly Official Records, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200 (stating that the Commission “reiterated its commitment expressed at its forty-first session, in 2008, regarding the importance of ensuring transparency in investor-State

2. To be effective in promoting transparency, it is essential to consider the investment treaties currently in force internationally.²
3. Application of the rules on transparency under an existing investment treaty is subject to the agreement of the Parties to that treaty.
4. In most cases, it will be clear if an existing treaty did not envision the application of the rules on transparency, and where it is not clear, the Parties to the treaty can take steps to prevent such application if they so desire.
5. However, those who do not wish the rules on transparency to apply under their treaties should not attempt to compel a similar result in cases where others desire the rules on transparency to apply under their own treaties and the language of the treaties provides for such application. To suggest otherwise would be unfair and not in keeping with the mandate from the Commission.
6. Moreover, the rules on transparency cannot purport to establish rules of treaty interpretation, which are governed by international law, including the Vienna Convention on the Law of Treaties.

Bearing in mind those principles, following is proposed language for Article (1) of the draft rules on transparency:

If a treaty concluded prior to [date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates these Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the treaty Parties' agreement to the application of that version of the UNCITRAL Arbitration Rules. The Parties may also agree, after [date of adoption/effective date of the Rules on Transparency], to apply these Rules on Transparency under a treaty concluded prior to that date.

This approach accommodates the interests of all concerned. It is based on the consent of the Parties to the investment treaty. If there is a disagreement between the Parties to the investment treaty on whether it should be interpreted to provide for application of the rules on transparency, that is a matter to be resolved by a tribunal or court in accordance with the relevant rules of treaty interpretation under international law; the rules on transparency cannot dictate that result.

arbitration" and citing *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314).

² See *id.* (stating that the Commission "confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with great practical interest, taking account of the high number of treaties already concluded.").

**E. Report of the Working Group on Arbitration and Conciliation on the
work of its fifty-eighth session (New York, 4-8 February 2013)**

(A/CN.9/765)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)¹ that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.²

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. The Commission confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working Group and a question with a great practical interest, taking account of the high number of treaties already concluded.³ Further, the Commission agreed that the question of possible intervention in the arbitration by a non-disputing State party to the investment treaty should be regarded as falling within the mandate of the Working Group. Whether the legal standard on transparency should deal with such a right of intervention, and if so, the determination of the scope and modalities of such intervention should be left for further consideration by the Working Group.⁴

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011,⁵ and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.⁶

4. The most recent compilation of historical references regarding the consideration by the Commission of works of the Working Group can be found in document A/CN.9/WG.II/WP.175, paragraphs 5-14.

II. Organization of the session

5. The Working Group, which was composed of all States members of the Commission, held its fifty-eighth session in New York, from 4-8 February 2013. The session was attended by the following States members of the Working Group: Algeria, Argentina, Australia, Austria, Bahrain, Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, Greece, India, Iran (Islamic Republic of), Israel, Italy, Japan, Kenya, Mauritius, Mexico,

¹ *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 314.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

³ *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200.

⁴ *Ibid.*, para. 202.

⁵ *Ibid.*, *Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 314, and *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 200, respectively.

⁶ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 69.

Nigeria, Norway, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Angola, Belarus, Belgium, Burkina Faso, Cyprus (Republic of), Ecuador, Finland, Indonesia, Ireland, Kuwait, Netherlands, Oman, Panama, Peru, Poland, Qatar, Romania, Slovakia, Sweden, Switzerland and Tunisia.

7. The session was attended by observers from the following non-member States and Entities: Holy See.

8. The session was attended by observers from the European Union.

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

(a) *United Nations system*: International Centre for Settlement of Investment Disputes (ICSID); Office of Legal Affairs, General Legal Division (OLA/GLD), the World Bank, United Nations Conference on Trade and Development (UNCTAD) and United Nations Educational Scientific and Cultural Organization (UNESCO);

(b) *Intergovernmental organizations*: Corte Centroamericana de Justicia (CCJ) and Permanent Court of Arbitration (PCA);

(c) *Invited non-governmental organizations*: American Arbitration Association/International Centre for Dispute Resolution (AAA/ICDR), American Bar Association (ABA), Arab Association for International Arbitration (AAIA), Arbitration Institute of the Stockholm Chamber of Commerce (SCC), Association of the Bar of the City of New York (ABCNY), Association Suisse de l'Arbitrage (ASA), Barreau de Paris, Belgian Center for Arbitration and Mediation (CEPANI), Center for International Environmental Law (CIEL), Chartered Institute of Arbitrators (CIARB), China International Economic and Trade Arbitration Commission (CIETAC), Construction Industry Arbitration Council (CIAC), Corporate Counsel International Arbitration Group (CCIAG), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), ICC International Court of Arbitration (ICC), Institute of International Commercial Law (IICL), International Arbitration Institute (IAI), International Bar Association (IBA), International Cotton Advisory Committee (ICAC), International Council for Commercial Arbitration (ICCA), International Federation of Commercial Arbitration Institutions (IFCAI), International Insolvency Institute (III), International Institute for Sustainable Development (IISD), Madrid Court of Arbitration, Miami International Arbitration Society (MIAS), Milan Club of Arbitrators, Moot Alumni Association of the Willem C. Vis International Commercial Arbitration Moot (MAA), New York State Bar Association (NYSBA), P.R.I.M.E. Finance Foundation (P.R.I.M.E.), Queen Mary University of London School of International Arbitration (QMUL), Swedish Arbitration Association (SAA) and Tehran Regional Arbitration Centre (TRAC).

10. The Working Group elected the following officers:

Chairman: Mr. Salim Moollan (Mauritius)

Rapporteur: Mr. David Brightling (Australia)

11. The Working Group had before it the following documents: (a) provisional agenda (A/CN.9/WG.II/WP.175); (b) notes by the Secretariat regarding the preparation of a legal standard on transparency in treaty-based investor-State arbitration (A/CN.9/WG.II/WP.176 and its addendum; and A/CN.9/WG.II/WP.177).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Preparation of a legal standard on transparency in treaty-based investor-State arbitration.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

13. The Working Group resumed its work on agenda item 4 on the basis of the notes prepared by the Secretariat (A/CN.9/WG.II/WP.176 and its addendum; A/CN.9/WG.II/WP.177). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations of the Working Group on other business are reflected in chapter V.

14. At the closing of its deliberations, the Working Group requested the Secretariat (i) to prepare a draft of revised rules on transparency in treaty-based investor-State arbitration based on the deliberations and decisions of the Working Group, and in that respect, to make the necessary drafting adjustments to ensure consistency of language in the text of the rules; (ii) to circulate the draft revised rules on transparency to Governments for their comments, with a view to consideration and adoption of the draft revised rules by the Commission at its forty-sixth session, to be held in Vienna from 8-26 July 2013; and (iii) to prepare a note for the consideration by the Commission containing the draft text of a convention on transparency, draft recommendations and model declarations, regarding the question of application of the rules on transparency to disputes arising under investment treaties concluded before their adoption (see A/CN.9/WG.II/WP.176/Add.1, paras. 14-34).

IV. Preparation of a legal standard on transparency in treaty-based investor-State arbitration

A. Consideration of outstanding substantive issues on the draft rules on transparency in treaty-based investor-State arbitration

15. The Working Group recalled the substantive matters left open for its consideration as part of the third reading of the rules on transparency as set out in paragraph 6 of document A/CN.9/WG.II/WP.176 (see also A/CN.9/760, paras. 123-124), and agreed to proceed first with the consideration of those issues.

1. Article 1 — Scope of application

16. The Working Group considered article 1 as contained in paragraph 7 of document A/CN.9/WG.II/WP.176 and, further to its agreement to proceed with outstanding substantive issues, proceeded to address paragraph (1) of article 1.

Paragraph (1) — Applicability of the legal standard on transparency

17. The Working Group recalled the approaches discussed at its fifty-sixth and fifty-seventh sessions in relation to paragraph (1). It was recalled that a solution in relation to the date of the conclusion of the treaty, whereby treaties concluded after the coming into force of the rules on transparency would require contracting Parties expressly to “opt-out” of their application, and for existing treaties, contracting Parties to “opt-in” to their application, had received wide support by way of compromise (see A/CN.9/741, para. 54).

18. It was said that neither option 1 nor option 3 (as contained in paragraph 7 of document A/CN.9/WG.II/WP.176) adequately reflected that compromise.

19. It was furthermore said that, although a proposal made at the fifty-seventh session of the Working Group and reproduced as option 2 (in paragraph 7 of document A/CN.9/WG.II/WP.176) had in some respects encapsulated the compromise referred to under paragraph 17 above, it did not sufficiently accommodate the views of those delegations that recognized that the rules on transparency could apply under existing treaties that referred to the UNCITRAL Arbitration Rules, in particular where the intention of those treaties — manifest by express wording therein — was to incorporate any amendments to the existing UNCITRAL Arbitration Rules as those rules evolved.

First proposal on paragraph (1)

20. Consequently and with a view to reconciling that viewpoint with the existing draft text of option 2, one delegation submitted a new proposal to replace paragraph (1) in its entirety, as follows (the “article 1(1) proposal”):

“1. The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (‘treaty’) concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise. 2. In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency] that does not expressly provide for application of the UNCITRAL Arbitration Rules ‘as amended,’ ‘as revised,’ or ‘as in force at the time a claim is submitted,’ or use words with similar meaning and effect, these Rules shall apply only when: (a) the disputing parties agree to their application in respect of that arbitration; or, (b) the Parties to the treaty, or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after [date of coming into effect of the Rules on Transparency] to their application. 3. These Rules shall not affect any authority that arbitral tribunals may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third parties. 4. These Rules are

available for use in investor-State arbitrations initiated under other arbitration rules or in ad hoc proceedings.”

21. It was clarified by way of introduction to that proposal that it sought to balance the different views expressed within the Working Group and was premised on two key objective factors. These factors were described as: (i) the timing of the conclusion of a treaty, and specifically, whether a treaty was concluded prior to or after the coming into force of the rules on transparency; and (ii) party autonomy, whereby Parties to treaties could determine whether the rules on transparency would or would not apply to disputes arising under that treaty.

22. It was said by way of summary that the article 1(1) proposal retained the compromise referred to under paragraph 17 above, by requiring a Party to the treaty to “opt-in” to the application of the rules on transparency in relation to its existing treaties, and to “opt-out” in relation to treaties concluded after the coming into force of the rules. It was furthermore clarified that the one category of treaties to which the rules on transparency could apply under the article 1(1) proposal, and which had not previously been caught by the compromise proposal in option 2 of paragraph 7 of document A/CN.9/WG.II/WP.176, were existing treaties that included express wording regarding the evolution of the UNCITRAL Arbitration Rules — for example, where a treaty referred to the UNCITRAL Arbitration Rules “as amended”, “as revised”, or “as in force at the time a claim is submitted”.

23. It was further stated by way of background that new paragraphs (3) and (4) of the proposal were in principle uncontroversial, with paragraph (3) simply ensuring that the new powers granted under the rules on transparency did not affect an arbitral tribunal’s decision-making powers under the UNCITRAL Arbitration Rules; and paragraph (4) re-stating the principle contained in the present paragraph (3) of article 1 of the draft rules on transparency (as set out in paragraph 7 of A/CN.9/WG.II/WP.176), namely that the rules on transparency may be used in conjunction with any applicable arbitration rules.

24. The Working Group proceeded to discuss the article 1(1) proposal, both with respect to the policy considerations it raised, and, as a secondary matter, any drafting improvements that might be required to clarify that proposal.

Policy considerations

25. Views were expressed that a reference in a treaty to the UNCITRAL Arbitration Rules “as amended” or similar expression should not be sufficient to make the rules on transparency applicable. In particular, the example was given of a treaty concluded at a time where arbitrations were held in confidence and where transparency standards were not widely contemplated. In response, it was said that where a treaty expressly provided for the application of an updated version of the UNCITRAL Arbitration Rules, Parties to the treaty had contemplated evolution at the time of negotiating it. In such cases, it was said that application of the rules on transparency should be possible where the arbitral tribunal considered that it reflected the agreement of the Parties to that treaty. It was also said that the expectations of confidentiality that one might have in relation to the UNCITRAL Arbitration Rules were peculiar to commercial arbitration and that such expectations would not necessarily extend to investor-State disputes.

26. A large number of delegations accepted that the article 1(1) proposal, which provided for the possibility of application of the rules on transparency where the treaty used express dynamic wording permitting such arguments to be made before an arbitral tribunal, represented a clear, reasonable and legally sound compromise, despite not reflecting their preferred option for article 1(1).

27. Many of those delegations expressed primary support in principle for the compromise as set out in paragraph 17 above, which did not provide for the possibility of application of the rules on transparency pursuant to a dynamic interpretation of a treaty by the arbitral tribunal. Many other delegations supporting the article 1(1) proposal as a reasonable compromise explained that their primary preference would be for the arbitral tribunal to have the ability, currently encapsulated in option 3 (as set out in paragraph 7 of A/CN.9/WG.II/WP.176), to apply the rules on transparency where the treaty was interpreted in accordance with international law to provide for such application. Nonetheless, in the spirit of achieving compromise, and in the interest of progressing the rules on transparency, many delegations expressing primary support for option 2 or option 3, acknowledged that the article 1(1) proposal, as set out in paragraph 20 above, would be acceptable.

Second proposal on paragraph (1)

28. After discussion, a new proposal, slightly modifying the article 1(1) proposal, was suggested (the “second proposal”), in order to achieve greater clarity regarding its scope, and in order to allay the concerns set out in paragraph 25 above. The second proposal would consist of deletion from the chapeau in paragraph (2) of the following: “that does not expressly provide for application of the UNCITRAL Arbitration Rules ‘as amended,’ ‘as revised,’ or ‘as in force at the time a claim is submitted,’ or use words with similar meaning and effect”. The chapeau would thus read: “In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency], these Rules shall apply only when:”. Furthermore a new paragraph (2)(c) would be added as follows: “the arbitral tribunal determines that language in the treaty providing for the application of the UNCITRAL Arbitration Rules, as amended, as revised, or as in force at the time a claim is submitted, or using words with the same meaning and effect, expresses the agreement of the contracting Parties to apply the Rules on Transparency.”

29. It was said that that proposal differed from option 3, because it limited the possibility of applying the rules on transparency based on dynamic treaty interpretation to those treaties that contained express wording (“as amended”, “as revised”, “as in force at the time a claim is submitted”, or words with similar meaning and effect). It was also said that that proposal clarified that an arbitral tribunal would have the discretion to accept submissions that such a dynamic interpretation was appropriate, but that the rules on transparency would not automatically apply where such wording existed. Finally, it was said that that wording made it clear that the role of the arbitral tribunal would be to interpret the treaty.

30. A large majority expressed support for the “second proposal”. The Working Group took note of suggestions made on that proposal as reflected under paragraphs 31 to 33 below.

31. As a matter of clarification, there was a shared understanding in the Working Group that (i) where a treaty contained rules on transparency which were drafted so as to prevail over the applicable arbitration rules, then the treaty provisions on transparency would prevail over the UNCITRAL rules on transparency, which in turn would prevail (as provided in draft article 1(3) of the rules on transparency, see paragraph 7 of document A/CN.9/WG.II/WP.176) over any applicable provision in the UNCITRAL Arbitration Rules; and (ii) nothing in article 1 should be construed as establishing rules on treaty interpretation.

Paragraph (2)(c) of the second proposal

32. It was suggested to amend paragraph (2)(c) of the second proposal so as to clarify that the arbitral tribunal should not on its own initiative make a determination on whether language in the treaty permitted application of the rules on transparency without a request of the parties to do so. One delegation disagreed with that suggestion.

Relation of the rules on transparency with the UNCITRAL Arbitration Rules

33. In response to a question regarding whether the UNCITRAL Arbitration Rules would be amended to include a reference to the rules on transparency, the Working Group was reminded of the draft proposal for amending the UNCITRAL Arbitration Rules, as contained in paragraph 15 of document A/CN.9/WG.II/WP.176. It was suggested that any amendment to the UNCITRAL Arbitration Rules be made effective as from the date of coming into effect of the transparency rules, as a number of treaties concluded since 2010 have included a reference to the 2010 UNCITRAL Arbitration Rules, and the Parties to such treaties did not necessarily intend to include rules on transparency.

Paragraph (2) — Application of the rules on transparency by the disputing parties

34. The Working Group considered article 1, paragraph (2), as contained in document A/CN.9/WG.II/WP.176, paragraph 7, which reflected the principle that the disputing parties cannot derogate from the rules on transparency unless permitted to do so by treaty (A/CN.9/741, paras. 60-81; A/CN.9/WG.II/WP.172, para. 19; A/CN.9/WG.II/WP.176, para. 17).

35. Views were expressed that paragraph (2)(b) might need to be slightly modified in order to ensure that the power it conferred on the arbitral tribunal to adapt the rules to achieve the objectives of transparency was clarified, in order to avoid such a power amounting to an additional exception to the rules (such as those set out in article 7), which, it was said, was not the intention of this provision. Rather, paragraph (2)(b) was intended only to provide some flexibility to the arbitral tribunal to adapt the rules should the circumstances of the proceedings so require. The Working Group mandated the Secretariat to amend the language as necessary in line with this objective.

36. In all other respects, the Working Group agreed on the substance of article 1, paragraph (2).

Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration Rules

37. The Working Group agreed on substance of article 1, paragraph (3) as contained in paragraph 7 of A/CN.9/WG.II/WP.176.

Paragraph (4) — Relationship between the rules on transparency and the applicable law

38. The Working Group agreed on substance of article 1, paragraph (4) as contained in paragraph 7 of A/CN.9/WG.II/WP.176.

Paragraph (5) — Discretion of the arbitral tribunal

39. The Working Group recalled that, at its fifty-sixth session, it had agreed on the substance of article 1, paragraph (5) regarding exercise of its discretion by the arbitral tribunal under the rules (A/CN.9/741, para. 85).

Footnote to article 1, paragraph (1)

- "a treaty providing for the protection of investments or investors"

40. The Working Group recalled that the footnote to article 1, aimed at clarifying the understanding that treaties to which the rules on transparency would apply should be understood in a broad sense, was agreed in substance at the fifty-sixth session of the Working Group (A/CN.9/741, para. 102).

2. Article 5 — Submission by a non-disputing Party to the treaty

41. The Working Group considered article 5 as contained in paragraph 38 of document A/CN.9/WG.II/WP.176, which provided for submission by a non-disputing Party to the treaty. In particular, at its fifty-seventh session, the Working Group identified that paragraph (1) of that article required further consideration by the Working Group (A/CN.9/760, para. 124; A/CN.9/WG.II/WP.176, para. 6).

Paragraph (1)

42. The Working Group considered whether the arbitral tribunal should, or should enjoy discretion to, accept submissions by a non-disputing Party to the treaty, and therefore whether the word "shall" or "may" should be used in paragraph (1) (see A/CN.9/WG.II/WP.176, para. 40).

43. Support was expressed for the use of the word "may" for the reason that it would provide the arbitral tribunal with discretion to accept submissions by a non-disputing Party to the treaty, thereby promoting a more flexible approach by, for example, permitting the arbitral tribunal to refuse submissions made at a late stage of the proceedings, when such submissions would disrupt the proceedings.

44. Support was also expressed for the principle that an arbitral tribunal should accept submissions by a non-disputing Party to the treaty, and therefore for the use of the word "shall". It was said that accepting submissions from non-disputing Parties to the treaty would ensure that balanced and comprehensive information would be provided to the arbitral tribunal and that all views would be on record, and

that the arbitral tribunal could in any event accord the weight to that submission as it saw fit. Moreover, it was observed that were a non-disputing Party to the treaty to make a submission, it would be unusual or unlikely for an arbitral tribunal to reject it.

45. In response to an invitation by the Working Group for States to review their treaties to identify if they contained provisions giving the non-disputing Party the right to submit an opinion on treaty interpretation to the arbitral tribunal (A/CN.9/760, para. 63), it was said that treaties were either silent on the matter, or included the word “shall” (the examples of the North American Free Trade Agreement and of the Central American Free Trade Agreement being given in that respect). It was furthermore said that to add a discretionary element would potentially diverge from current practice and dilute future standards in that regard.

46. A view was expressed that the proposed distinction regarding whether the arbitral tribunal should enjoy discretion in accepting submissions by a non-disputing Party to the treaty was not relevant in practice. It was said that a non-disputing Party could make submissions on its own initiative irrespective of the use of the word “may” or “shall”, and that the arbitral tribunal would in any case deal with them as it deemed appropriate. In response, it was stated that there could be situations where rejecting a submission would be justified. Therefore, regulating that matter with some flexibility was indeed necessary, in particular to deal with those situations such as late submissions disrupting the arbitral proceedings.

47. It was said that the use of the word “shall” did not preclude this flexibility, when paragraph (1) was read in conjunction with paragraph (4), which provided that the arbitral tribunal should ensure that any submission did not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

48. Two concerns were raised to this approach. First, it was said that the words “shall accept” might appear to prevent the arbitral tribunal from exercising any discretion under paragraph (4) where disruption was caused by, for example, a very late submission. Second, it was said that the second limb of paragraph (4), which addressed the question of prejudice caused to any disputing party by a submission, might not apply in relation to paragraph (1), as any submission on treaty interpretation could be seen as affecting the position of a party to the dispute.

49. In reply to the concerns set out in paragraph 48 above, it was said that (i) wording could be inserted to make clear that paragraph (4) applied, even where the words “shall accept” were used; and (ii) that the threshold in paragraph (4) was not whether prejudice would be caused, but rather a higher standard of whether “unfair” prejudice would result from such a submission.

50. A view was expressed that the ability of the arbitral tribunal to invite the non-disputing Party to make submissions with respect to treaty interpretation may prejudice the rights of the other Party to that treaty.

51. After discussion, the Working Group agreed that the arbitral tribunal should accept submissions by a non-disputing Party to the treaty, provided that any submissions would not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party. The Working Group also agreed that the word “accept” was clearer than “allow” in relation to submissions, and that the text should be amended accordingly. As a result, the Working Group agreed to amend paragraph (1) as follows: “1. The arbitral tribunal shall, subject to paragraph (4),

accept, or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.”

3. Article 6 — Hearings

52. The Working Group considered draft article 6 as contained in paragraph 44 of document A/CN.9/WG.II/WP.176. In particular, at its fifty-seventh session, the Working Group had identified that paragraph (1) of that article required further consideration by the Working Group (A/CN.9/760, para. 124; A/CN.9/WG.II/WP.176, para. 6) and, consequently, the Working Group resumed its discussions on that paragraph.

Paragraph (1)

53. At its fifty-seventh session, the Working Group had expressed significant support for the principle that the default rule would remain that hearings would be public under the transparency rules, subject only to the exceptions in paragraphs (2) and (3) (A/CN.9/760, para. 82). It was clarified that the text of paragraph (1) in relation to which the Working Group had agreed to proceed in that respect at its fifty-seventh session should read: “Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (‘hearings’) shall be public.” The wording as set out in paragraph 44 of document A/CN.9/WG.II/WP.176 did not accurately reflect that agreement.

54. At the fifty-seventh session of the Working Group, some delegations had supported instead the view that a disputing party should have a unilateral right to hearings being closed (A/CN.9/760, para. 79). That proposal did not receive support at the current session of the Working Group. Instead, it was proposed by way of alternative that hearings should be closed with the agreement of both disputing parties.

55. Substantial support was expressed for the text set out in paragraph 53 above. It was said that the exceptions to which the general rule on open hearings were subject, set out in paragraphs (2) and (3) of article 6, not only created a balanced regime and protected interests identified as potentially confidential or damaging to the integrity of the arbitral process, but furthermore that any valid objection to holding open hearings would be captured by those exceptions. It was additionally said that the mandate of the Working Group in developing rules on transparency was to create a standard that provided for a different, higher standard of transparency than the existing UNCITRAL Arbitration Rules, which provided as a default rule that hearings would be held in camera (see article 25(4) of the 1976 UNCITRAL Arbitration Rules and article 28(3) of the 2010 Rules). Views were expressed that creating a discrepancy between the levels of transparency in the publication of documents under article 3, and a derogable provision regarding open hearings in article 6, might lead to the circumvention of transparency by disputing parties. It was said that disputing parties might avoid submitting written documentation subject to a standard on transparency and instead raise those issues in closed hearings. It was furthermore pointed out that article 1, paragraph (2) provided that the disputing parties may not derogate from the rules on transparency, unless permitted to do so by the treaty, and that permitting a derogation from the general rule of open hearings by agreement between the disputing parties, in the rules on transparency, would be incompatible with that article.

56. Support was also expressed for the proposal set out in paragraph 54 above, namely that hearings should be closed where both disputing parties so agreed. It was said that that proposal was a compromise, insofar as it had moved away from the previous suggestion of a unilateral veto right, and that it would facilitate the resolution of disputes by disputing parties. It was said that that proposal struck a good balance in the rules on transparency, in light of the other provisions, including on publication, notices, submissions, awards and transcripts. It was also said that the cost burden would be lower on the disputing parties if hearings were closed. A proposed modification to the joint veto proposal, to grant the arbitral tribunal discretion to override the parties' joint veto in cases involving human rights, did not receive support.

57. Delegations supporting open hearings as the default rule, subject only to the exceptions set out in paragraphs (2) and (3) of article 6, and delegations supporting a joint veto right in respect of open hearings, were invited as a possible compromise to consider whether the text of paragraph (1) as set out in paragraph 44 of document A/CN.9/WG.II/WP.176 might provide adequate comfort in relation to both approaches. That text provided for open hearings as a default rule, subject to the exceptions set out in paragraphs (2) and (3), and in addition with a discretion of the arbitral tribunal to otherwise decide, after consultation with the disputing parties. It was also pointed out that article 1, paragraph (5) would then apply in relation to the discretion of the arbitral tribunal and the factors therein to be taken into account.

4. Article 7 — Exceptions to transparency

58. The Working Group considered draft article 7 as contained in paragraph 1 of document A/CN.9/WG.II/WP.176/Add.1, which addressed exceptions to transparency. In particular, at its fifty-seventh session, the Working Group had identified that paragraph (2)(c) of that article, as well as a draft proposal for two new paragraphs, tentatively numbered 2(d) and (2)bis, required further consideration by the Working Group (A/CN.9/760, para. 123; A/CN.9/WG.II/WP.176, para. 6).

Paragraph (2)(c)

59. The Working Group considered the three options under paragraph (2)(c): (i) option 1, under which the arbitral tribunal was to conduct a conflict of law analysis for all information; (ii) option 2, under which the arbitral tribunal was directed to the law of the respondent for the respondent's information, and a conflict of law analysis for all other information; and (iii) option 3, under which the arbitral tribunal was given guidance for its conflict of law analysis that on issues of respondent information, it should take respondent law particularly into account (A/CN.9/760, para. 104).

60. Support was expressed for option 1, on the basis that it best provided for all the different possibilities that might arise in an arbitration, and that the law of the respondent might not be best suited in every case. In that respect, it was said that the arbitral tribunal was best placed to make a determination in light of all of the circumstances. It was said by those delegations in favour of option 1 that option 3 might be an acceptable compromise insofar as it, while making express that the arbitral tribunal should take into account the applicable law of the respondent and

thus potentially providing comfort to delegations favouring option 2, did not mandate a certain determination.

61. Support was also expressed for option 2. It was said that the information provided by the respondent should be protected against being made available to the public under the applicable law of the respondent. It was said that a respondent would be bound by its own law in any event and that, in that regard, there should be a level of consistency between investment treaty arbitration and domestic laws.

62. Views were expressed that, as recorded at the fifty-seventh session of the Working Group (A/CN.9/760, para. 103), option 2 was open to abuse. It was recalled that the Working Group had expressed unanimous support for the proposal that it was not permissible for a State to adopt in its investment treaties the rules on transparency and then to use its domestic laws to undermine the spirit of those rules. The Working Group unanimously reaffirmed that view.

Paragraph (2)(d)

63. The Working Group considered paragraph (2)(d), which corresponded to a proposal made at the fifty-seventh session of the Working Group (A/CN.9/760, para. 117).

64. No support was expressed for that paragraph, and consequently the Working Group agreed to delete it.

Paragraph (2)bis

65. The Working Group considered the language in tentatively numbered paragraph (2)bis, which corresponded to a proposal made at the fifty-seventh session of the Working Group (A/CN.9/760, paras. 105-109). Some support was expressed for paragraph (2)bis on the basis that it provided a separate category of information than that set out in paragraph (2)(c), and that security interests were sufficiently critical that they must be carved out as self-judging exceptions in the rules on transparency.

66. It was said that the Working Group was mandated to produce rules on transparency and that paragraph (2)bis represented a wide-ranging exception which would allow a State to circumvent the rules on transparency unilaterally. In response, it was said that the language in that paragraph was used in a number of free trade agreements and bilateral investment treaties.

B. Proposals to resolve outstanding substantive issues on the draft rules on transparency in treaty-based investor-State arbitration

1. Proposals

67. With a view to resolving the outstanding substantive and policy issues, a possible compromise proposal was made in relation to, on the one hand the scope of application of the rules, and on the other hand, the level of transparency the rules would establish.

68. It was said that a compromise in that respect might be (i) to draft article 1 on the application of the rules on transparency, such that the rules on transparency

would not apply to existing treaties (except to the extent an instrument for their application such as those set out in paragraphs 14-34 of document A/CN.9/WG.II/WP.176/Add.1 was implemented), and that the rules on transparency would apply to treaties concluded in the future unless Parties to a treaty opted out of their application; and (ii) at the same time, to retain a high level of transparency in the substantive provisions addressing open hearings (article 6, paragraph (1)) and exceptions to transparency (draft article 7, paragraph (2)). In that manner, it was said that the rules on transparency need not compromise on substance or create a lower standard of transparency, because the rules would not apply save for where Parties to a treaty had so elected.

69. In that respect, the following specific proposal was introduced as a comprehensive package to resolve outstanding substantive and policy issues (the “compromise proposal”):

(i) A new draft of article 1(1) on applicability of the rules, as follows: “(1) The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (‘treaty’) concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise. (2) In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency], these Rules shall apply only when: (a) the disputing parties agree to their application in respect of that arbitration; or, (b) the Parties to the treaty, or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after [date of coming into effect of the Rules on Transparency] to their application under that treaty. (3) These Rules shall not affect any authority that arbitral tribunals may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third parties.”;

(ii) Draft article 6(1), as follows: “1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (‘hearings’) shall be public.”;

(iii) The selection of option 3 of draft article 7(2)(c) as set out in document A/CN.9/WG.II/WP.176/Add.1, paragraph 1; and

(iv) A modification to draft article 7(2)bis such that it would read “(2)bis. Nothing in these Rules shall require a disputing party to make available information [to the public] the disclosure of which it considers would be contrary to its essential security interests.”

70. Following discussion, it was noted that there was a very strong majority in favour of that compromise. Those delegations that could not accept the compromise proposal were invited (i) to determine, if a record of consensus were to be found in favour of the compromise proposal, whether those delegations would raise a formal objection to that record and, (ii) in parallel, to pursue discussions with other delegations.

71. Consequently, those delegations unable to accept the compromise proposal in paragraph 69 above introduced a new proposal as follows (the “counter-proposal”): (i) article 1 would remain as set out in paragraph 69(i) above; (ii) article 6(1) would remain as set out in the compromise proposal in paragraph 69(ii) above; (iii) option 2 of draft article 7(2)(c), rather than option 3, as set out in the compromise proposal, would be selected; and (iv) in draft article 7(2)bis, the language of the compromise proposal as set out in paragraph 69(iv) above would be adopted, but with an additional carve-out: specifically, an exception for information that would impede law enforcement, albeit without the self-judging standard to which essential security interests was subject in that paragraph.

2. Consideration of the proposals

72. The Working Group considered the compromise proposal, as set out in paragraph 69 above as well as the counter-proposal set out in paragraph 71 above. Some further support was added to the large majority expressing support for the compromise proposal.

73. It was said that in relation to both proposals, delegations had made important concessions and in so doing had moved from their original positions. In particular, it was said that in considering the counter-proposal, the concessions agreed by some delegations in the initial compromise proposal were open to re-negotiation only on a non-comprehensive, article-by-article basis.

74. In view of the large majority supporting the compromise proposal, those delegations that had been unable to accept the compromise proposal were invited to respond to whether, despite that compromise failing to represent their preferred solution, it would nonetheless be a solution that could be accepted. Those delegations requested further consideration of the counter-proposal in order to find common ground with those delegations supporting the compromise proposal.

3. Revised compromise proposal

75. After consultation, the Working Group proposed a revised compromise proposal (the “revised compromise proposal”). The articles the subject of the revised compromise proposal are set out in full as follows:

“Article 1

“(1) The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (‘treaty’) concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise.

“(2) In investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency], these Rules shall apply only when: (a) the disputing parties agree to their application in respect of that arbitration; or, (b) the Parties to the treaty or, in the case of a multilateral treaty, the home State of the investor and the respondent State, have agreed after [date of coming into effect of the Rules on Transparency] to their application.

“(3) These Rules shall not affect any authority that arbitral tribunals may otherwise have under the UNCITRAL Arbitration Rules to conduct the arbitration in such a manner as to promote transparency, for example by accepting submissions from third parties.

“(4) In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty: (a) The [disputing parties] [the parties to that arbitration (the ‘disputing parties’)] may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty; (b) The arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case if such adaptation is necessary to achieve the transparency objectives of these Rules in a practical manner.

“(5) Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail. Notwithstanding any provision in these Rules, where there is a conflict between the Rules on Transparency and the treaty, the provisions of the treaty shall prevail.

“(6) Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

“(7) Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings, and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

“(8) In the presence of any conduct, measure or other action having the effect of wholly undermining the transparency objectives of these Rules, the arbitral tribunal shall ensure that those objectives prevail.

“Footnote to article 1, paragraph (1):

“* For the purpose of the Rules on Transparency, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any agreement concluded between or among States or regional integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, so long as it contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty.”

“Article 6

“(1) Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (‘hearings’) shall be public.

“(2) Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make

arrangements to hold in private that part of the hearing requiring such protection.

“(3) The arbitral tribunal shall make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) but may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render infeasible any original arrangement for public access to a hearing.”

“Article 7

“Confidential or protected information

“(1) Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 4 and 5, shall not be made available to the public or to non-disputing Parties to the treaty pursuant to articles 2 to 6.

“(2) Confidential or protected information consists of: (a) Confidential business information; (b) Information that is protected against being made available to the public under the treaty; (c) Information that is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information; or (d) Information the disclosure of which would impede law enforcement.

“(3) Nothing in these Rules requires a respondent to make available to the public information the disclosure of which it considers to be contrary to its essential security interests.

“(4) The arbitral tribunal, in consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public or to non-disputing Parties to the treaty including by putting in place, as appropriate (a) time limits in which a disputing party, non-disputing Party to the treaty, or third person shall give notice that it seeks protection for such information in a document, (b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents, and (c) procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

“(5) Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

“Integrity of the arbitral process

“(6) Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 7.

“(7) The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the arbitral process because (a) it could hamper the collection or production of evidence, or (b) it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances.”

76. All delegations supported the revised compromise proposal save for two delegations, which indicated that they could positively recommend the text to their Governments but required further time to consider that proposal.

77. After discussion, those delegations formally accepted the revised compromise proposal set out in paragraph 75 above, with one delegation expressing concerns regarding article 6(1) of that proposal in relation to open hearings.

78. The Working Group expressed formal and unanimous support for the revised compromise proposal.

Amendment to the UNCITRAL Arbitration Rules

79. The Working Group agreed that, given the solution reached as recorded in paragraph 75 above, the UNCITRAL Arbitration Rules would require an amendment in article 1(4) of those Rules in order to create a link with the rules on transparency along the lines of the language in paragraph 15 of document A/CN.9/WG.II/WP.176, and that this amendment would result in a new 2013 or 2014 version of the Rules.

80. The Working Group agreed that the language in paragraph 15 of document A/CN.9/WG.II/WP.176, with the addition of the words in brackets “[as an appendix]” after the words “include the UNCITRAL Rules on Transparency”, would be presented to the Commission in that respect.

C. Establishment of a registry of published information

1. Institution(s) to serve as a registry

81. The Working Group considered article 8 as contained in paragraph 9 of document A/CN.9/WG.II/WP.176/Add.1, which addressed the repository of published information, and which contained two options regarding the possible institutional management of a registry — on the one hand, a single registry to undertake all functions (option 1); and on the other, a system whereby various arbitral institutions would maintain their own registry system (option 2).

82. The Working Group also had before it a note by the Secretariat (A/CN.9/WG.II/WP.177) further to the mandate given by the Working Group to the Secretariat to liaise with arbitral institutions to assess better the cost and other

implications of the establishment of a registry under the draft rules on transparency (A/CN.9/760, paras. 122 and 123).

83. The Working Group noted the strong preference of arbitral institutions for there to be a single institution to undertake the registry function (option 1 of draft article 8), for a number of reasons (A/CN.9/WG.II/WP.177, paras. 6-11). After discussion, the Working Group agreed that option 1, a single registry, was its preferred option, and proceeded to consider which institution should undertake that work.

84. The Working Group expressed the unanimous view that the best institution to serve as a registry under the rules on transparency would be UNCITRAL.

85. The Working Group also took note of the willingness of two other institutions, the International Centre for Settlement of Investment Disputes (ICSID), and the Permanent Court of Arbitration at The Hague (PCA), to undertake the function of a single registry under the rules on transparency should UNCITRAL not be in a position to take up that role.

2. Hard copy documents

86. After discussion, the Working Group agreed, having regard to the issues raised in paragraph 15 of document A/CN.9/WG.II/WP.177, that the registry would only publish electronic documents. Consequently, the Working Group agreed to delete the square bracketed wording in article 8.

3. Guidelines

87. The Working Group agreed that a document setting out guidelines for the functioning of a registry should be drafted, and that it would be within the remit of the institution ultimately serving as registry to create the same.

4. Waiver of liability

88. The Working Group considered whether a waiver of liability clause, in respect of both the arbitral tribunal, through which the documents would be sent to the registry under article 3, and for the registry itself, should be added to the rules. The question of how to address liability claims brought by third parties (e.g., in case of violation of data privacy) was also raised. The Working Group agreed that the registry should enjoy the widest possible immunity. It was agreed that the UNCITRAL Secretariat, the PCA and ICSID would consider, in relation to their respective institutions, whether a waiver of liability clause would need to be included in the rules, taking into account that immunities may attach to those institutions by virtue of their status as international organizations.

D. Consideration of outstanding drafting issues on the draft rules on transparency in treaty-based investor-State arbitration

89. The Working Group agreed to consider outstanding drafting issues relating to the rules on transparency. It was clarified that the guiding principle in considering those suggestions was to ensure the rules on transparency functioned properly but not to alter in any way the substance of provisions already agreed.

1. Article 2 — Publication of information at the commencement of arbitral proceedings

90. In order to clarify that the notice of arbitration had been transmitted to, or received by, the respondent before publication of information pursuant to article 2, the Working Group agreed that the second sentence of article 2 should be amended to read as follows: “Upon receipt of the notice of arbitration from the respondent, or upon receipt of the notice of arbitration and a record of its transmission to the respondent, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.”

2. Article 3 — Publication of documents

General

91. The Working Group considered how the registry would deal with requests for documents after the arbitral tribunal has discharged its function and its mandate terminated. It was clarified that requests for documents would have to be made before the arbitration terminated, as in any case, documents published by the registry could only be communicated to the registry by the arbitral tribunal. It was suggested that disputing parties should be encouraged to work out an arrangement to deal with requests for documents after the arbitral tribunal had discharged its functions.

Paragraphs (1), (2) and (3)

92. As a matter of drafting, the Working Group agreed to delete the words “which must be requested separately under paragraph 3” in draft article 3, paragraphs (1) and (2). Further, the Working Group agreed to add the word “exhibits and” before the words “any other documents” in the first sentence of paragraph (3).

Paragraph (2)

93. The Working Group further considered whether paragraph (2) might create ambiguity in relation to a request for expert reports or witness statements after the arbitral tribunal had discharged its duties (A/CN.9/WG.II/WP.177, para. 23). It was agreed to add the words “to the arbitral tribunal” at the end of paragraph (2) in order to clarify (as set out in paragraph 91 above) that requests must be made whilst the arbitral tribunal was extant.

Paragraph (5)

94. The Working Group took note of a concern that the phrase “any administrative costs” in paragraph (5) might be ambiguous insofar as it might, erroneously, suggest that a third party may have to pay for the administrative costs relating to publication such as uploading onto the registry website. The Working Group requested that the Secretariat amend the language accordingly.

V. Other business

95. The Working Group recalled that the Secretariat was entrusted by the Commission with the preparation of a guide on the New York Convention, in order to promote a more uniform interpretation and application of the Convention. That project is carried out by the Secretariat in close cooperation with Professors G. Bermann and E. Gaillard. Mr. Gaillard, with his research team, in conjunction with Mr. Bermann and his research team, with the support of the Secretariat have established a website (www.newyorkconvention1958.org) in order to make the information gathered in the preparation of the guide on the New York Convention publicly available. The purpose of the website is to make available details on the judicial interpretation of the Convention by States Parties.

96. The Working Group was informed that the [newyorkconvention1958.org](http://www.newyorkconvention1958.org) website has been upgraded and streamlined to make the latest version a more complete and user-friendly research and information tool for legislators, judges, practitioners, parties and academics. The interface has been improved to facilitate quick or advanced searches, which can be performed by clicking on icons, checkboxes, or suggested search terms. It can handle complex search equations and track the results of multiple-step searches. As part of the latest update to the [newyorkconvention1958.org](http://www.newyorkconvention1958.org) website, users can access a larger and constantly growing database of information. To date, the [newyorkconvention1958.org](http://www.newyorkconvention1958.org) website assembles summaries of 782 cases on the implementation of the New York Convention from 18 jurisdictions, and makes available over 900 original-language decisions and 90 English-language translations.

97. Case law and summaries from other jurisdictions will be added to the website on an ongoing basis. In that respect, delegates were invited to contribute case law from their jurisdiction through the website.

98. The Working Group expressed its appreciation for the establishment of the website and for its update. Special appreciation was expressed to Ms. Yas Banifatemi who coordinated the work under the project.

**F. Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based
investor-State arbitration, submitted to the Working Group on
Arbitration and Conciliation at its
fifty-eighth session**

(A/CN.9/WG.II/WP.176 and Add.1)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), with respect to future work in the field of settlement of commercial disputes, the Commission recalled the decision made at its forty-first session (New York, 16 June-3 July 2008)¹ that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the revision of the UNCITRAL Arbitration Rules. The Commission entrusted its Working Group II with the task of preparing a legal standard on that topic.²

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reiterated its commitment expressed at its forty-first session regarding the importance of ensuring transparency in treaty-based investor-State arbitration. It was confirmed that the question of applicability of the legal standard on transparency to existing investment treaties was part of the mandate of the Working

¹ *Official records of the General Assembly, Sixty-third Session, Supplement No. 17 and corrigendum (A/63/17 and Corr.1)*, para. 314.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 190.

Group and a question with a great practical interest, taking account of the high number of such treaties already concluded.³

3. At its forty-fifth session (25 June-6 July 2012), the Commission reaffirmed the importance of ensuring transparency in treaty-based investor-State arbitration expressed at its forty-first session, in 2008, and at its forty-fourth session, in 2011,⁴ and urged the Working Group to pursue its efforts and to complete its work on the rules on transparency for consideration by the Commission preferably at its next session.⁵

4. At its fifty-third (Vienna, 4-8 October 2010) and fifty-fourth (New York, 7-11 February 2011) sessions, the Working Group considered the matters of form, applicability and content of a legal standard on transparency in treaty-based investor-State arbitration.⁶ At its fifty-fifth session (Vienna, 3-7 October 2011), the Working Group completed a first reading of the draft rules on transparency in treaty-based investor-State arbitration (as contained in document A/CN.9/WG.II/WP.166 and its addendum).⁷ At its fifty-sixth (New York, 6-10 February 2012) and fifty-seventh (Vienna, 1-5 October 2012) sessions, the Working Group undertook a second reading of the draft rules on transparency (as contained in document A/CN.9/WG.II/WP.169 and its addendum).⁸

5. In accordance with the decisions of the Working Group at its fifty-seventh session (A/CN.9/760, para. 12), part II of this note contains a revised draft of the rules on transparency (articles 1 to 6 are dealt with in this note and articles 7 and 8 in the addendum to this note). The question of instruments that could be prepared regarding the application of the rules on transparency to the settlement of disputes arising under investment treaties concluded before the date of adoption of the rules on transparency is addressed in part III (in the addendum to this note), as well as in document A/CN.9/WG.II/WP.166/Add.1, part III.

II. Draft rules on transparency in treaty-based investor-State arbitration

A. General remarks

List of outstanding issues for the consideration by the Working Group

6. At its fifty-seventh session, the Working Group noted matters left open for its consideration as part of the third reading of the rules on transparency, as follows: article 1(1) on the scope of application (see below, paras. 8-16); article 5(1), regarding whether the word “may” or “shall” should be used in relation to

³ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

⁴ Ibid., *Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314; *ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 200.

⁵ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), paras. 65-69.

⁶ Reports of the Working Group on the work of its fifty-third (A/CN.9/712) and fifty-fourth (A/CN.9/717) sessions.

⁷ Report of the Working Group on the work of its fifty-fifth session (A/CN.9/736).

⁸ Report of the Working Group on the work of its fifty-sixth (A/CN.9/741) and fifty-seventh (A/CN.9/760) sessions.

permission by the arbitral tribunal of submissions on issues of treaty interpretation from a non-disputing Party to the treaty (see below, para. 40); article 6(1), regarding the question of open hearings, and whether a disputing party should have a unilateral right to hearings being closed (see below, para. 45); article 7(2)(c) and a draft proposal for two new paragraphs, tentatively numbered (2)(d) and (2)bis, regarding the definition of confidential or protected information and a provision on the respondent's ability to prevent the disclosure of certain information, respectively (see document A/CN.9/WG.II/WP.176/Add.1, paras. 4-6); and article 8, on the organization of a repository of published information (see document A/CN.9/WG.II/WP.176/Add.1, para. 10 and 11).

B. Content of draft rules on transparency in treaty-based investor-State arbitration

Article 1. Scope of application

7. Draft article 1 — Scope of application.

Paragraph (1) — Applicability of the legal standard on transparency

Option 1 (see document A/CN.9/WG.II/WP.172, paras. 6-18)

“1. The Rules on Transparency shall apply to investor-State arbitration initiated pursuant to a treaty providing for the protection of investments or investors (“treaty”) when the Parties to the treaty [or all parties to the arbitration (the “disputing parties”)] have agreed to their application. In a treaty concluded after [date of coming into effect of the Rules on Transparency], a reference in the treaty to the UNCITRAL Arbitration Rules shall be presumed to incorporate the Rules on Transparency, unless the Parties to the treaty have agreed otherwise, such as through a reference to a particular version of the UNCITRAL Arbitration Rules [that does not refer to the Rules on Transparency].”*

Option 2 (see document A/CN.9/760, para. 132)

“1. The Rules on Transparency shall apply to investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty providing for the protection of investments or investors (“treaty”) concluded after [date of coming into effect of the Rules on Transparency], unless the Parties to the treaty have agreed otherwise.*

2. In respect of (i) investor-State arbitrations initiated under the UNCITRAL Arbitration Rules pursuant to a treaty concluded before [date of coming into effect of the Rules on Transparency] and (ii) investor-State arbitrations initiated under other arbitration rules or ad hoc, the Rules on Transparency shall [only] apply [if][provided that]:

(a) The disputing parties agree to their application in respect of that arbitration; or

(b) The Parties to the treaty, or in the case of a multilateral treaty, the home State of the investor and the respondent, have agreed to

the application of these Rules [after] [in an instrument adopted after] [date of coming into effect of the Rules on Transparency].”

Option 3 (see document A/CN.9/WG.II/WP.174)

“1. If a treaty concluded prior to [date of adoption/effective date of the Rules on Transparency] refers to the UNCITRAL Arbitration Rules, that reference means the version of the UNCITRAL Arbitration Rules that incorporates the Rules on Transparency if the treaty, as interpreted in accordance with international law, reflects the agreement of the Parties to the treaty to the application of that version of the UNCITRAL Arbitration Rules. The Parties to the treaty may also agree, after [date of adoption/effective date of the Rules on Transparency], to apply the Rules on Transparency under a treaty concluded prior to that date.

Paragraph (2) — Application of the rules on transparency by the disputing parties

“2. “In any arbitration in which the Rules on Transparency apply pursuant to a treaty or to an agreement by the Parties to that treaty,

(a) The [disputing parties] [the parties to that arbitration (the “disputing parties”)] may not derogate from these Rules, by agreement or otherwise, unless permitted to do so by the treaty;

(b) The arbitral tribunal shall have the power, beside its discretionary authority under certain provisions of these Rules, to adapt the requirements of any specific provision of these Rules to the particular circumstances of the case if such adaptation is necessary to achieve the transparency objectives of these Rules in a practical manner.

Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration rules

“3. Where the Rules on Transparency apply, they shall supplement any applicable arbitration rules. Where there is a conflict between the Rules on Transparency and the applicable arbitration rules, the Rules on Transparency shall prevail.

Paragraph (4) — Relationship between the rules on transparency and the applicable law

“4. Where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the disputing parties cannot derogate, that provision shall prevail.

Paragraph (5) — Discretion of the arbitral tribunal

“5. Where the Rules on Transparency provide for the arbitral tribunal to exercise discretion, the arbitral tribunal in exercising such discretion shall take into account, (a) the public interest in transparency in treaty-based investor-State arbitration and in the particular arbitral proceedings, and (b) the disputing parties’ interest in a fair and efficient resolution of their dispute.

Footnote to article 1, paragraph (1):

“ For the purpose of the Rules on Transparency, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any agreement concluded between or among States or regional integration organizations, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, so long as it contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty.”*

Remarks

Paragraph (1) — Applicability of the rules on transparency

8. At its fifty-sixth session, the Working Group entrusted the Secretariat with the preparation of a revised version of article 1(1) (A/CN.9/741, paras. 54 and 57). At that session, the Working Group had considered two solutions for the applicability of the rules on transparency. Under the “opt-out” solution, the rules on transparency would be incorporated into the UNCITRAL Arbitration Rules (as revised in 2010), and consequently would apply under investment treaties providing for arbitration under the UNCITRAL Arbitration Rules, unless the investment treaty provided that the rules on transparency did not apply (A/CN.9/741, para. 14). It was discussed whether, under this “opt-out” solution, the rules on transparency would also apply to arbitrations arising under existing treaties. It was said that the application of the rules to existing treaties might result from a “dynamic interpretation” of an investment treaty, meaning that a reference in such a treaty to the UNCITRAL Arbitration Rules might be interpreted to incorporate the rules on transparency (A/CN.9/741, paras. 20 and 42). Under the “opt-in” solution, the rules on transparency would only apply when the High Contracting parties (referred to as “Parties”) to an investment treaty expressly consent to their application (A/CN.9/741, para. 14).

- Option 1

9. At that session, views expressed differed on (i) whether an opt-in or opt-out approach was preferable and (ii) whether the possibility of dynamic interpretation for existing investment treaties should be left open (A/CN.9/741, para. 55). Pursuant to the instructions from the Working Group to redraft article 1(1) based on the deliberations at its fifty-sixth session (A/CN.9/741, paras. 54 and 57), option 1, reproduced above in paragraph 7, was proposed in document A/CN.9/WG.II/WP.172, paragraph 6. The first sentence of draft paragraph (1) states the general principle of public international law that treaty Parties can only be bound by an external set of rules if they have so agreed. The second sentence of paragraph (1) refers to treaties concluded after the date of coming into effect of the rules on transparency. It establishes a presumption in favour of the applicability of the rules on transparency.

10. Delegations that found it difficult to agree with the approach described above under paragraph 9 were invited to communicate drafting suggestions in that respect

to the Secretariat for consideration by the Working Group (A/CN.9/741, para. 59). Options 2 and 3 correspond to proposals by delegations.

- Option 2

11. Option 2 was proposed for further consideration during the fifty-seventh session the Working Group. Paragraph (1) establishes the principle that for investment treaties concluded after the date of adoption of the rules on transparency, the rules shall apply when a dispute is initiated under the UNCITRAL Arbitration Rules unless the Parties to the investment treaty have agreed otherwise. Paragraph (2) establishes the principle that for investment treaties concluded before the date of adoption of the rules on transparency, the rules on transparency would apply to a dispute initiated under any arbitration rules where (a) the disputing parties agree to their application in relation to that arbitration; or (b) the Parties to the treaty have so agreed after the date of adoption/effective date of the rules on transparency. As part of option 2, a proposal was made to amend article 1 of the 2010 UNCITRAL Arbitration Rules (see below, para. 15).

- Option 3

12. Option 3 also aims at establishing principles of application of the rules on transparency for investment treaties concluded before the date of adoption of the rules on transparency. This proposal (also reproduced with comments in document A/CN.9/WG.II/WP.174) was made on the basis that no rule or presumption should be established in the transparency rules regarding their application under existing investment treaties, but rather that internationally accepted rules of treaty interpretation should prevail (A/CN.9/760, para. 140).

- Rules on transparency as stand-alone rules or as appendix

13. At its fifty-sixth session, the Working Group requested the Secretariat to provide an analysis of the implications of presenting the rules on transparency in the form of an appendix to the 2010 UNCITRAL Arbitration Rules or as a stand-alone text. If the rules on transparency were to become an appendix to the 2010 UNCITRAL Arbitration Rules, this would result in three sets of UNCITRAL Arbitration Rules: 1976 UNCITRAL Arbitration Rules, 2010 UNCITRAL Arbitration Rules and the 2013 UNCITRAL Arbitration Rules (see document A/CN.9/WG.II/WP.172, paras. 11-16).

14. At the fifty-sixth session of the Working Group, concerns had been expressed that it might be difficult to exclude a dynamic interpretation if the transparency rules were presented as an appendix to the UNCITRAL Arbitration Rules (A/CN.9/741, para. 57). If the rules on transparency were to take the form of a stand-alone text, the possibility of a dynamic interpretation would be more limited.

15. At the fifty-seventh session of the Working Group, a proposal was made to articulate the link between the 2010 UNCITRAL Arbitration Rules and the rules on transparency, without formally making the rules on transparency part of, or an annex to, the 2010 UNCITRAL Arbitration Rules. That proposal was made in conjunction with option 2 (see above, para. 11) (A/CN.9/760, para. 133). In this respect, it was proposed to amend article 1 of the 2010 UNCITRAL Arbitration Rules as follows: “4. *For investor-State arbitrations initiated pursuant to a*

treaty providing for the protection of investments or investors, these Rules of Arbitration include the UNCITRAL Rules on Transparency [as amended from time to time] subject to article 1 of the UNCITRAL Rules on Transparency.” The Working Group may wish to consider that, if the rules on transparency are a stand-alone text, it may then not be necessary to amend the 2010 UNCITRAL Arbitration Rules. The rules on transparency would apply in conjunction with the UNCITRAL Arbitration Rules, as they would apply in conjunction with any other sets of arbitration rules.

- Date of adoption/effective date of the rules on transparency

16. The Working Group may wish to consider whether the date of coming into effect of the rules on transparency should be the date of their adoption by the Commission, or a later date.

Paragraph (2) — Application of the rules on transparency by the disputing parties

17. Paragraph (2) reflects the modifications found acceptable at the fifty-sixth session of the Working Group (A/CN.9/741, paras. 74, 78 and 81). It establishes the principle that the disputing parties may not derogate from the rules on transparency unless permitted to do so by the investment treaty, for the policy reason that it would not be appropriate for the disputing parties to reverse a decision made by the Parties to the investment treaty regarding application of the rules, particularly as the rules are intended to benefit not only the investor and the host State but also the general public (A/CN.9/741, para. 61). Pursuant to the decision made by the Working Group at its fifty-sixth session, paragraph (2) provides, in addition, for the possibility that the arbitral tribunal could adapt the rules on transparency (A/CN.9/741, paras. 73, 74, 78 and 81). As a matter of drafting, if the reference to the disputing parties is retained under paragraph (1), the definition of disputing parties in paragraph (2)(a) would be deleted.

Paragraph (3) — Relationship between the rules on transparency and the applicable arbitration rules

18. At the fifty-sixth session of the Working Group, a large majority was in favour of including a provision on the relationship between the rules on transparency and the applicable arbitration rules (A/CN.9/741, para. 97).

Paragraph (4) — Relationship between the rules on transparency and the applicable law

19. At its fifty-sixth session, the Working Group mandated the Secretariat to complement the provision on the relationship between the rules on transparency and the applicable arbitration rules with a provision on the relationship between the rules on transparency and the applicable law pursuant to the provision contained in article 1(3) of the 2010 UNCITRAL Arbitration Rules (A/CN.9/741, para. 97). The Working Group may wish to consider article 1(4) as contained above in paragraph 7, which closely follows the wording of article 1(3) of the 2010 UNCITRAL Arbitration Rules. The Working Group may wish to note that, depending on the applicable domestic law, disputing parties could then derogate from the rules on transparency (see also document A/CN.9/WG.II/WP.176/Add.1, paras. 4-6).

Paragraph (5) — Discretion of the arbitral tribunal

20. At its fifty-sixth session, the Working Group adopted the substance of paragraph (5) (A/CN.9/741, para. 85).

Footnote to article 1, paragraph (1)

21. The footnote to article 1(1) on the definition of the term “a treaty providing for the protection of investments or investors” reflects the drafting proposals made at the fifty-sixth session of the Working Group. The footnote aims at clarifying the understanding that investment treaties to which the rules on transparency would apply should be understood in a broad sense. The footnote was approved by the Working Group, subject to the deletion of the word “intergovernmental” after the word “integration” and the use of reference to the “protection of investments and investors” in a consistent manner (A/CN.9/741, paras. 101 and 102).

Article 2. Publication of information at the commencement of arbitral proceedings

22. Draft article 2 — Publication of information at the commencement of arbitral proceedings.

“Once the notice of arbitration has been received by the respondent, each of the disputing parties shall promptly communicate a copy of the notice of arbitration to the repository referred to under article 8. Upon its receipt of the notice of arbitration from either disputing party, the repository shall promptly make available to the public information regarding the name of the disputing parties, the economic sector involved, and the treaty under which the claim is being made.”

Remarks

23. At its fifty-sixth session, the Working Group adopted article 2 in the version that left the publication of the notice of arbitration (and of the response thereto) to be dealt with under article 3, after the constitution of the arbitral tribunal (A/CN.9/741, para. 109). Article 2 encapsulates the drafting modifications agreed to by the Working Group (A/CN.9/741, para. 109) in order to clarify that all disputing parties should have the obligation to send the notice of arbitration to the repository. The repository in turn should publish the information once it receives the notice of arbitration from either disputing party.

24. The Working Group may wish to consider: (i) how to address a situation where a notice of arbitration is sent by a claimant to the repository before the arbitral proceedings had commenced, i.e., before the notice of arbitration had been received by the respondent (A/CN.9/741, para. 107); (ii) whether the opening words “once the notice of arbitration has been received by the respondent” sufficiently address that matter; (iii) the difficulties of fulfilling the administrative functions involved for the repository in that regard.

Article 3. Publication of documents

25. Draft article 3 — Publication of documents.

“1. Subject to article 7, the following documents shall be made available to the public: the notice of arbitration; the response to the notice of arbitration; the statement of claim, the statement of defence and any further written statements or written submissions by any disputing party; a table listing all exhibits to the aforesaid documents and to expert reports and witness statements, if such table has been prepared for the proceedings, but not the exhibits themselves, which must be requested separately under paragraph 3; any written submissions by the non-disputing Party(ies) to the treaty and by third persons; transcripts of hearings, where available; and orders, decisions and awards of the arbitral tribunal.

“2. Subject to article 7, expert reports and witness statements, exclusive of the exhibits thereto which must be requested separately under paragraph 3, shall be made available to the public, upon request by any person.

“3 Subject to article 7, the arbitral tribunal may decide, on its own initiative or upon request from any person, and after consultation with the disputing parties, whether and how to make available any other documents provided to, or issued by, the arbitral tribunal not falling within paragraphs 1 or 2 above. This may include, for example, making such documents available at a specified site.

“4. The documents to be made available to the public pursuant to paragraphs 1 and 2 shall be communicated by the arbitral tribunal to the repository referred to under article 8 as soon as possible, subject to any relevant arrangements or time limits for the protection of confidential or protected information prescribed under article 7. The documents to be made available pursuant to paragraph 3 may be communicated by the arbitral tribunal to the repository referred to under article 8 as they become available and, if applicable, in a redacted form in accordance with article 7. The repository shall make all documents available in a timely manner, in the form and in the language in which it receives them.

“5. A person, who is not a disputing party, granted access to documents under paragraphs 2 or 3, shall bear any administrative costs of such access (such as photocopying or shipping documents).”

Remarks

26. Article 3 reflects a proposal made at the fifty-fifth session of the Working Group that the provision on publication of documents should provide: (i) a list of documents made available to the public; (ii) discretionary power of the arbitral tribunal to order publication of additional documents and (iii) an opportunity for third persons to request access to additional documents (A/CN.9/736, paras. 54-66). Such a provision was seen as establishing a good balance between the documents to be published and the exercise by the arbitral tribunal of its discretion in managing the process (A/CN.9/736, paras. 58 and 65).

Paragraph (1) — List of documents*- Table listing exhibits*

27. The words “, if such table has been prepared for the proceedings, but not the exhibits themselves, which must be requested separately under paragraph 3” have been included to reflect the decisions of the Working Group at its fifty-seventh session that: (i) where a table of exhibits already exists, there will be an obligation to produce it pursuant to paragraph (1), but if a list of exhibits has not been produced in the course of proceedings, there will not be a requirement to create one for the purposes of disclosure under article 3 (A/CN.9/760, para. 16); and (ii) exhibits themselves should not fall within the scope of paragraph (1), but should rather be subject to disclosure on a discretionary basis under other provisions of article 3 (A/CN.9/760, para. 15).

- Expert reports and witness statements

28. The reference to “witness statements and expert reports” has been deleted from the list under paragraph (1) in accordance with the decision of the Working Group at its fifty-seventh session that those documents be taken out of the ambit of paragraph (1), and dealt with separately (A/CN.9/760, paras. 20-22) (see below, para. 31).

- Transcripts

29. At its fifty-seventh session, the Working Group recalled its previous discussion, and agreement (see document A/CN.9/736, paras. 107 to 109) to include transcripts in article 3(1) on the basis, inter alia, that confidential information in transcripts could be redacted and that therefore transcripts should be treated in the same fashion as the other documents listed in paragraph (1). The words “where available” are intended to clarify that article 3 does not impose a requirement that transcripts be produced where none have been made in the course of proceedings (A/CN.9/760, paras. 23 and 24).

- Arbitral award

30. Further to a decision of the Working Group at its fifty-seventh session, arbitral awards are now included in the list of documents to be made available to the public under article 3(1), thus rendering article 4 of the previous draft rules (as contained in document A/CN.9/WG.II/WP.169, para. 33) obsolete (A/CN.9/760, para. 38). That article has consequently been deleted, and the draft rules have been renumbered accordingly.

Paragraph (2) — Expert reports and witness statements

31. Paragraph (2) is a new paragraph reflecting the decision of the Working Group at its fifty-seventh session that expert reports and witness statements be taken out of the ambit of paragraph (1), and a separate category created under article 3 for those documents. Expert reports and witness statements shall be made available upon request by any person, subject to article 7 (A/CN.9/760, paras. 20-22). Exhibits to those documents would be subject to separate request under the provisions of article 3(3), as with exhibits to pleadings or other submissions (A/CN.9/760, para. 20).

Paragraph (3) — Further documents

32. Paragraph (3) reflects the decision of the Working Group at its fifty-seventh session that the arbitral tribunal, on its own initiative or upon request from a disputing party or a person who is not a disputing party, would have the discretion to decide whether and how to make available to the public any other documents submitted to, or issued by, the arbitral tribunal, not falling within paragraphs (1) or (2) (A/CN.9/760, paras. 28-30). (As a result, paragraphs (2) and (3) of article 3, as contained in document A/CN.9/WG.II/WP.169, paragraph 29 have been merged into a single paragraph (3)). The last sentence of paragraph (3) is meant to provide guidance to the arbitral tribunal as to alternative measures for making such documents public at a certain location.

Paragraph (4) — Communication of documents to the repository

33. Paragraph (4) corresponds to a drafting proposal approved by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 34 and 35), which has been modified slightly to retain consistency with article 7.

Paragraphs (1) to (4) — Relationship with article 7 (previously article 8)

34. In order to reflect the decision of the Working Group at its fifty-seventh session that article 3 should refer to article 7, instead of “exceptions set out in” article 7, the opening words of the respective paragraphs read “Subject to article 7 (...)” (A/CN.9/760, paras. 32 and 33).

Paragraph (5) — Costs

35. Paragraph (5) is a new provision reflecting the decision of the Working Group at its fifty-seventh session that persons, other than the disputing parties, requesting access to documents would be required to meet the administrative costs of such access (such as photocopying, shipping, etc.) (A/CN.9/760, para. 130).

Article 4. Submission by a third person (formerly numbered article 5)

36. Draft article 4 — Submission by a third person.

“1. After consultation with the disputing parties, the arbitral tribunal may allow a person that is not a disputing party and not a non-disputing Party to the treaty (“third person(s)”) to file a written submission with the arbitral tribunal regarding a matter within the scope of the dispute.

“2. A third person wishing to make a submission shall apply to the arbitral tribunal, and shall, in a concise written statement, which is in a language of the arbitration and complies with any such page limits as may be set by the arbitral tribunal: (a) describe the third person, including, where relevant, its membership and legal status (e.g. trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the third person); (b) disclose any connection, direct or indirect, which the third person has with any disputing party; (c) provide information on any government, person or organization that has provided to the third person (i) any financial or other assistance in preparing

the submission; or (ii) substantial assistance in either of the two years preceding the request, such as, for instance, funding around 20 per cent of its overall operations annually; (d) describe the nature of the interest that the third person has in the arbitration; and (e) identify the specific issues of fact or law in the arbitration that the third person wishes to address in its written submission.

“3. In determining whether to allow such a submission, the arbitral tribunal shall take into consideration, among other things (a) whether the third person has a significant interest in the arbitral proceedings; and (b) the extent to which the submission would assist the arbitral tribunal in the determination of a factual or legal issue related to the arbitral proceedings by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties.

“4. The submission filed by the third person shall: (a) be dated and signed by the person filing the submission; (b) be concise, and in no case longer than as authorized by the arbitral tribunal; (c) set out a precise statement of the third person’s position on issues; and (d) only address matters within the scope of the dispute.

“5. The arbitral tribunal shall ensure that the submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

“6. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on the submission by the third person.”

Remarks

37. Article 4 addresses submission by a third person and provides for a detailed procedure on information to be provided regarding the third person that wishes to make a submission (para. (2)); matters to be considered by the arbitral tribunal (paras. (3), (5) and (6)); and the submission itself (para. (4)). It is based on decisions made by the Working Group at its fifty-seventh session, as follows: paragraphs (1), (3), (4) and (5) were approved in substance without modifications (A/CN.9/760, paras. 42, 53, 55 and 56); paragraph (2) corresponds to a drafting proposal agreed to by the Working Group (A/CN.9/760, paras. 43-51); and paragraph (6) includes the drafting suggestion approved by the Working Group to delete the word “also” (A/CN.9/760, para. 57) and to include the word “reasonable” before the word “opportunity” (A/CN.9/760, para. 74).

Article 5. Submission by a non-disputing Party to the treaty (formerly numbered article 6)

38. Draft article 5 — Submission by a non-disputing Party to the treaty.

“1. The arbitral tribunal [shall] [may] allow or, after consultation with the disputing parties, may invite submissions on issues of treaty interpretation from a non-disputing Party to the treaty.

“2. The arbitral tribunal, after consultation with the disputing parties, may allow submissions on further matters within the scope of the dispute from a

non-disputing Party to the treaty. In exercising its discretion to allow such submissions, the arbitral tribunal shall take into consideration, among other things, the factors referred to in article 4, paragraph 3.

“3. The arbitral tribunal shall not draw any inference from the absence of any submission or response to any invitation pursuant to paragraphs 1 or 2.

“4. The arbitral tribunal shall ensure that any submission does not disrupt or unduly burden the arbitral proceedings, or unfairly prejudice any disputing party.

“5. The arbitral tribunal shall ensure that the disputing parties are given a reasonable opportunity to present their observations on any submission by a non-disputing Party to the treaty.”

Remarks

39. At its fifty-fifth session, the Working Group took note of the broad agreement for (i) addressing submissions by a non-disputing Party to the treaty in a provision distinct from the provision on third person submissions (A/CN.9/736, paras. 83, 84 and 97); (ii) providing that the arbitral tribunal should consult the disputing parties in the exercise of its discretion; and (iii) allowing disputing parties to present their observations on the submission (A/CN.9/736, para. 97).

Paragraph (1) — Matter for further consideration: “[shall] [may]”

40. The Working Group agreed to consider further whether the arbitral tribunal should enjoy discretion to accept submissions by a non-disputing Party to the treaty, and therefore whether the word “shall” before the word “allow” should be replaced by the word “may” (A/CN.9/736, paras. 90 and 98; A/CN.9/760, paras. 59-63). The Working Group invited States to review their treaties to identify whether they contained provisions giving the non-disputing Party to the treaty the right to submit its opinion on treaty interpretation to the arbitral tribunal (A/CN.9/760, para. 63).

Paragraph (2)

41. The question whether, in addition to making submissions on matters of treaty interpretation, a non-disputing Party to the treaty could also make submissions on questions of law or fact or on matters within the scope of the dispute was extensively discussed by the Working Group at its fifty-fifth (A/CN.9/736, paras. 85-89 and 98) and fifty-seventh (A/CN.9/760, paras. 64-67) sessions. Paragraph (2) reflects the decision of the Working Group that a non-disputing Party to the treaty could also make submissions on matters within the scope of the dispute (A/CN.9/760, para. 67), but does not contain any express provision for the tribunal to invite such submissions (A/CN.9/760, para. 70).

Paragraphs (3) and (4)

42. Paragraphs (3) and (4) were approved in substance by the Working Group without modifications at its fifty-seventh session (A/CN.9/760, paras. 72 and 73).

Paragraph (5)

43. Consistent with the proposal agreed in relation to article 4(6), set out above in paragraph 37, the word “also” has been deleted from the text of paragraph (5). Furthermore, the word “reasonable” has been inserted before the word opportunity. With those modifications, paragraph (5) was approved in substance by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 74 and 75).

Article 6. Hearings (formerly numbered article 7)

44. Draft article 6 — Hearings.

“1. Subject to article 6, paragraphs 2 and 3, hearings for the presentation of evidence or for oral argument (“hearings”) shall be public, unless otherwise decided by the arbitral tribunal, after consultation with the disputing parties.

“2. Where there is a need to protect confidential information or the integrity of the arbitral process pursuant to article 7, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

“3. The arbitral tribunal may make logistical arrangements to facilitate the public access to hearings (including where appropriate by organizing attendance through video links or such other means as it deems appropriate) and may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this is or becomes necessary for logistical reasons.”

Remarks***Paragraph (1) — Matter for further consideration: public hearings***

45. At the fifty-seventh session of the Working Group, there was very significant support for the principle that the default would remain that hearings would be public under the rules, subject only to the exceptions in paragraphs (2) and (3), with some delegations supporting the view that a disputing party should have a unilateral right to hearings being closed. In order to progress the second reading, it was ultimately agreed to leave paragraph (1) open for further deliberation (A/CN.9/760, para. 82).

Paragraphs (2) and (3) — Exceptions to public hearings

46. Paragraphs (2) and (3) provide guidance on the exceptions to the principle that hearings shall be public. Paragraph (2) refers to the exceptions contained in article 7. Paragraph (3) addresses the concerns expressed in the Working Group that all or part of hearings may have to be held in private for practical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible (A/CN.9/717, para. 109 and A/CN.9/736, para. 104).

“Hearings for the presentation of evidence or for oral argument”

47. The words “for the presentation of evidence or for oral argument” have been added after the word “hearings” in paragraph (1) in order to clarify that hearings should be open where they are substantive (including jurisdictional hearings and hearings in which evidence by witnesses or experts, or oral arguments, were

presented), but not where mere matters of procedure are to be addressed (A/CN.9/760, paras. 86 and 88). These words mirror the language used in article 24(1) of the UNCITRAL Model Law on International Commercial Arbitration.

(A/CN.9/WG.II/WP.176 and Add.1) (Original: English)

**Note by the Secretariat on settlement of commercial disputes:
preparation of a legal standard on transparency in treaty-based
investor-State arbitration, submitted to the Working Group on
Arbitration and Conciliation at its fifty-eighth session**

ADDENDUM

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II. Draft rules on transparency in treaty-based investor-State arbitration (*continued*)

B. Content of draft rules on transparency in treaty-based investor-State arbitration (*continued*)

Article 7. Exceptions to transparency (*formerly numbered article 8*)

1. Draft article 7 — Exceptions to transparency.

Confidential or protected information

“1. Confidential or protected information, as defined in paragraph 2 and as identified pursuant to the arrangements referred to in paragraphs 3 and 4, shall not be made available to the public or to non-disputing Parties to the treaty pursuant to articles 2 to 6.

“2. Confidential or protected information consists of:

“(a) Confidential business information;

“(b) Information that is protected against being made available to the public under the treaty; or

Option 1: [*“(c) Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.”*]

Option 2: [*“(c) Information that is protected against being made available to the public, in the case of the information of the respondent, under the law of the respondent, and in the case of other information, under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information.”*]

Option 3: [*“(c) Information that is protected against being made available to the public under any law or rules determined by the arbitral tribunal to be applicable to the disclosure of such information, taking account of the applicable law of the respondent when considering information disclosed by the respondent”*].

[*“(d) information that both disputing parties agree not be made available to the public unless it constitutes a breach of the public interest.”*]

[*“(2(bis) Nothing in these Rules shall require a disputing party to make available information [to the public] the disclosure of which it considers would impede law enforcement or would be contrary to the public interest or its essential security interests.”*]

“3. The arbitral tribunal, in consultation with the disputing parties, shall make arrangements to prevent any confidential or protected information from being made available to the public or to non-disputing Parties to the treaty including by putting in place, as appropriate (a) time limits in which a disputing party, non-disputing Party to the treaty, or third person shall give notice that it seeks protection for such information in a document, (b) procedures for the prompt designation and redaction of the particular confidential or protected information in such documents, and (c) procedures for holding hearings in private to the extent required by article 6, paragraph 2. Any determination as to whether information is confidential or protected shall be made by the arbitral tribunal after consultation with the disputing parties.

“4. Where the arbitral tribunal determines that information should not be redacted from a document, or that a document should not be prevented from being made available to the public, any disputing party, non-disputing Party to the treaty or third person that voluntarily introduced the document into the record shall be permitted to withdraw all or part of the document from the record of the arbitral proceedings.

Integrity of the arbitral process

“5. Information shall not be made available to the public pursuant to articles 2 to 6 where the information, if made available to the public, would jeopardise the integrity of the arbitral process as determined pursuant to paragraph 6.

“6. The arbitral tribunal may, on its own initiative or upon the application of a disputing party, after consultation with the disputing parties where practicable, take appropriate measures to restrain or delay the publication of information where such publication would jeopardise the integrity of the

arbitral process because (a) it could hamper the collection or production of evidence, or (b) it could lead to the intimidation of witnesses, lawyers acting for disputing parties, or members of the arbitral tribunal, or (c) in comparably exceptional circumstances.”

Remarks

2. The purpose of article 7 is to define the exceptions to transparency, which are limited to the protection of confidential or protected information (paras. (1) to (4)) and the protection of the integrity of the arbitral process (paras. (5) and (6)) (A/CN.9/717, paras. 129-147; A/CN.9/736, paras. 110-130; A/CN.9/760, paras. 89-119).

Confidential or protected information

3. Paragraphs (1) to (4) reflect a draft proposal considered by the Working Group at its fifty-seventh session and include the drafting modifications agreed to by the Working Group (A/CN.9/760, paras. 89-119).

Paragraph (2) — Matters for further consideration

- Paragraph (2)(c)

4. The Working Group may wish to consider the three options under paragraph (2)(c) which reflect different views expressed at its fifty-seventh session: (i) option 1, under which the tribunal is given discretion to conduct a conflict of law analysis for all information; (ii) option 2, under which the tribunal is directed to the law of the respondent for the respondent's information, and a conflict of law analysis for all other information; and (iii) option 3, under which the tribunal is given guidance for its conflict of law analysis that on issues of respondent information, it should take respondent law particularly into account (A/CN.9/760, para. 104).

- Paragraph (2)(d)

5. Paragraph (2)(d) corresponds to a proposal made at the fifty-seventh session of the Working Group. Some support was expressed for the proposal, while other delegations expressed strong disagreement with the suggestion, and it was agreed to further consider this proposal during the third reading of the rules (A/CN.9/760, para. 117).

- Paragraph (2)bis

6. A new provision, tentatively numbered paragraph (2)bis, was proposed at the fifty-seventh session of the Working Group for further consideration (A/CN.9/760, paras. 105-109). The provision was said not to be intended as a further exception under article 7 but as a matter that a party (particularly a State party to a dispute) could determine for itself (A/CN.9/760, para. 106). The Working Group may wish to consider the extent to which the matter would already be covered under paragraph (2)(c) (A/CN.9/760, paras. 108 and 109).

Procedure for protecting the integrity of the arbitral process

7. At the fifty-third session of the Working Group, it was generally recognized that the question of protection of the integrity of the arbitral process should be taken into account as part of the discussion on limitations to transparency (A/CN.9/712, para. 72).

8. Paragraphs (5) and (6) define a procedure for the protection of the integrity of the arbitral process and were approved in substance by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 118 and 119).

Article 8. Repository of published information (formerly numbered article 9)

9. Draft article 8 — Repository of published information

Option 1

“----- shall be in charge of making available to the public information pursuant to the Rules on Transparency.” [Other services to be determined, such as storage of documents].”

Option 2

“1. If the arbitral proceedings are administered by an arbitral institution, that institution shall be in charge of making information available to the public pursuant to the Rules on Transparency. [Other services to be determined, such as storage of documents].”

“2. If the arbitral proceedings are not administered by an arbitral institution, the respondent shall designate an arbitral institution among the list of institutions in annex, which shall fulfil the functions referred to in paragraph 1.”

Remarks

10. At its fifty-fourth session, the Working Group discussed whether establishing a neutral repository (also called a “registry”) should be seen as a necessary step in the promotion of transparency in treaty-based investor-State arbitration (A/CN.9/717, paras. 148-151). The prevailing view was that the existence of a registry would be crucial to provide the necessary level of neutrality in the administration of a legal standard on transparency. General support was expressed for the idea that, should such a neutral registry be established, the United Nations Secretariat would be ideally placed to host it. It was also recalled that, should the United Nations not be in a position to take up that function, the Permanent Court of Arbitration at The Hague (PCA) and the International Centre for Settlement of Investment Disputes (ICSID) had expressed their readiness to provide such registry services (A/CN.9/717, para. 148).

11. At the fifty-fifth session of the Working Group, various proposals were made (A/CN.9/736, paras. 131-133). One was the establishment of a single registry as contained in option 1. Another proposal was in favour of a list of arbitral institutions that could fulfil the function of a registry as reflected under option 2 (A/CN.9/736, para. 131). The Working Group did not reach consensus on which of the two options set out therein would be preferable. The decision on that point was left for consideration at a future session. It was nonetheless agreed in principle that if the

Working Group ultimately proceeded with option 1, then UNCITRAL would be the preferred registry institution, if it had the capacity to so act. It was also agreed that if multiple institutions were to be designated as registries under option 2, then a central website should be established, preferably by UNCITRAL, to serve as a hub of information linking to such institutions' registry function (A/CN.9/760, paras. 120-121).

General issue of costs

Costs related to holding a public hearing

12. As requested by the Working Group at its fifty-fifth session (A/CN.9/736, para. 106), information on the costs related to holding public hearings has been provided by the International Centre for Settlement of Investment Disputes (ICSID), and is contained in document A/CN.9/WG.II/WP.170/Add.1.

Costs associated with establishing and maintaining a registry

13. At its fifty-fifth session, the Working Group invited interested arbitral institutions to provide information on the costs of establishing and maintaining a registry of information to be published in accordance with the rules on transparency (A/CN.9/736, para. 133). Pursuant to that decision, the Secretariat circulated a questionnaire to arbitral institutions that had expressed an interest in being associated to the current activities of the Working Group or that had been listed by UNCTAD as institutions administering treaty-based investor-State disputes.¹ The questionnaire and the replies received from arbitral institutions are reproduced in document A/CN.9/WG.II/WP.170 and its addendum. Information produced by the UNCITRAL Secretariat is contained in document A/CN.9/WG.II/WP.169, Add.1, paras. 9 to 12.

III. Instruments for the application of the legal standard on transparency to existing investment treaties

14. At the fifty-fourth session of the Working Group, views had been expressed in favour of pursuing further the option to prepare an instrument that, once adopted by States, could make the legal standard on transparency applicable to existing treaties. That question was said to have an important practical impact as there were more than 2,500 investment treaties in force to date (A/CN.9/712, para. 85 and A/CN.9/717, paras. 33-35).² At its fifty-fifth session, the Working Group considered various instruments to make the rules on transparency applicable to existing investment treaties, as contained in document A/CN.9/WG.II/WP.166/Add.1, paragraphs 10-23. The instruments included (i) a recommendation urging States to make the rules applicable in the context of treaty-based investor-State dispute

¹ See *Latest Developments in Investor-State Dispute Settlement*, IIA Issues Note No. 1 (2010), International Investment Agreements, p. 2; available on 28 November 2011 at www.unctad.org/en/docs/webdiaeia20103_en.pdf; see also document A/CN.9/WG.II/WP.160, para. 29.

² For an online compilation of all investment treaties, see the database of the United Nations Conference on Trade and Development (UNCTAD), available on 20 July 2011 at www.unctadxi.org/templates/Startpage____718.aspx.

settlement, (ii) a convention, whereby States could express consent to apply the rules on transparency to arbitration under their existing investment treaties, and (iii) joint interpretative declarations pursuant to article 31(3)(a) Vienna Convention on the Law of Treaties (the “Vienna Convention”) or amendment or modification pursuant to articles 39-41 Vienna Convention. All proposed instruments were found to be interesting and it was noted that they were not mutually exclusive, but could complement one another. (A/CN.9/736, paras. 143 and 135).

15. As requested by the Working Group at its fifty-seventh session (A/CN.9/760, paras. 12 and 141), this note contains wording for a draft convention on transparency in treaty-based investor-State arbitration and for a model of unilateral declaration (see below, paras. 17 and 34, respectively). The Working Group may wish to consider possible wording developed by the Secretariat in document A/CN.9/WG.II/WP.166/Add.1 regarding the option of a recommendation urging States to make the legal standard applicable in the context of treaty-based investor-State dispute settlement, as well as regarding the options of making the legal standard on transparency applicable to existing treaties by joint interpretative declarations pursuant to article 31(3)(a) Vienna Convention on the Law of Treaties (the “Vienna Convention”), by amendment or modification pursuant to articles 39-41 Vienna Convention.

A. Possible UNCITRAL instruments

16. Possible instruments that UNCITRAL can prepare and promote for the application of the legal standard on transparency to treaties concluded before the date of adoption of the rules on transparency include a recommendation and a convention. The text of a draft recommendation, with comments, is contained in document A/CN.9/WG.II/WP.166/Add.1, paragraphs 12-14.

17. At its fifty-seventh session, the Working Group mandated the Secretariat to prepare more detailed wording for a convention on transparency in treaty-based investor-State arbitration, to include a draft clause permitting a reservation thereto (A/CN.9/760, paras. 12 and 141). The text of a possible draft convention on transparency in treaty-based investor-State arbitration could read as follows.

Draft text

“The Parties to this Convention,

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

“Convinced that the progressive harmonization and unification of international trade law, in reducing or removing legal obstacles to the flow of international trade, significantly contributes to universal economic cooperation among all States on a basis of equality, and common interest, and to the well-being of all peoples,

“Recognizing the value of arbitration as a method of settling disputes that may arise in the context of international relations, and the extensive and wide-ranging use of arbitration for the settlement of investor-State disputes,

“Also recognizing the need for provisions on transparency in the settlement of treaty-based investor-State disputes to take account of the public interest involved in such arbitrations,

“Believing that the Rules on Transparency adopted by the United Nations Commission on International Trade Law (UNCITRAL) on [date] would contribute significantly to the establishment of a harmonized legal framework for a fair and efficient settlement of international [investment] disputes,

“Noting the great number of investment treaties already in force, and the practical importance of promoting the application of the UNCITRAL Rules on Transparency to arbitration under those already concluded investment treaties,

“Have agreed as follows:

Article 1

Scope of application

“1. This Convention shall apply to investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors between Contracting Parties to this Convention.

“2. The term ‘treaty providing for the protection of investments or investors’ means any investment agreement between Contracting Parties, including free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral and multilateral investment treaties, so long as it contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty.

Article 2

Interpretation

“In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

Article 3

Use of the UNCITRAL Rules on Transparency

“Each Contracting Party agrees to apply the UNCITRAL Rules on Transparency to investor-State arbitration conducted on the basis of a treaty providing for the protection of investments or investors, where treaty was concluded between Contracting Parties to this Convention. Nothing in this Convention prevents Contracting Parties from applying standards that provide a higher degree of transparency than the Rules on Transparency.

*Article 4**Reservations*

- “1. A Contracting Party may declare that certain investment treaties fall outside the scope of this Convention. No other reservations are permitted to this Convention.
- “2. Reservations made at the time of signature are subject to confirmation upon ratification, acceptance or approval.
- “3. Reservations and their confirmations are to be formally notified to the depositary.
- “4. A reservation takes effect simultaneously with the entry into force of this Convention in respect of the Contracting Party concerned. A reservation of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of [six] months after the date of its receipt by the depositary.
- “5. Any Party that makes a reservation under this Convention may modify or withdraw it at any time by a formal notification in writing to the depositary. The modification or withdrawal is to take effect on the first day of the month following the expiration of [six] months after the date of receipt of the notification by the depositary.

*Article 5**Depositary*

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

*Article 6**Signature, ratification, acceptance, approval, accession*

- “1. This Convention is open until [date] for signature by any Party to a treaty providing for the protection of investments or investors.
- “2. This Convention is subject to ratification, acceptance or approval by the signatory Parties.
- “3. This Convention is open for accession by any entity referred to in article 7, paragraph (1), as from the date it is open for signature.
- “4. Instruments of ratification, acceptance, approval or accession are to be deposited with the depositary.

*Article 7**Effect in territorial units*

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

units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

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

“3. When a Contracting State has declared pursuant to this article that this Convention extends to one or more but not all of its territorial units, a place located in a territorial unit to which this Convention does not extend is not considered to be in a Contracting State for the purposes of this Convention.

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

Article 8

Participation by regional economic integration organizations

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

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

“3. Any reference to a ‘Contracting Party’ or ‘Contracting Parties’ in this Convention applies equally to a regional economic integration organization when the context so requires.

Article 9

Entry into force

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

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

*Article 10**Time of application*

“This Convention and any declaration or reservation apply only to arbitral proceedings that have been commenced after the date when the Convention, declaration or reservation enters into force or takes effect in respect of each Contracting Party.

*Article 11**Revision and amendment*

“1. At the request of not less than one-third of the Contracting Parties to this Convention, the Secretary-General of the United Nations shall convene a conference of the Contracting Parties for revising or amending it.

“2. Any instrument of ratification, acceptance, approval or accession, or any reservation, deposited after the entry into force of an amendment to this Convention is deemed to apply to the Convention as amended.

*Article 12**Denunciation of this Convention*

“1. A Contracting Party may denounce this Convention at any time by means of a notification in writing addressed to the depositary. The denunciation takes effect on the first day of the month following the expiration of one year after the notification is received by the depositary.

“2. This Convention will continue to apply to arbitration in respect of which arbitral proceedings have been commenced before the denunciation takes effect.

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

“IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised [by their respective Governments], have signed the present Convention.”

Remarks***Draft article 1***

18. Draft article 1 deals with the scope of application of the convention on transparency, and provides that the convention shall apply to treaty-based investor-State arbitration when Parties to the investment treaty are also contracting Parties to the convention on transparency. This is in line with the understanding expressed at the fifty-fifth session of the Working Group that a convention would make the rules on transparency applicable only to investment treaties between such States (or regional economic integration organizations) Parties that would also be Parties to the convention on transparency (A/CN.9/736, para. 135).

19. The Working Group may wish to consider article 1 of the draft convention in concert with article 1 of the draft rules on transparency such that to the extent

possible, consistency is maintained between the scope of application of both instruments. It may be noted that the definition of a “treaty providing for the protection of investments or investors” is similar to the definition of article 1 of the draft rules on transparency.

- Parties

20. As currently drafted, the convention on transparency only applies to investment treaties concluded between Parties which are also Parties to the convention on transparency (see above, para. 18). The Working Group may wish to consider whether, in the event an investment treaty has multiple signatories, only some of which are contracting Parties to the convention on transparency, whether this convention should apply in disputes between a contracting Party to this convention and a national of another contracting Party. If the Working Group believes that as a matter of principle, the transparency rules ought to apply in that instance, the wording of draft articles 1 and 3 may need to be amended to reflect such a possibility.

- Arbitration rules

21. The Working Group may wish to note that the convention would apply to any investor-State arbitration initiated under a treaty regardless of the set of institutional or ad hoc arbitration rules applicable to the settlement of the dispute.

Draft article 2

22. The principles reflected in draft article 2 have appeared in most of the UNCITRAL texts, and its formulation mirrors article 7 of the United Nations Sales Convention. The provision is aimed at facilitating uniform interpretation of the provisions in uniform instruments on commercial law.

Draft article 3

23. A convention in the form of a general statement of applicability as proposed in this note does not incorporate the contents of the rules on transparency currently developed by the Working Group, but reflects the agreement of the contracting Parties to apply these rules to arbitrations under their investment treaties existing at the date of entry into force of the convention. The Working Group may wish to consider whether article 3 should clarify the version of the rules on transparency that is included by reference in case those rules would be revised. The Working Group may wish to consider further the question whether the convention should also include the text of the rules on transparency (A/CN.9/736, para. 135; see also A/CN.9/WP.166/Add.1, para. 39).

Draft article 4

24. The Working Group may wish to recall its decision at its fifty-seventh session that a reservation be included in the convention on transparency (A/CN.9/760, para. 141). The Working Group may wish to consider the reservation permitted under paragraph (1) as presently drafted, and whether the scope of this reservation ought to remain broad, or to be more clearly prescribed.

25. The Working Group may also wish to consider whether any other reservations ought to be enumerated, or whether the convention should prohibit further reservations. The Working Group may wish to consider Article 19 of the Vienna Convention on the Law of Treaties 1969 in this respect.

Draft articles 5 to 12 — Final provisions

26. Provisions in draft articles 5 to 12 are customary provisions in multilateral treaties and are not intended to create rights and obligations for private parties. However, as these provisions regulate the extent to which a contracting Party is bound by the convention, including the time the convention or any declaration submitted thereunder enter into force, they may affect the ability of the disputing parties to rely on the provisions of the convention.

- Draft article 7

27. Draft article 7 permits a contracting State, at the time of signature, ratification, acceptance, approval or accession, to declare that the convention is to extend to all its territorial units or only to one or more of them and to amend its declaration by submitting another declaration at any time. This provision, often called “the federal clause”, is of interest to relatively few States — federal systems where the central Government lacks treaty power to establish uniform law for the subject matter covered by the convention. The effect of the provision would therefore be on the one hand to permit federal States to apply the convention progressively to their territorial units and on the other to permit those States that wish to do so to extend its application to all their territorial units from the very outset. The Working Group may wish to consider whether such a provision would be necessary.

- Draft article 8

28. In addition to “States”, the convention allows participation by international organizations of a particular type, namely “regional economic integration organizations”, which are Parties to investment treaties. The text of the convention does not contain a definition of “regional economic integration organizations”. Usually, the notion of “regional economic integration organizations” encompasses two key elements: the grouping of States in a certain region for the realization of common purposes, and the transfer of competencies relating to those common purposes from the members of the regional economic integration organization to the organization.

- Draft article 9

29. The basic provisions governing the entry into force of the convention are laid down in draft article 9. Three ratifications correspond to the modern trend in commercial law conventions, which promotes their application as early as possible. A six-month period from the date of deposit of the third instrument of ratification, acceptance, approval or accession is provided so as to give Parties to the convention sufficient time to notify all the national organizations and individuals concerned that a convention that would affect them would soon enter into force. Paragraph 2 deals with the entry into force of the draft convention as regards those contracting Parties that become parties thereto after the time for its entry into force under paragraph 1 has already started.

- Draft article 10

30. While draft article 9 is concerned with the entry into force of the convention as regards the international obligations of the contracting Parties arising under the convention, draft article 10 determines the point in time when the convention would commence to apply in respect of the arbitral proceedings. The convention would only apply prospectively, that is to arbitral proceedings that are commenced after the date when the convention entered into force. The words “in respect of each Contracting Party” are intended to make it clear that the article refers to the time when the convention would enter into force in respect of the contracting Party in question, and not when the convention would enter into force generally.

B. Possible actions by States

31. At its fifty-third and fifty-fourth sessions, the Working Group considered the possible actions that could be undertaken by States to ensure applicability of the rules on transparency to existing multilateral or bilateral investment treaties (A/CN.9/712, paras. 85-86, A/CN.9/717, paras. 42-46). At the fifty-fourth session of the Working Group, joint interpretative declarations by States pursuant to article 31(3)(a) Vienna Convention as well as amendment or modification to treaties according to article 39 ff. Vienna Convention were mentioned as possible instruments to ensure application of the rules on transparency to existing investment treaties (A/CN.9/717, paras. 42-45).

32. Models of such instruments were proposed in document A/CN.9/WG.II/WP.161/Add.1, paragraphs 22 and 23. The Working Group may wish to recall that document A/CN.9/WG.II/WP.162 addresses joint interpretative declarations and unilateral declarations, in addition to other possible actions that could be undertaken by States to ensure applicability of the rules on transparency to existing investment treaties (see A/CN.9/WG.II/WP.162, paras. 26-48).

33. It was also suggested at the fifty-third and fifty-seventh sessions of the Working Group that the applicability of the rules on transparency could be achieved through unilateral declarations by States (A/CN.9/712, para. 93 and A/CN.9/760, para. 141). The Working Group may wish to recall that it had noted that a declaration by only one State would not be sufficient to make the rules on transparency applicable to already existing treaties, because a treaty is based on the agreement of the States parties (A/CN.9/712, para. 93). Therefore, States parties to an investment treaty would each need to issue unilateral declarations to the same end to apply the legal standard on transparency to an existing treaty. Such unilateral declarations would then form a subsequent agreement between the States parties regarding the interpretation of the treaty or the application of its provisions under article 31(3)(a) Vienna Convention, which provides as a general rule of interpretation that any subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions shall be taken into account, together with context. Such subsequent declarations do not necessarily need to take the form of a “joint” statement. However, there needs to be evidence of the agreement of the parties on the interpretation of the treaty, which could be expressed by an exchange of notes. As the International Law Commission has stated

in its draft guidelines on declarations relating to bilateral agreements,³ an authentic interpretation of a treaty can result from an interpretive declaration made by only one State party to the treaty, if it has been accepted by the other party.⁴

34. Possible draft model of a unilateral interpretative declaration pursuant to article 31(3)(a) Vienna Convention could read as follows.

“Understanding of Government of [___] on the interpretation and application of certain provisions of the ___ [name of the investment treaty]

“The provision[s] of articles [___] of the [name of investment treaty] permitting an investor from a Contracting State to initiate an arbitration against another Contracting State [under the UNCITRAL Arbitration Rules] in the context of the [name of investment treaty] shall be understood as including the application of the UNCITRAL Rules on Transparency.”

³ The draft guidelines on declarations relating to bilateral agreements are included in the draft guidelines on reservations and authentic interpretation of a treaty pursuant to article 31(3)(a) of the Vienna Convention issued by the International Law Commission, Report of the International Law Commission on the work of its sixty-second session, *Official Records of the General Assembly, Sixty-fifth session, Supplement No. 10* (A/65/10), p. 40, available at <http://untreaty.un.org/ilc/reports/2010/2010report.htm>.

⁴ Ibid., Draft Guidelines 1.5.3.

**G. Note by the Secretariat regarding the establishment of a repository
of published information (“registry”): settlement of commercial
disputes: preparation of a legal standard on transparency in
treaty-based investor-State arbitration, submitted to the Working
Group on Arbitration and Conciliation at its
fifty-eighth session
(A/CN.9/WG.II/WP.177)**

[Original: English]

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I. Introduction

1. In preparation for the fifty-eighth session of the Working Group, and further to the mandate given by the Working Group to the Secretariat to liaise with arbitral institutions to assess better the cost and other implications of the establishment of a registry under the UNCITRAL draft rules on transparency in treaty-based investor-State arbitration (the “Rules”) (A/CN.9/760, para. 122), the Secretariat consulted with the following arbitral institutions:¹ the International Centre for the Settlement of Investment Disputes (ICSID), the Permanent Court of Arbitration at the Hague (PCA), the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the Stockholm Chamber of Commerce (SCC) (the “arbitral institutions”). This note sets out the main conclusions of those consultations for the consideration of the Working Group in relation to (i) the various institutional options in relation to a registry; (ii) the proposed nature and scope of a registry and related cost implications; and (iii) possible implications in respect of the draft Rules.

2. The arbitral institutions observed that the function of the registry would be critical to ensuring that the aims of transparency will be met in practice. The Working Group may wish to consider that the determination of the nature, function, scope and costs of a registry will necessarily affect the level of transparency ultimately achieved by the Rules in practice.

¹ The Cairo Regional Centre for International Commercial Arbitration (CRCICA) was invited to attend but was unable to do so.

II. Establishment of a registry under the UNCITRAL draft rules on transparency in treaty-based investor-State arbitration

A. Institutional options for a registry

1. Options

3. Two options are proposed for consideration under the Rules (see A/CN.9/WG.II/WP.176/Add.1, para. 9) regarding the possible institutional management of a registry (see also A/CN.9/736, paras. 131-133; and A/CN.9/WG.II/WP.170, paras.7 et seq).

4. The first option ("option 1") consists of a single registry for the publication of information under treaty-based investor-State disputes where the Rules apply, to be maintained by a single organization, with other arbitral institutions providing visibility and advice for that registry where requested but not performing any registry functions.

5. The second option ("option 2") is a system whereby various arbitral institutions would maintain their own registry system. This option could have two variants: under the first variant, all institutions would operate under a common umbrella website with a single interface for external users. In a second variant of that option, various arbitral institutions would maintain their own registry system, no common interface would exist to link all registries, as in the first variant, but one organization would host a website with links to each arbitral proceeding for which information is published on the various institutions' online registries.

2. Remarks by arbitral institutions regarding the options

6. Option 1, set out in paragraph 4 above, was the strongly preferred option, for a number of reasons.

7. First, from a technical perspective, option 1 was perceived by the institutions to be the most attractive. Under that option, only one technical system would need to be created, a single set of technical guidelines could be easily implemented and consistently maintained, and there would be no need for technical integration and management by an "oversight" institution or organization should, in the event of multiple registries, one system fail. One system would safeguard a uniform standard for document search, as well as for the presentation of search results. Managing and safeguarding security of information held by the registry would be more simple under that option.

8. Under option 2 spreading publication across a number of institutional document systems would not be conducive to global searches, and may consequently dilute transparency in practice. Variant 1 of option 2 was perceived as being technically the most complex option, and indeed possibly not viable from a technical perspective. Variant 2 of option 2 was deemed to be technically feasible in principle; however, a registry comprising a single web portal linking to a number of different underlying systems would require an additional layer of substantive oversight and management by a single organization, hence increasing cost and complexity.

9. From a cost perspective, the arbitral institutions outlined that, apart from the PCA and ICSID (whose differing capabilities are outlined in para. 11 below), other arbitral institutions do not have the requisite technical systems or servers in place, and that start-up costs in addition to maintenance and staffing costs (for any institution, including the PCA and ICSID) could be disproportionately high should an institution receive only a fraction of the global case load per year. Moreover, as different institutions would necessarily need to charge different fees to cover their respective costs, adopting a consistent fee structure amongst institutions would mean adopting the highest common denominator; alternatively, a non-consistent fee structure might lead to disagreement among parties to a dispute as to which institutional registry to use.

10. Option 2 was said to require a much clearer defined scope of registry functions before arbitral institutions would be willing to commit to such a role, in order for each institution to be able to assess the costs of performing a registry function in light of their current or future capabilities, and reconcile the same within their budgetary frameworks.²

11. The current capabilities of the arbitral institutions consulted are varied. ICSID, for example, uses a sophisticated case management system which is integrated with the World Bank's institutional document management system. It inserts a select number of meta-data for searchability, and the process involves a multi-tiered review of each document before it is posted. The PCA posts case information and documents with the agreement of the parties, but does not add meta-data to those documents and does not currently have a search mechanism integrating information across all public cases (nor is the posting of documents linked to its document management system). The SCC, LCIA and ICC do not publish information and would need to create and manage new technical systems or servers to do so. It was foreseen that at least some, and possibly all institutions, would require additional staff to maintain a registry function. At the PCA and ICSID, the institutions which currently publish case-related information in some form, the associated staff includes a legal officer (performing a review function), administrative support staff, and some IT staff time.

B. Nature and scope of registry

Level of transparency and cost

12. The arbitral institutions were unable to provide any global cost estimates without guidance from the Working Group as to the desired functionality and sophistication of the registry, because both start-up and maintenance costs are inextricably related to the nature of the systems being built and maintained.

13. A single database, with a uniformity of format, free text search functionality and filtering function (requiring insertion by the registry of limited meta-data; see para. 14 below) would lead to a higher level of transparency (allowing some

² Document A/CN.9/WG.II/WP.170 and its addendum set out arbitral institutions' cost estimates and staffing requirements, subject to the more precise definition of the proposed functions of the registry.

research and analysis) as well as a higher cost than if documents were to be simply uploaded on the web.

C. Matters for consideration by the Working Group

1. Scope of registry functions

14. The Working Group may wish to consider what degree of searchability function would be desirable for a registry. In order to make information most accessible to the public, searchability features, in addition to a full “free text” search, might include: insertion of meta-data identifying type of document (possibly corresponding to the types of document set out in draft article 3 of the Rules); economic sector (possibly consistent with World Bank sector tags); parties; counsel; arbitrators; the treaty under which the claim is filed; dates.

15. The Working Group may also wish to consider the desirability of including the possibility for the provision of hard copy documents by an arbitral tribunal to the registry. Hard copy documents raise specific issues to be considered, such as resources required for filing, storing and archiving, as well as the possible requirement that the registry upload or scan hard copy documents in order to make such documents available electronically and to a wider audience, as well as related issues such as the costs and legal issues related to archiving. In particular, the Working Group may wish to consider to what extent the storage of hard copy documents by the registry would advance the aim of transparency if the documents were only available in hard copy at a fixed physical location. The arbitral institutions pointed out that it is increasingly the norm that all documents are provided to tribunals in electronic format (even where they might be also provided in hard copy). The Working Group may wish to consider whether the Rules (or, if deemed appropriate, guidelines accompanying the Rules, see below, para. 17) could specify that the registry should receive documents and information only in electronic form, to avoid the costly and resource-intensive work of storing and archiving.

16. Translation, except in very limited contexts (name of the treaty, for example), would not be feasible in the context of an international registry system. The extent of translation and responsibility for translation would have to be factored into the Rules or any guidelines for arbitral tribunals (see para. 17 below).

Guidelines

17. The Working Group may wish to consider whether guidelines for tribunals — including format requirements for documents to be submitted to the registry — and guidelines for a registry — including publishing guidelines and issues relating to, for example, digital preservation, security, language of website, and level of discretion of the registry in various contexts, would be required for such a registry system to function properly.

2. Matters for consideration in relation to the draft Rules

Draft article 1(4) and draft article 7(3)

18. The Working Group may wish to consider whether the registry should or must withhold publication of information, or remove already published information in case of recourse before national courts in circumstances where documents or information provided to it by the arbitral tribunal under the Rules is deemed by national courts to be confidential under the mandatory applicable domestic law.

Draft article 2

19. Draft article 2 requires publication of certain information (name of parties, economic sector, treaty) before the arbitral tribunal has been constituted. Arbitral institutions suggested that, to reduce scope for the provision of false information or frivolous claims at that stage of proceedings, and consequently to reduce the liability of the publishing institution, draft article 2 should be amended to include:

(a) A requirement that information sent to the registry be copied to the other party to a dispute; and

(b) A procedure for objection by the other party (for example, an objection regarding whether the Rules on Transparency applied) within a certain time limit, in which case the registry would wait to publish that information until after the arbitral tribunal was constituted and made a decision in relation to any objection.

20. It was furthermore suggested that the Rules should include, at this initial, pre-constitution stage, a provision for payment “up front” (the specifics of which to be included in a separate document, in order to facilitate updates or amendments from time to time). One proposal was that the arbitral tribunal could be instructed to add a percentage amount to its advance on costs. More generally, the Working Group may wish to consider whether provisions concerning payment to the registry should be addressed in the Rules.

Draft article 3

21. The Working Group may wish to consider how the registry would deal with requests for documents after the arbitral tribunal has discharged its function and its mandate is terminated. Issues arising from a post-proceeding request include but are not limited to access to documents, decisions regarding redactions, and determination of confidentiality under draft article 7.

Draft article 3(1)

22. The Working Group may wish to determine whether publication of “written statements or written submissions” includes publication of documents such as procedural orders, letters or e-mail correspondence.

Draft article 3(2)

23. Under draft article 3(2), expert reports and witness statements are provided to the registry by the tribunal and published, upon request, and are not subject to a discretionary decision regarding their publication by the arbitral tribunal (unlike the documents in draft article 3(3)). This provision thus raises the following questions:

(a) How should the registry deal with a request made after the tribunal has discharged its function and its mandate is terminated (see para. 21 above)?

(b) Because such documents may require redaction, which redaction may be contentious and subject to a final determination by a tribunal, what would happen if the tribunal is still acting but the request is made, for example, at a late stage in proceedings (such as just before the rendering of a final award) where the parties or tribunal are unable to spend time redacting, in the case of the former, or to make a determination regarding redactions, in the case of the latter?

(c) In light of the above, is the intention that the parties be required to provide expert reports and witness statements to the tribunal (and consequently the tribunal to the registry) in redacted form, in order that they are available upon request pursuant to draft article 3(2), such that the parties and tribunal bear the cost of publicizing these documents even if these documents might never be requested or publicized?

Draft article 3(5)

24. Further to the suggestion that any storage and archiving of hard copy documents might not be an acceptable burden for a registry of published information in investor-State disputes (see para. 15 above), that the Working Group may wish to consider whether the words “photocopying or shipping” should be amended or deleted from draft article 3(5), perhaps replaced with the words “incurred by the registry” to maintain the current meaning.

Draft article 8, option 2

25. In the event option 2 is retained, the Working Group may wish to consider including language to indicate how an institution must be selected, and in particular in the event that a respondent fails to designate an institution listed in the annex.

Inclusion of a waiver of liability clause

26. The Working Group may wish to consider whether a waiver of liability clause, in respect of both the arbitral tribunal, through which the documents will be sent to the registry under article 3, and for the registry itself, should be added to the Rules. The question of how to address liability claims brought by third parties (e.g., in case of violation of data privacy) might also need to be considered by the Working Group.

**H. Note by the Secretariat on settlement of commercial disputes:
UNCITRAL Guide on the Convention on the Recognition and
Enforcement of Foreign Arbitral Awards (New York, 1958): excerpt,
guide on article VII**

(A/CN.9/786)

[Original: English]

1. At its forty-first session, in 2008, the Commission agreed that work should be undertaken to eliminate or limit the effect of legal disharmony regarding the interpretation and application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (“the Convention”). The Commission requested the Secretariat to study the feasibility of preparing a guide on the Convention, with a view to promoting a uniform interpretation and application of the Convention, thus avoiding uncertainty resulting from its imperfect or partial implementation and limiting the risk that practices of States diverge from the spirit of the Convention. Also, at that session, the Commission agreed that, resources permitting, the activities of the Secretariat in the context of its technical assistance programme could include dissemination of information on the judicial interpretation of the New York Convention, which would usefully complement other activities in support of the Convention.¹ At its forty-fourth and forty-fifth sessions, in 2011 and 2012, the Commission had been informed that the Secretariat was carrying out the project related to the preparation of a guide on the Convention, in close cooperation with G. Bermann (Columbia University School of Law) and E. Gaillard (Sciences Po School of Law), who had established research teams to work on the project. The Commission was informed that a website (www.newyorkconvention1958.org) had been established in order to make the information gathered in preparation of the guide on the New York Convention publicly available.² The annex hereto contains an excerpt of the guide on the New York Convention for the consideration of the Commission. The Commission may wish to note that, resources permitting, the guide should be completed by December 2013.

¹ *Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), paras. 355 and 360.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 252; and *ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 135.

Annex: UNCITRAL Guide on the New York Convention

Excerpt — article VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Article VII

1. *The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.*

2. *The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.*

TRAVAUX PRÉPARATOIRES ON ARTICLE VII

The *travaux préparatoires* on article VII are contained in the following documents:

Draft Convention on the Recognition and enforcement of Foreign Arbitral Awards and comments by Governments and Organizations:

- Report of the Committee on the Enforcement of International Arbitral Awards: E/2704 and annex.
- Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: E/2822, annexes I-II; E/2822/Add.1, annex I.

United Nations Conference on International Commercial Arbitration:

- Amendments to the Draft Convention Submitted by Governmental Delegations: E/Conf. 26/7; E/Conf. 26/L.16; E/Conf. 26/L.44.

Summary records:

- Summary Records of the Eighteenth, Nineteenth and Twentieth Meetings of the United Nations Conference on International Commercial Arbitration: E/CONF.26/SR.18; E/CONF.26/SR.19; E/CONF.26/SR.20.
- Summary Record of the Eighth Meeting of the Committee on the Enforcement of International Arbitral Awards: E/AC.42/SR.8. See also E/AC.42/4/Rev.1.

(Available on the Internet at www.uncitral.org).

ARTICLE VII(1)

INTRODUCTION

1. Article VII(1) governs the relationship of the New York Convention with other treaties and domestic law and is considered to be one of the cornerstones of the

Convention.¹ By stipulating that the Convention shall not affect the validity of other treaties concerning the recognition and enforcement of arbitral awards, and facilitating the application of rules on recognition and enforcement that may be more liberal than the Convention, article VII(1) ensures the Convention's compatibility with other international instruments as well as its durability, with the result that foreign arbitral awards are recognized and enforced to the greatest extent possible.

2. By virtue of article VII(1), Contracting States will not be in breach of the Convention by enforcing arbitral awards pursuant to provisions of domestic laws or treaties that are more favourable to enforcement. This reflects the notion that the New York Convention sets a "ceiling", or the maximum level of control, which national courts of the Contracting States may exert over the recognition and enforcement of arbitral awards.²

3. Article VII(1) was based on the text of Article 5 of the Convention on the Execution of Foreign Arbitral Awards (done in Geneva, 26 September 1927) (the "Geneva Convention"). Article 5 of the Geneva Convention granted an interested party the right to avail itself of an arbitral award in the manner and to the extent allowed by the law or treaties of the State where the award was sought to be relied upon.³

4. The drafters of the New York Convention built on Article 5 of the Geneva Convention by adding the rule that the provisions of the Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of awards entered into by the Contracting States.⁴ This first part of article VII(1) has been referred to as "the compatibility provision". The second part of article VII(1), which allows an interested party to rely on a more favourable treaty or domestic law concerning recognition or enforcement instead of the Convention, has become widely known as the "more-favourable-right" provision.⁵

¹ One commentator has described this provision as "the treasure, the ingenious idea" of the New York Convention. See Philippe Fouchard, *Suggestions pour accroître l'efficacité internationale des sentences arbitrales*, 1998 REV. ARB. 653, at 663.

² See Philippe Fouchard, *La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine*, 1997 REV. ARB. 329; Emmanuel Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION (A. J. van den Berg ed., 1999); Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in ICCA CONGRESS SERIES NO. 14, 50 YEARS OF THE NEW YORK CONVENTION: ICCA INTERNATIONAL ARBITRATION CONFERENCE 689 (A. J. van den Berg ed., 2009).

³ For the legislative history of article VII(1) of the New York Convention and Article 5 of the 1927 Geneva Convention, see Gerald H. Pointon, *The Origins of Article VII.1 of the New York Convention 1958*, in LIBER AMICORUM EN L'HONNEUR DE SERGE LAZAREFF 499 (L. Lévy, Y. Derains eds., 2011).

⁴ *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1, p. 15.

⁵ ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 81; Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL

5. While it may be useful for certain analytical purposes to bisect the paragraph into two parts, article VII(1), when read as a whole, enshrines the notion of “more favourable right”. The first part of article VII(1) is merely a precursor to the second part, confirming that the validity of other treaties is not affected by the Convention, such that they can be relied upon by an interested party if more favourable. Thus, article VII(1) ensures that whenever the New York Convention proves to be less favourable than the provisions of another treaty or law of the country where recognition or enforcement is sought by a party seeking “to avail himself of an arbitral award”, the more favourable rules shall prevail over the rules of the New York Convention.

ANALYSIS

A. General principles

a. Meaning of “interested party”

6. Article VII(1) provides that, in addition to the New York Convention, any “interested party” shall not be deprived of the right to rely on a more favourable domestic law or treaty.

7. A Swiss court has confirmed that the term “interested party” refers only to the party seeking enforcement of an award, and not to the party resisting enforcement.⁶ In a case where an Italian party sought enforcement of an arbitral award against a Swiss party, the Zurich Court of First Instance rejected the argument of the Swiss party that it was, in application of article VII(1), entitled to rely on the more stringent conditions of the Swiss-Italian bilateral treaty on the Recognition and Enforcement of Judgments of 1933 to resist enforcement of the award. In the words of the Court, “the more-favourable-right principle does not provide the party opposing enforcement with further grounds for refusal than are listed in the Convention.”

8. As leading commentators have noted, allowing a respondent to assert the more stringent conditions of another law or treaty would run counter to the pro-enforcement basis of the New York Convention.⁷

9. According to the *travaux préparatoires* to the New York Convention, an “interested party” may also be a Contracting State. During the negotiation of the Convention, the State delegates considered that to expressly stipulate this eventuality would be superfluous, as it was self-evident from the text of

AWARDS: THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard, D. Di Pietro eds., 2008), at 70.

⁶ *Italian party v. Swiss company*, Bezirksgericht, Zurich, Switzerland, 14 February 2003.

⁷ ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 333-34; Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard, D. Di Pietro eds., 2008), at 74-75.

article VII(1).⁸ At the date of this Guide, there is, however, no publicly available case law where a State has sought to rely on article VII(1).

b. Subject matter of more favourable right

10. Article VII(1) refers without restriction to “any right” allowed by the laws or the treaties of the country where such award is sought to be relied upon. The German Federal Court of Justice has confirmed that, in application of article VII(1), an enforcing court may take into account the domestic law’s conflict-of-laws rules, which may result in the application of a foreign law more favourable to recognition and enforcement than the New York Convention.⁹

c. Party request not necessary

11. Article VII(1) provides that the Convention shall not deprive any “interested party” from “availing” itself of an arbitral award.

12. Most courts have adopted the view that an interested party need not explicitly request recognition or enforcement on the basis of laws or treaties that are more favourable to enforcement.¹⁰ As a court will not be in breach of the New York Convention by applying more liberal rules on recognition and enforcement, it may rely on article VII(1) of its own motion. The French Court of Cassation, accordingly, has stated that “[t]he judge cannot refuse enforcement when its own national system permits it, and (...) he should, even *sua sponte*, research the matter if such is the case.”¹¹

d. Multiple enforcement regimes permissible

13. In certain decisions, German courts have considered that a party seeking to rely on another treaty or domestic law by virtue of article VII(1) must rely on it in its entirety, to the exclusion of the New York Convention.¹² According to these decisions, it would not be permissible for a party to base a request for enforcement on the Convention and, at the same time, rely on the more liberal formal requirements for an arbitration agreement under German law.

⁸ *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1, p. 15.

⁹ Bundesgerichtshof, Germany, III ZB 18/05, 21 September 2005, SchiedsVZ 2005, 306, where the application of German conflict-of-laws rules via article VII(1) of the Convention directed the Court to apply Dutch law, which contained more liberal formal requirements for an arbitration agreement than those under article II of the Convention.

¹⁰ *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1984, with English translation in 24 ILM 360 (1985). German courts have adopted the same view. See Bundesgerichtshof, Germany, III ZB 50/05, 23 February 2006, SchiedsVZ 2006, 161. The Swiss Federal Supreme Court has deviated from this view, without discussion. *Sudan Oil Seeds Co. Ltd. (U.K.) v. Tracom S.A. (Switz.)* Federal Supreme Court, Switzerland, 5 November 1985, Arrêts du Tribunal Fédéral (1985) 111 Ib 253.

¹¹ *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1984, with English translation in 24 ILM 360 (1985) at 363.

¹² Bundesgerichtshof, Germany, III ZB 18/05, 21 September 2005; Bundesgerichtshof, Germany, III ZB 50/05, 23 February 2006; Bundesgerichtshof, Germany, III ZB 68/02, 25 September 2003. See also Albert Jan Van den Berg, *The German Arbitration Act 1998 and the New York Convention 1958*, in LIBER AMICORUM KARL-HEINZ BOCKSTIEGEL (Robert Briner et al. eds., 2001).

14. A view advanced by a number of other German courts¹³ is that the pro-enforcement policy of the Convention would permit an interested party to select the more favourable rules and combine them with the provisions of the New York Convention.¹⁴ For instance, a Higher Regional Court has enforced an award pursuant to procedural requirements under German domestic law, which are more favourable than article IV of the Convention, while applying article V of the Convention in respect of possible grounds for refusal to enforce.¹⁵ A court in the United States of America has also granted enforcement to a foreign arbitral award by combining elements of the New York Convention and more favourable domestic law.¹⁶

15. Furthermore, as described at para. 17 below, the Swiss Federal Supreme Court has held that where competing legal provisions concerning recognition and enforcement apply to the enforcement of an arbitral award, precedence should be given to “the provision that allows for making such recognition and enforcement easier,” thus implicitly accepting a fragmented application of two systems.¹⁷

B. Interaction of the Convention with other treaties

16. Certain arbitral awards or agreements may fall under the field of application of the New York Convention as well as the field of application of a multilateral or bilateral treaty. Article VII(1) provides the basic rule that the Convention shall not affect the validity of multilateral or bilateral treaties concerning the recognition and enforcement of arbitral awards entered into by the Contracting States to the Convention, and that an interested party may rely on those treaties if they are more favourable to enforcement than the Convention. This is in keeping with the broader objective of the New York Convention to provide for the recognition and enforcement of arbitral awards and agreements whenever possible, either on the basis of its own provisions or those of another instrument.

17. As the Swiss Federal Supreme Court has confirmed, article VII(1) thus derogates from the rules that normally govern the application of conflicting provisions of treaties, namely that a later legal rule prevails over a prior inconsistent legal rule (“*lex posterior derogat legi priori*”) and that wherever two or more norms deal with the same subject matter, priority should be given to the norm that is more specific (“*lex specialis derogat legi generali*”). As the Court explained, the Convention replaces these rules with the principle of maximum effectiveness (“*règle d’efficacité maximale*”) by providing that the instrument which prevails is neither the more recent nor the more specific, but instead that which is the more

¹³ For instance, Oberlandesgericht, Celle, 8 Sch 06/06, 31 May 2007; Oberlandesgericht, Karlsruhe, 9 Sch 02/07, 14 September 2007; Oberlandesgericht, Köln, Germany, 9 Sch 01-03, 23 April 2004; Oberlandesgericht, München, Germany, 34 Sch 31/06, 23 February 2007.

¹⁴ JULIAN LEW AND LOUKAS A. MISTELIS, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION*, at 697-698 (2003); FOUCHARD GAILLARD *GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION*, at 350 (E. Gaillard, J. Savage eds., 1996).

¹⁵ Oberlandesgericht, Köln, Germany, 9 Sch 01-03, 23 April 2004.

¹⁶ *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt*, 939 F. Supp. 907 (D.D.C.1996).

¹⁷ *Denysiana S.A. v. Jassica S.A.*, Federal Supreme Court, Switzerland, March 14, 1984, Arrêts du Tribunal Fédéral 110 Ib 191, 194.

favourable to the enforcement of the foreign arbitral award. In the words of the Court, “[t]his solution corresponds to the so-called rule of maximum effectiveness (...). According to this rule, in case of discrepancies between provisions in international conventions regarding the recognition and enforcement of arbitral awards, preference will be given to the provision allowing or making such recognition and enforcement easier, either because of more liberal substantive conditions or because of a simpler procedure. This rule is in conformity with the aim of bilateral or multilateral conventions in this matter, which is to facilitate, as much as possible, the recognition and enforcement of arbitral awards.”¹⁸

18. While the provisions of the New York Convention rarely compete with other international instruments concerning recognition and enforcement, where courts have been faced with such conflicts, they have typically resolved them under the more-favourable-right provision under article VII(1).

a. European Convention of 1961

19. The European Convention on International Commercial Arbitration (done in Geneva, 21 April 1961) (the “European Convention”) is one of the few regional instruments containing more liberal rules governing the arbitral process than the New York Convention. It is the first international instrument to treat international arbitration as a whole, and consequently to provide rules governing all of its various stages. As of the date of this Guide, 32 States are bound by the European Convention.¹⁹

20. Under the European Convention, the recognition and enforcement of arbitral awards is considered only very indirectly.²⁰ Accordingly, where an arbitration agreement or award falls within the field of application of both the European Convention and the New York Convention, courts have correctly considered that the provisions of the New York Convention concerning enforcement complement the provisions of the European Convention and that they need not apply the more-favourable-right provision at article VII(1). For instance, when considering an application for the enforcement of a foreign arbitral award, a Spanish court applied

¹⁸ *Denysiana S.A. v. Jassica S.A.*, Federal Supreme Court, Switzerland, March 14, 1984, Arrêts du Tribunal Fédéral 110 Ib 191, 194. Courts in Spain have also endorsed that article VII(1) follows the principle of maximum effectiveness. See *Actival Internacional S.A. v. Conservas El Pilar S.A.*, Tribunal Supremo, Spain, 16 April 1996, 3868/1992; *Unión de Cooperativas Agrícolas Epis-Centre v. La Palentina S.A.*, Tribunal Supremo, Spain, 17 February 1998, 3587/1996, 2977/1996; *Delta Cereales España S.L. v. Barredo Hermanos S.A.*, Tribunal Supremo, Spain, 6 October 1998.

¹⁹ For the current status of the European Convention, see the United Nations Treaty Collection, at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en.

²⁰ Pursuant to its article I, the European Convention applies to “arbitration agreements concluded for the purpose of settling disputes from international trade between physical legal persons having, when concluded the agreement, their habitual place of residence or their seat in different Contracting States” and to “arbitral procedures and awards based on” such agreements. Its application thus differs from that of the New York Convention in two respects: (i) the European Convention applies only to disputes arising from international trade; and (ii) the European Convention requires that the parties to the arbitration agreement come from different Contracting States. The scope of application of the New York Convention contains neither of these two requirements and is thus broader.

both instruments, noting that “the European Convention concerns the applicable law and the jurisdiction of judicial authorities and arbitrators, whereas the New York Convention concerns the recognition and enforcement of arbitral awards.”²¹ German courts have affirmed the complementary nature of these instruments by reference to Section 1061(1) of the German Code of Civil Procedure, which provides that the stipulations of other treaties concerning the recognition and enforcement of arbitral awards will remain unaffected by the application of the New York Convention.²²

b. Panama Convention of 1975

21. The Inter-American Convention on International Commercial Arbitration (done in Panama, 30 January 1975) (the “Panama Convention”) was modelled after the New York Convention and written to be fully compatible with it.²³ The Panama Convention contains provisions concerning the recognition and enforcement of awards which are similar, but not identical, to those found in the New York Convention.²⁴ At the date of this Guide, the Panama Convention is applicable in 19 countries, all of which are also Contracting Parties to the New York Convention.²⁵

22. According to a 2008 survey of decisions from Latin America, most Latin American States that are party to both instruments have relied exclusively on the New York Convention when recognizing and enforcing foreign arbitral awards.²⁶

23. The majority of reported cases expressly discussing the Panama Convention were rendered in the United States of America, whose Federal Arbitration Act contains provisions governing the relationship between the New York Convention

²¹ *Nobulk Cargo Services Ltd. v. Compania Española de Laminacion S.A.*, Tribunal Supremo, Spain, 27 February 1991. See also the same view expressed by French courts in *Société Européenne d’Etudes et d’Entreprises (S.E.E.E.) v. République Socialiste Fédérale de Yougoslavie*, Court of Appeal, Rouen, France, 13 November 1984.

²² For instance, Oberlandesgericht, München, Germany, 34 Sch 019/08, 27 February 2009. In contrast, where a party resisting enforcement has alleged that an interested party may not rely on both the European Convention and the New York Convention in support of its request for enforcement, an Italian court has referred to the compatibility in the first clause of article VII(1) to support its finding that both instruments would apply. See *Arenco-BMD Maschinenfabrik GmbH v. Società Ceramica Italiana Pozzi-Richard Ginori S.p.A.*, Corte di Appello, Milan, Italy, 16 March 1984.

²³ Albert Jan van den Berg, *The New York Convention 1958 and the Panama Convention of 1975: Redundancy or Compatibility?*, 5 ARB. INTL. 214 (1989).

²⁴ For instance, unlike article II(3) of the New York Convention, the Panama Convention nowhere specifically requires the courts of a Contracting State to refer the parties to arbitration when seized of an action subject to an arbitration agreement falling under its field of application. While article 5 of the Panama Convention largely incorporates the grounds for refusal under article V of the New York Convention, the precise wording of these articles differs in several respects. Furthermore, unlike the New York Convention, the Panama Convention contains provisions governing other aspects of the arbitral process, such as the appointment of arbitrators (article 2), the conduct of the arbitral proceedings (article 3).

²⁵ The current status of the Panama Convention is available online at: www.oas.org/juridico/english/sigs/b-35.html.

²⁶ Cristián Conejero Roos, *The New York Convention in Latin America: Lessons From Recent Court Decisions*, in 2009 GLOBAL ARBITRATION REVIEW, THE ARBITRATION REVIEW OF THE AMERICAS 21.

and the Panama Convention. Section 305 of the Federal Arbitration Act provides that when both Conventions are applicable to an arbitral award or agreement, the Panama Convention shall apply if a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Panama Convention and are member States of the Organization of American States. At the same time, Section 302 of the Federal Arbitration Act mandates that certain provisions of the Federal Arbitration Act shall apply together with the provisions of the Panama Convention.²⁷

24. In practice, courts in the United States of America have applied the New York Convention and the Panama Convention as if they were identical. For instance, in a case before the United States District Court, when a party seeking to enforce an award relied on both the New York Convention and the Panama Convention, the Court limited its consideration to the New York Convention on the grounds that “codification of the Panama Convention incorporates by reference the relevant provisions of the New York Convention (...) making discussion of the Panama Convention unnecessary.”²⁸

25. The effect of article VII(1) in cases where both the New York Convention and the Panama Convention apply has not been considered in the reported case law. In specific cases, however, the Panama Convention may offer enhanced enforcement options compared to those of the New York Convention. For instance, Article 4 of the Panama Convention may, in certain cases, imply more favourable options for enforceability for arbitral awards than the New York Convention by equating final arbitral awards with final judicial judgments.²⁹ Pursuant to the more-favourable-right provision of the New York Convention, a party seeking to enforce an award falling under both instruments could take advantage of such an option.

c. Bilateral treaties

26. In accordance with article VII(1), an interested party may base its request for enforcement on a bilateral agreement that specifically concerns the recognition and

²⁷ United States Code, Title 9 — Arbitration, § 302, which specifies: “Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter ‘the Convention’ shall mean the Inter-American Convention.”

²⁸ *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*, District Court, District of Columbia, United States of America, 17 March 2006, 421 F. Supp. 2d 87, (D.D.C. 2006), at footnote No. 4, p.91. See also *Productos Mercantiles E Industriales, S.A. v. Faberge USA Inc.*, United States Court of Appeals, Second Circuit, United States of America, 18 April 1994, 23 F.3d. 41 (2d Cir. 1994), at 45, where the court noted, “The legislative history of the Inter-American Convention’s implementing statute ... clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention.”

²⁹ Article 4 of the Panama Convention provides as follows: “An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.” This provision however mitigates the equality of treatment between arbitral awards and judicial judgements by stating that the recognition or enforcement of an award “may be ordered”, in contrast to the imperative “shall” of article III of the New York Convention.

enforcement of foreign arbitral awards and agreements, as well as bilateral agreements that contain, *inter alia*, provisions on these issues.³⁰ The conditions for recognition and enforcement under bilateral agreements may be more or less favourable than the New York Convention, depending on the circumstances surrounding the award.

27. As an illustration, German courts have applied more favourable provisions of bilateral treaties in accordance with article VII(1). In a case before the German Federal Court of Justice, an interested party was permitted to rely on the 1958 German-Belgian Treaty concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Official Documents in Civil and Commercial Matters, which provides that an award rendered in Belgium must be recognized and enforced in Germany when it has been declared enforceable in Belgium and does not violate German public policy.³¹

28. Courts have also inquired whether an applicable bilateral treaty specifically excludes the application of the New York Convention, and in the event that it does not, have enforced awards pursuant to either the New York Convention, or more favourable domestic law provisions. For instance, in a 1997 decision — *Chromalloy* — the Paris Court of Appeal considered an argument advanced by Egypt that enforcement of an award should be denied, *inter alia*, because it violated Article 33 of the 1982 France-Egypt Convention on Judicial Cooperation (the “France-Egypt Convention”).³² According to the Court, since the France-Egypt Convention expressly stipulates that the recognition and enforcement of awards should be granted in accordance with the provisions of the New York Convention, the States had implicitly consented to the application of any more favourable domestic law pursuant to article VII(1). Enforcing the award, the Court relied on the more limited grounds for refusal of enforcement under the then applicable Article 1502 of the French Code of Civil Procedure.³³

C. Interaction of the Convention with domestic law

29. Article VII(1) facilitates the recognition and enforcement of foreign arbitral awards by ensuring that Contracting States will not be in breach of the Convention

³⁰ Franz Matscher, *Experience with Bilateral Treaties*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 452 (A.J. van den Berg ed., 1999).

³¹ Bundesgerichtshof, Germany, III ZR 78/76, 9 March 1978. See also Bundesgerichtshof, Germany, III ZB 50/05, 23 February 2006, in which the Federal Supreme Court remanded a case back to the Oberlandesgericht Karlsruhe, which, it considered, had erroneously examined a request to refuse enforcement to an arbitral award rendered in Minsk in light of the provisions of the New York Convention, instead of the more restricted grounds for non-enforcement of the 1958 Bilateral Treaty on General Issues of Commerce and Navigation between Germany and the former USSR, which continue to apply in respect of Belarus.

³² *République arabe d’Égypte v. Société Chromalloy Aero Services*, Court of Appeal, Paris, France, 14 January 1997.

³³ For similar reasoning by German courts, see Bundesgerichtshof, Germany, XI ZR 349/89, 26 February 1991; Oberlandesgericht, Frankfurt, Germany, 6 U (Kart) 115/88, 29 June 1989; and by an Italian court see *Viceré Livio v. Prodexport*, Corte di Cassazione, 11 July 1992.

by enforcing arbitral awards pursuant to more favourable provisions found in their domestic laws.

30. The domestic laws of Contracting States to the New York Convention take a variety of approaches to the recognition and enforcement of foreign arbitral awards. While the domestic arbitration law of some jurisdictions provides that recognition and enforcement is to take place pursuant to the New York Convention,³⁴ others contain specific provisions concerning recognition and enforcement.³⁵ Other laws provide that a foreign award can be enforced if the court in the country where the award was rendered has entered a judgment on the award.³⁶

a. Domestic law more favourable than article II

31. Article VII(1) refers only to the enforcement of “arbitral awards” and not “arbitration agreements”. As commentators have noted, the omission of arbitration agreements from the text of article VII(1) was unintentional³⁷ and can be explained by the inclusion of the provisions concerning arbitration agreements in the New York Convention at a very late stage of its negotiation.³⁸

32. French courts have long considered that article VII(1) applies to the recognition and enforcement of arbitration agreements. Thus, in a series of decisions beginning in 1993, French courts have held that pursuant to article VII(1) of the Convention, arbitration agreements could be enforced under the more favourable provisions of French arbitration law, rather than the more stringent requirements of article II of the New York Convention.³⁹

33. As confirmation that article VII(1) also applies to arbitration agreements, at its thirty-ninth session, in 2006, UNCITRAL adopted a Recommendation regarding the interpretation of articles II(1) and VII(1) of the New York Convention. The

³⁴ For instance, Switzerland, Private International Law Act, 1987, Article 194; Germany, Arbitration Act, 1998, Article 1061.

³⁵ For instance, France, New Code of Civil Procedure, Articles 1504-1527; Netherlands, Code of Civil Procedure, Article 1076.

³⁶ For instance, Italy, Code of Civil Procedure, Article 830; Colombia, Code of Civil Procedure, Decree Number 1400 and 2019 of 1970, Article 694(3).

³⁷ ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 27; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 86-88.

³⁸ *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Sixteenth Meeting, E/CONF.26/SR.16.

³⁹ See *Bomar Oil N.V. v. Etap — L'Entreprise Tunisienne d'Activités Pétrolières*, Court of Cassation, France, 87-15.094, 9 November 1993, 1994 REV. ARB. 108; *American Bureau of Shipping (ABS) v. Copropriété maritime Jules Verne*, Court of Cassation, 03-12.034, France, 7 June 2006, 2006 REV. ARB. 945; *S.A. Groupama transports v. Société MS Régine Hans und Klaus Heinrich K.G.*, Court of Cassation, France, 05-21.818, 21 November 2006. The former Article 1443 of the French Code of Civil Procedure, in force from 1981, stipulated that an arbitration agreement shall be contained in the main convention or in a document to which the convention refers, without setting further requirements for the validity of an arbitration agreement in international arbitration matters. The current Article 1507 of the French Code of Civil Procedure applicable to international commercial arbitration provides that “[a]n arbitration agreement shall not be subject to any requirements as to its form.” At the date of this Guide, there were no reported cases where a French court relied on this provision in application of article VII(1) of the Convention.

Recommendation clarifies that article VII(1) “should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement.”⁴⁰

34. Since the UNCITRAL Recommendation, courts from a number of Contracting States have, in the application of article VII(1), enforced arbitration agreements pursuant to any less stringent formal requirements under their domestic laws. For instance, in a recent decision the German Federal Court of Justice enforced an arbitral award involving two commercial parties in light of the theory of *kaufmännisches Bestätigungsschreiben*, which recognizes that commercial contracts, including arbitration agreements, may be concluded by the tacit acceptance of a confirmation letter between merchants.⁴¹ Dutch courts have similarly applied article VII(1) to enforce awards pursuant to a domestic law provision which stipulates that, upon request, a court shall deem effective an arbitration agreement which is not included in a contract signed by the parties or contained in an exchange of letters or telegrams, conditions which are otherwise required to be met by article II of the New York Convention.⁴²

35. The domestic laws of certain other national legal systems also contain fewer formal requirements for an arbitration agreement than the New York Convention. For example, Switzerland’s international arbitration law provides that an arbitration agreement shall be valid if it is made “in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by text.”⁴³ In a still broader manner, the United Kingdom Arbitration Act explicitly stipulates that the writing need not be signed by one of the parties and may result from a recording by one of the parties, or by a third party if authorized by parties to the agreement.⁴⁴ A party seeking enforcement of an arbitral award could avail itself of these provisions pursuant to article VII(1) of the Convention.

b. Domestic law more favourable than article IV

36. Article IV of the New York Convention sets out the documents to be submitted by a petitioner to the enforcing court at the time of a request for recognition and/or enforcement, namely: a duly authenticated original award or duly certified copy

⁴⁰ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17 (A/61/17)*, annex II.

⁴¹ Bundesgerichtshof, Germany, III ZB 69/09, 30 September 2010, SchiedsVZ 2010, 332. See also Kammergericht Berlin, Germany, 20 Sch 09/09, 20 January 2011; Oberlandesgericht Celle, Germany, 8 Sch 14/05, 14 December 2006. German courts enforced arbitration agreements pursuant to this notion even before the 2006 UNCITRAL Recommendation. See Oberlandesgericht Köln, Germany, 16 W 43/92, 16 December 1992. The concept, as it relates to arbitration agreements, was codified in 1998 at Section 1031(2) of the new German Code of Civil Procedure, which is contained in the rules concerning domestic awards. The Oberlandesgericht Frankfurt has considered that article VII(1) of the Convention, which refers to the laws that relate to the enforcement of foreign arbitral awards, would not necessarily lead to the application of Section 1031(2). See Oberlandesgericht Frankfurt, Germany, 26 Sch 28/05, 26 June 2006.

⁴² *Claimant v. Ocean International Marketing B.V., et al*, Rechtbank, Rotterdam, Netherlands, 29 July 2009, 194816/HA ZA 03-925.

⁴³ Switzerland, Private International Law Act, 1987, Article 178(1).

⁴⁴ United Kingdom, Arbitration Act 1996, c. 23, Section 5.

thereof, the original agreement referred to in article II or a duly certified copy thereof and translations of these documents into the language of the country where the award is relied upon, where relevant.

37. Courts in Germany have consistently applied the more-favourable-right principle in article VII(1) to allow an interested party to rely on the less stringent requirements of German law, pursuant to which a party seeking enforcement of a foreign arbitral award in Germany need only supply the authenticated original arbitral award or a certified copy.⁴⁵

38. Likewise, German courts have referred to the more favourable provisions of their domestic law to dispense with the requirement under article IV(2) of the Convention that an interested party produce translations of the award and the original arbitration agreement.⁴⁶ The same approach has been followed by courts in Switzerland, which apply the more favourable provision in Article 193(1) of the Swiss Private International Law Act.⁴⁷

c. Domestic law more favourable than article V(1)(e)

39. Pursuant to article VII(1) of the New York Convention, an interested party may seek the application of a national law if that is more favourable than the provisions of the Convention, including the grounds for refusal listed in article V. Among these grounds, article V(1)(e) provides that recognition and enforcement may be refused if the award “has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

40. The legislative history of the Convention does not discuss the relationship between articles V(1)(e) and VII(1). In particular, there is no record that the State delegates or their governments contemplated whether an award that has been set aside or suspended could be enforced through the application of article VII(1).

⁴⁵ Germany, Code of Civil Procedure, Sections 1064(1) and (3). See e.g. Oberlandesgericht München, Germany, 34 Sch 14/09, 1 September 2009; Bundesgerichtshof, Germany, III ZB 68/02, 25 September 2003. See also Oberlandesgericht München, 22 June 2009; Oberlandesgericht München, 34 Sch 19/08, 27 February 2009; Oberlandesgericht München, 34 Sch 18/08, 17 December 2008; Oberlandesgericht Frankfurt, 17 October 2007; Oberlandesgericht München, 23 February 2007; Oberlandesgericht Celle, 14 December 2006; Kammergericht, 10 August 2006; Oberlandesgericht München, 15 March 2006; Oberlandesgericht München, 28 November 2005; Oberlandesgericht Dresden, 7 November 2005; Oberlandesgericht Dresden, 2 November 2005; Oberlandesgericht Hamm, 27 September 2005; Bayerisches Oberstes Landesgericht, 11 August 2000. For a contrary opinion, see Oberlandesgericht Rostock, Germany, 1 Sch 03/00, 22 November 2001, in which the court considered that Article VII(1) could not allow a party to dispense with the formal requirements for enforcement under the New York Convention.

⁴⁶ For instance, Oberlandesgericht Celle, Germany, 8 Sch 14/05, 14 December 2006; Kammergericht Berlin, 20 Sch 07/04, 10 August 2006. See also Oberlandesgericht München, 28 November 2005; Oberlandesgericht Hamm, 27 September 2005; Oberlandesgericht Köln, 23 April 2004.

⁴⁷ Federal Supreme Court, Switzerland, 2 July 2012, Decision 5A_754/2011. Courts in the Netherlands have also enforced awards pursuant to Article 1076 of the Netherlands Civil Procedure Code, which is more favourable than article IV of the Convention: *Dubai Drydocks v. Bureau voor Scheeps- en Werktuigbouw [X] B.V.*, Rechtbank, Dordrecht, Netherlands, 30 June 2010, 79684/KG RK 09-85.

41. The final text of the New York Convention does not prohibit a court in a Contracting State from recognizing or enforcing such an award, if it can be recognized or enforced pursuant to that State's domestic law or another treaty to which it is party. In application of the more-favourable-right provision under article VII(1), courts in certain Contracting States have thus consistently enforced awards that have been set aside or suspended.

42. For instance, in a series of decisions beginning in 1984, French courts have established a rule that a party contesting enforcement is precluded from relying on grounds for non-enforcement under article V(1)(e) of the Convention in light of the more limited grounds under French law.⁴⁸ In the *Hilmarton* case of 1994, the Court of Cassation enforced an award rendered in Switzerland despite the fact that it had been set aside by the Swiss Federal Supreme Court and a new arbitral tribunal had been constituted to hear the dispute. The Court reasoned that "the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to public policy."⁴⁹

43. French courts have followed this reasoning in a series of subsequent cases.⁵⁰ In the 2007 decision *Putrabali*, for instance, the Court of Cassation affirmed that "[a]n international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Under article VII [the interested party] (...) could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country".⁵¹

44. The same year, the Paris Court of Appeal found that the rule according to which the setting aside of an arbitral award in a foreign country does not affect the right of the interested party to request the enforcement of the award in France

⁴⁸ The former Article 1502 of the French Code of Civil Procedure, in force until 2011, provided an exhaustive list of the five grounds upon which recognition and enforcement could be refused in France. See *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation, France, 83-11.355, 9 October 1984, 1985 REV. ARB. 431, with English translation in 24 ILM 360 (1985). Articles 1520 and 1525(4) of the French Code of Civil Procedure that is currently in force provide for the same grounds for refusal.

⁴⁹ *Société OTV v. Société Hilmarton*, Court of Cassation, France, 10 June 1997. XX Y.B. Com. Arb. 663, at 665, para. 5. The new tribunal ordered to be constituted by the Swiss Federal Supreme Court then rendered a conflicting second award ordering the respondent to pay a consulting fee under the contract at issue. The French Court of Cassation rejected a lower court ruling recognizing the second award and held that only the first award was recognized in France, ruling that the recognition in France of the first award, set aside outside France, necessarily prevented the recognition or enforcement in France of the second award.

⁵⁰ *Bargues Agro Industrie S.A. (France) v. Young Pecan Company (US)*, Court of Appeal, Paris, France, 10 June 2004, 2004 REV. ARB. 733; *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Appeal, Paris, France, 31 March 2005, 2006 REV. ARB. 665, affirmed by *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Cassation, France, 05-18053, 29 June 2007, 2007 REV. ARB. 507; *Direction Generale de l'Aviation Civile de l'Emirat de Dubai v. International Bechtel Co., LLP*, Court of Appeal, Paris, France, 29 September 2005, 2006 REV. ARB. 695.

⁵¹ *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Cassation, France, 05-18053, 29 June 2007, 2007 REV. ARB. 507, affirming *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Appeal, Paris, France, 31 March 2005, 2006 REV. ARB. 665.

(since the arbitrator is not part of the national legal order of the country where the award was rendered) constitutes a “fundamental principle under French law.”⁵²

45. In the 1996 decision *Chromalloy*, the United States District Court of Columbia took a similar view and allowed an application to enforce an award rendered in Egypt and subsequently annulled by a Court of Appeal in Egypt.⁵³ The Court considered that in contrast to article V of the Convention, which sets out a “permissive standard” under which a court “may” refuse to enforce an award, article VII(1) “mandates that this Court must consider [the interested party’s] claims under applicable U.S. law.” The Court analysed whether the Egyptian Court’s reasons for vacating the award were grounds that would have justified vacating a domestic award under Section 10 of the Federal Arbitration Act, Chapter 1. It held that, because the award would not have been vacated under Section 10, it should enforce the award in accordance with article VII(1) of the Convention.

46. Conversely, the New York Convention does not obligate courts in the Contracting States to recognize an award that has been set aside or suspended and they will not violate the Convention by refusing to do so.

47. Some courts have decided that the enforcement of an award should be refused if it has been set aside in the country where it was rendered. German courts, for instance, have adopted this position based on the previous version of the Code of Civil Procedure, which required the validity (“*Rechtswirksamkeit*”) of a foreign arbitral award as a precondition for its enforcement,⁵⁴ as well as the new German Code of Civil Procedure, which provides that recognition and enforcement “shall be granted in accordance with [the New York Convention]”, including the grounds for refusal under article V(1)(e).⁵⁵

48. Similarly, courts in the United States of America have distinguished the 1996 *Chromalloy* decision and have declined to enforce awards that have been

⁵² Cour d’appel de Paris, 18 January 2007, *Société S.A. Lesbats et Fils v. Volker le Docteur Grub*.

⁵³ *Chromalloy Aeroservices Inc. v. Ministry of Defence of the Republic of Egypt*, 939 F. Supp. 907 (D.D.C.1996). See David W. Rivkin, *The Enforcement of Awards Nullified in the Country of Origin: The American Experience*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 528 (A.J. van den Berg ed., 1998); See Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE (E. Gaillard, D. Di Pietro eds., 2008), at 80-86; Georgios C. Petrochilos, *Enforcing Awards Annulled In Their State Of Origin Under The New York Convention*, 48 ICLQ 856 (1999).

⁵⁴ Oberlandesgericht, Rostock, Germany, 1 Sch 03/99, 28 October 1999. See Klaus Sachs, *The Enforcement of Awards Nullified in the Country of Origin: The German Experience*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 552 (A.J. van den Berg ed., 1998).

⁵⁵ Bundesgerichtshof, Germany, III ZB 14/07, 21 May 2007.

annulled or suspended.⁵⁶ For instance, in the 1999 decision *Baker Marine*, the Court of Appeals for the Second Circuit refused to enforce two awards rendered in Nigeria and set aside by the Nigerian courts, rejecting the argument of the interested party that the awards were set aside for reasons that would not be recognized under United States law as valid grounds for vacating an award. The Court reasoned that the “mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments.”⁵⁷

49. By contrast, a court’s refusal to enforce an award that has been set aside or suspended could constitute a violation of the European Convention which, when applicable,⁵⁸ expressly limits the grounds for refusal that are set out at article V of the New York Convention. In this relation, Article IX(2) of the European Convention provides that where a State is party to both the European Convention and the New York Convention, a court’s discretion to refuse enforcement on the basis of an award having been set aside shall be limited to those cases where the award has been set aside for one of the limited reasons enumerated in its Article IX(1).⁵⁹

⁵⁶ *Baker Marine Ltd. v. Chevron Ltd.*, United States Court of Appeal, Second Circuit, United States of America, 12 August 1999, 191 F.3d 194 (2nd Cir. 1999); *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*, District Court, District of Columbia, United States of America, 17 March 2006, 421 F. Supp. 2d 87 (D.D.C. 2006); *Martin Spier v. Calzaturificio Tecnica, S.p.A.*, District Court, Southern District of New York, United States of America, 22 October 1999, 86 Civ. 3447.

⁵⁷ *Baker Marine Ltd. v. Chevron Ltd.*, United States Court of Appeal, Second Circuit, United States of America, 12 August 1999, 191 F.3d 194 (2nd Cir. 1999). The Court distinguished *Chromalloy* on the basis of the nationality of the interested party, who was not a United States citizen, and of a provision in the arbitration clause stating that the decision of the arbitrator “could not be subject to any appeal or other recourse”.

⁵⁸ For the application of the European Convention, see the United Nations Treaty Collection, at http://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&lang=en.

⁵⁹ Article IX(1) of the European Convention provides in full: “1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons: (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention. 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.”

50. Pursuant to its obligation under the European Convention, the Austrian Supreme Court has enforced an award that had been set aside for violation of public policy in Slovenia, reasoning that “[p]ursuant to Article IX(1) of the European Convention, even the annulment of an award for public policy of the country of origin (...) is not one of the grounds for refusal exhaustively listed (...) and is therefore not a ground for refusing enforcement in the enforcement state.”⁶⁰

d. Domestic law more favourable than article VI

51. Article VI of the New York Convention provides that a court before which the enforcement of the award is sought “may”, if it considers it proper, adjourn its decision on enforcement if the award is subject to an action for setting aside in the country in which, or under the law of which, it is made. In application of article VII(1) of the Convention, courts have applied domestic laws more favourable to recognition and enforcement than article VI in order to dispense with any suspensive effect of an action for setting aside.

52. For instance, in a 1999 decision, the Luxembourg Court of Appeal considered the argument of the party resisting enforcement that an award rendered in Switzerland had no *res judicata* effect in light of proceedings to set the award aside at the Swiss Federal Supreme Court and that pursuant to article VI of the New York Convention, enforcement proceedings in Luxembourg should be suspended pending this decision. Rejecting this argument, the Court noted that “the principle of *favor arbitrandum* (...) permeates the Convention” and in particular article VII(1), which is “aimed at making the enforcement of foreign awards possible in the highest number of cases.” The Court reasoned that “according to the Convention the Luxembourg court can only deny enforcement on one of the grounds provided for in its national law.” Since Article 1028(3) of the Luxembourg Code of Civil Procedure does not include the challenge of the award abroad among its grounds for refusal, it refused to suspend its decision and enforced the award.⁶¹

53. French courts have also refused to suspend enforcement proceedings pending an action to set aside an award. In the 2004 *Bargues Agro* case, for instance, the Paris Court of Appeal refused to stay the enforcement of an award rendered in Belgium pending the conclusion of setting aside proceedings there, applying the more favourable provisions of French law.⁶² The Court noted that because the award was rendered in the context of an international arbitration, it was not anchored in the national legal order of Belgium and its potential setting aside could not prevent its recognition and enforcement in another Contracting State. The Court thus held that article VI of the Convention “is of no use in the context of the recognition and enforcement of an award under [the then applicable] Article 1502 of the Code of Civil Procedure.”

⁶⁰ Supreme Court, Austria, 26 January 2005, 3Ob221/04b.

⁶¹ *Sovereign Participations International S.A. v. Chadmore Developments Ltd.*, Court of Appeal, Luxembourg, 28 January 1999.

⁶² *Société Bargues Agro Industries S.A. v. Société Young Pecan Company*, Court of Appeal, Paris, France, 10 June 2004.

e. Other more favourable domestic law practice

54. German courts have relied on article VII(1) of the New York Convention to apply the domestic law principle of preclusion, which provides that a party that has participated in an arbitration proceeding without objecting to a known defect before the arbitral tribunal will not, in general, be able to rely on that defect as a ground for refusal to recognize or enforce the award.⁶³ German courts have interpreted Section 1044(2)(1) of the former Code of Civil Procedure as requiring the preclusion of objections against the award, for instance based on the invalidity of an arbitration agreement, if that ground could have been asserted in an action to set aside the award in the country where the award was made and a party had not availed itself of that possibility.

55. The German Code of Civil Procedure does not contain specific provisions setting out the grounds for refusal to recognize and enforce an award, but instead provides that “recognition and enforcement of foreign awards shall be granted in accordance with the New York Convention.”⁶⁴ There is a divergence of opinion among German courts on the question of whether the preclusion principle may be applied on the basis of the New York Convention only. Some courts have held that while the grounds for non-enforcement under article V of the New York Convention do not preclude defences in this manner, a German court may nonetheless apply this principle despite the fact that it finds no explicit expression in the current Civil Code of Procedure.⁶⁵

56. At the date of this Guide, the most recent decision of the German Federal Court of Justice on this issue has affirmed that the preclusion of defences should have limited applicability. According to the Court, it would not necessarily amount to bad faith for a party to raise a defect for the first time at the enforcement stage and such party would be precluded from doing so only where circumstances make the party’s behaviour appear to be contrary to good faith and the principle of consistency with previous conduct (“*venire contra factum proprium*”).⁶⁶

ARTICLE VII(2)

57. The New York Convention was conceived as a replacement for the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (together, the “Geneva Treaties”), which were considered too cumbersome a legal framework for the enforcement

⁶³ Oberlandesgericht, Düsseldorf, Germany, 8 November 1971; Bundesgerichtshof, Germany, III ZR 206/82, 10 May 1984. See also Albert Jan van den Berg, *The German Arbitration Act 1998 and the New York Convention 1958*, in LAW OF INTERNATIONAL BUSINESS AND DISPUTE SETTLEMENT IN THE 21ST CENTURY — LIBER AMICORUM KARL-HEINZ BOCKSTIEGEL 783 (R.G. Briner, Y.L. Fortier, P.K. Berger, J. Bredow eds., 2001).

⁶⁴ Germany, Code of Civil Procedure, Section 1061.

⁶⁵ For instance, Oberlandesgericht, Karlsruhe, Germany, 9 Sch 02/05, 27 March 2006; Oberlandesgericht, Karlsruhe, Germany, 9 Sch 02/09, 4 January 2012. Certain lower courts have deduced from the absence of such an explicit provision that no preclusion of defences may be applied under New York Convention. See e.g. Bayerisches Oberstes Landesgericht, Germany, 4 Z Sch 50/99, 16 March 2000; Oberlandesgericht, Celle, Germany, 8 Sch 11/02, 4 September 2003.

⁶⁶ Bundesgerichtshof, Germany, III ZB 100/09, 16 December 2010.

of arbitral awards in the context of the growth of international trade after the Second World War.

58. It was only on 10 June 1958, during one of the last meetings of the New York Conference, that the provisions relating to the validity of the enforcement of the arbitration agreement were added to the New York Convention (what is now article II).⁶⁷ These matters being covered by the Geneva Protocol on Arbitration Clauses of 1923 (the “Geneva Protocol”), the Geneva Protocol was included in the new provisions which abrogated the Geneva Convention.⁶⁸

59. According to the *travaux préparatoires*, it was suggested that article VII(2) should expressly provide that the Geneva Treaties shall become extinct (“cease to have effect”) between Contracting States “on their becoming bound by [the New York Convention]”. The addendum, “to the extent they become bound”, was introduced in the text to accommodate the Contracting States that would not become bound by the New York Convention in all their territories simultaneously and not to ensure the continued application of the Geneva Treaties.⁶⁹ The *travaux préparatoires* further confirm that the replacement mandated by article VII(2) refers to the entirety of the Geneva Treaties: a proposal to limit their replacement to the degree that they were incompatible with the New York Convention was rejected during the drafting process.⁷⁰

60. The rules for recognition and enforcement under the New York Convention introduced a number of improvements to the regime provided by the Geneva Treaties.

61. First, the Geneva Convention, which applied to awards based on agreements covered by the Geneva Protocol, provided for the execution of a foreign award only if the party seeking to rely on it could demonstrate that the award was “final” in its country of origin.⁷¹ An interested party thus had to seek an exequatur (or leave for enforcement) in the country where the award was made before seeking enforcement in another country, thus giving rise to a requirement of “double exequatur”. The more liberal regime under the New York Convention does not require an award to be final, but only requires it to be “binding”.

62. Second, in order for the Geneva Protocol and Geneva Convention to be applicable, the parties to the arbitration both had to be subject to the jurisdiction of the States parties to the respective treaties. The New York Convention, by contrast, only requires that the award be made in the territory of another Contracting State or

⁶⁷ *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24, p. 4.

⁶⁸ *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24.

⁶⁹ *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as provisionally approved by the drafting Committee on 6 June 1958, E/CONF.26/L.61, pp. 3-4; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24, p. 4. See also comments in Oberlandesgericht, Düsseldorf, 8 November 1971.

⁷⁰ *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Eighteenth Meeting, E/CONF.26/SR.18, p. 7.

⁷¹ This notion was defined in Article 1(d) of the 1927 Geneva Convention as an award that was not (i) open to any form of recourse or (ii) the subject of pending proceedings contesting its validity.

in the enforcing State if the award is considered as non-domestic in the State where recognition and enforcement is sought.

63. Third, the burden of proof under the New York Convention is less onerous on the party seeking enforcement. Pursuant to Article I of the Geneva Convention, an interested party was required to demonstrate the existence of a valid arbitration agreement, concerning an arbitral subject matter, that the arbitral proceedings had been conducted in accordance with the parties' agreement and also that the award had become final in the place of arbitration and was not contrary to the public policy of the recognizing State. Under the New York Convention, a party seeking enforcement need only supply to a court the original award (or a duly certified copy thereof) along with the original arbitration agreement (or a duly certified copy thereof). Under the New York Convention, it is up to the party resisting enforcement to prove the existence of one of the grounds for refusal enumerated in article V of the New York Convention.

64. Reported case law on article VII(2) confirms the principle that the Geneva Treaties shall cease to apply to the recognition and enforcement of foreign arbitral awards in Contracting States that have become bound by the New York Convention.⁷²

65. With very few exceptions, all States which had adhered to the Geneva Treaties have now become Parties to the New York Convention.⁷³ Article VII(2) is therefore of limited practical relevance today.

⁷² For instance, *S.p.A. Nosegno e Morando v. Bohne Friedrich und Co-Import-Export*, Corte Di Cassazione, Italy, 20 January 1977; *Jassica S.A. v. Ditta Polojaz*, Corte di Appello, Trieste, Italy, 2 July 1982; Supreme Court, Austria, 21 February 1978; Oberlandesgericht, Düsseldorf, 8 November 1971; *Trefileries & Ateliers de Commerce (T.A.C.) v. Société Philipp Brothers France et Société Derby & Co. Limited*, Court of Appeal, Nancy, France, 5 December 1980; *Minister of Public Works of the Government of the State of Kuwait v. Sir Frederick Snow & Partners*, House of Lords, England, 1 March 1984, [1984] A.C. 426.

⁷³ The status of former colonies that were Contracting States to the Geneva Treaties is not clear, as some of them have not made formal announcements regarding their status. See Dirk Otto, *Article IV*, in *RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION* 143 (H. Kronke, P. Nascimiento et al. eds, 2010).

II. ELECTRONIC COMMERCE

A. Report of the Working Group on Electronic Commerce on the work of its forty-sixth session (Vienna, 29 October-2 November 2012)

(A/CN.9/761)

[Original: English]

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I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).¹

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.²

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions at the colloquium on electronic commerce (New York, 14-16 February 2011).³ After discussion, the

¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, para. 343.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 250.

³ Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

Commission mandated the Working Group to undertake work in the field of electronic transferable records.⁴ It was recalled that such work would be beneficial not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the Rotterdam Rules.⁵ In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.⁶

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.⁷ There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.⁸ In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.⁹ After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.¹⁰

II. Organization of the session

6. The Working Group, composed of all States members of the Commission, held its forty-sixth session in Vienna from 29 October to 2 November 2012. The session was attended by representatives of the following States members of the Working Group: Algeria, Austria, Bolivia (Plurinational State of), Brazil, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Honduras, Israel, Italy, Japan, Kenya, Malaysia, Malta, Mexico, Nigeria, Pakistan, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

7. The session was also attended by observers from the following States: Belarus, Belgium, Cyprus, Dominican Republic, Ecuador, Hungary, Indonesia, Iraq, Poland, Qatar, Republic of Moldova and Viet Nam.

8. The session was also attended by observers from the European Union.

⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 238.

⁵ *Ibid.*, para. 235.

⁶ *Ibid.*

⁷ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 82.

⁸ *Ibid.*, para. 83.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 90.

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

(a) *Intergovernmental organizations*: International Institute for the Unification of Private Law (Unidroit) and the World Customs Organization (WCO);

(b) *International non-governmental organizations*: Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States, European Law Institute, European Multi-Channel and Online Trade Association, Forum for International Conciliation & Arbitration, Fédération Internationale des Associations de Transitaires et Assimilés, Institute of Law and Technology (Masaryk University), International Air Transport Association and the New York State Bar Association.

10. The Working Group elected the following officers:

Chairman: Sr. Agustin MADRID PARRA (Spain)

Rapporteur: Ms. Kachida MEETORTHARN (Thailand)

11. The Working Group had before it the following documents: (a) annotated provisional agenda (A/CN.9/WG.IV/WP.117); (b) a note by the Secretariat on legal issues relating to the use of electronic transferable records (A/CN.9/WG.IV/WP.118 and Add.1); (c) legal issues relating to the use of electronic transferable records — Proposal by the Governments of Colombia, Spain and the United States (A/CN.9/WG.IV/WP.119); and (d) a paper submitted by the Identity Management Legal Task Force of the American Bar Association (ABA) on identity management (A/CN.9/WG.IV/WP.120).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of legal issues relating to the use of electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

13. The Working Group engaged in discussions on the legal issues relating to the use of electronic transferable records on the basis of document A/CN.9/WG.IV/WP.118 and Add.1. The deliberations and decisions of the Working Group on those topics are reflected in chapter IV below.

IV. Legal issues relating to the use of electronic transferable records

14. At the outset, the Working Group was briefed about the results of consultations undertaken in States with respect to electronic transferable records. While consultations in a couple of States showed limited or no industry interest or need for the use of electronic transferable records in the finance sector, it was noted that consultations in a significant number of other States received favourable responses from several sectors.

15. A suggestion was made that work on electronic transferable records should be solely based on actual industry needs and resolve identified problems, if any. In response, it was noted that actual industry needs had been identified. It was further highlighted that enabling the use of electronic transferable records would bring clear benefits to the industries concerned.

16. In that respect, it was noted that, by facilitating the use of electronic transferable records, transactions costs could decrease, while efficiency and security of commercial transactions could increase. References were made to the benefits arising from the use of electronic promissory notes and electronic warehouse receipts in existing national systems. The prevailing cross-border dimension in the use of electronic bills of lading, which called for harmonized laws enabling their use which UNCITRAL was uniquely placed to develop and which could also entail the use of electronic bills of exchange as trade documents, was highlighted. Finally, it was pointed out that detailed rules could usefully complement the provisions of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”) on negotiable electronic transport records.

17. The Working Group agreed that a considerable amount of information collected during consultations confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field.

A. Scope of Work

1. Electronic transferable records

18. As to the scope of work, while a suggestion was made that it would be desirable for the Working Group to focus on specific types of or specific issues related to electronic transferable records, it was widely felt that the Working Group should develop generic rules based on a functional approach and that such generic rules should be broad enough to encompass various types of electronic transferable records, including those relating to goods and money. Significant past achievements in developing generic rules based on a functional approach were noted and therefore, it was suggested that a similar approach be taken with regard to electronic transferable records. It was further proposed that specific rules pertaining to certain types of electronic transferable records could be developed after the preparation of such generic rules, if necessary.

19. It was suggested that the general description of transferable documents and instruments excluded from the scope of application of the United Nations

Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”) under article 2, paragraph 2, could provide a starting point for discussion as it offered a general yet comprehensive description of electronic transferable records.

20. It was restated that the Working Group should not deal with matters governed by underlying substantive law. In addition, it was emphasized that terminology should be carefully chosen so as to accommodate the substantive laws of all legal traditions.

21. Thereafter, the Working Group discussed the distinction between transferability and negotiability. It was agreed that negotiability related to the underlying rights of the holder of the instrument under substantive law and that the discussion therefore should focus on transferability.

22. After discussion, the Working Group adopted the working assumption that electronic transferable records should refer to the electronic equivalent of any transferable document or instrument “that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money” (see article 2, paragraph 2, of the Electronic Communications Convention). It was further clarified that electronic transferable records should not include electronic equivalents of securities, such as shares and bonds, nor electronic means of payment.

2. Management of electronic transferable records

23. With respect to the existence of different models for the management of electronic transferable records (registry-based, token-based or other systems), it was explained that neutrality should be respected not only with regard to the technology but also to the system chosen.

B. Legal issues with respect to electronic transferable records

1. Creation and release of electronic transferable records

24. The importance of defining a functional equivalent of the notion of possession of paper-based documents in order to identify the party entitled to the performance embodied in the electronic transferable record was stressed. It was suggested that functional equivalence could be achieved through the notion of control of the electronic transferable record. It was noted that the attribution of control was inherent in the creation of electronic transferable records. It was stressed that the notion of control was to be formulated in a technology neutral manner.

25. It was further suggested that, to establish control over an electronic transferable record, the following requirements might be applied to technology: authenticity of the record and of its signatures; originality and integrity of the record, at least for the period of time required by law; and ability to identify the holder, taking into consideration the desirability not to disclose its identity in certain circumstances. It was noted that chapter 10 of the Rotterdam Rules might provide useful guidance in the discussion of the notion of control.

26. It was explained that business practice evidenced the use of paper-based documents issued to bearer. It was added that rules on electronic transferable

records should enable such use, allowing anonymity to the extent permitted by technology, for instance, through the use of pseudonyms. In that respect, it was also said that the parties might not necessarily be identified in the electronic transferable record management system, but could remain identifiable depending on the features of that system or the technology used. However, it was also noted that regulatory requirements increasingly demanded the identification of the parties involved, particularly in financial transactions.

27. It was indicated that it might be beneficial for the Working Group to consider whether it would be appropriate to distinguish between licensed and unlicensed third-party service provider, the issue of liability of third-party service provider, as well as the question of any possible liability of the issuer of the record in respect of choosing a third-party service provider. It was noted that articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures, dealing with the conduct and trustworthiness of the certification service provider, could provide useful guidance on that topic.

28. As to the creation of electronic transferable records, the Working Group considered whether its scope of work should be confined to the transposition of paper-based transferable documents to the electronic environment or should also consider novel instruments that would exist only in the electronic environment. It was pointed out that examining novel instruments would entail work on substantive law aspects, which was not within the mandate of the Working Group. In that line, it was suggested that the Working Group should focus on addressing formal requirements for the creation of electronic transferable records, some of which (for example, writing and signature) had already been addressed in previous UNCITRAL texts.

29. After discussion, it was generally agreed that the Working Group should focus on enabling the use of electronic transferable records as equivalents of existing paper-based transferable documents. However, it was also suggested that while the Working Group should not engage in preparing substantive rules for instruments that would exist only in the electronic environment, those instruments should not be excluded from the general scope of its work on electronic transferable records.

30. As to the creation of electronic transferable records, the significance of building users' trust through a secure, effective and reliable system was highlighted.

31. The Working Group agreed that the two terms "issuance" and "release" were closely related yet distinct. It was explained that, while the term "issuance" had potential connotations under substantive law, the term "release" referred to the physical or technical step of placing the electronic transferable record under the control of its first holder. Reference was made to article 8 (b) of the Rotterdam Rules where the term "issuance" was used in connection with an electronic transport record. It was further noted that the role of a third party in releasing the record, for instance as an agent of the issuer, would need to be examined. It was explained that a registry-based system could be designed to allow the issuer to directly release the electronic transferable record. The need to distinguish between the functions of a registry and of a repository was mentioned.

32. As to the information required for the creation of electronic transferable records, it was agreed that the same information required for the creation of the paper-equivalent should be required. However, it was noted that, due to the

electronic form of the record, additional technical information could be required, such as an identification number assigned to that record. In that context, it was mentioned that the need for consent to the use of electronic transferable records, explicit or implicit (as provided in article 8, paragraph 2, of the Electronic Communication Convention), would also need to be addressed. In addition, it was noted that due to the electronic nature, information additional to that available in the paper-based equivalent could be included in the record, and that parties should not be prevented from adding such information, if so agreed. It was further noted that article 5 bis of the UNCITRAL Model Law on Electronic Commerce could also be relevant in the sense that required or additional information might be incorporated by reference in the electronic transferable record.

33. It was explained that uniqueness should not be an end in itself, but rather a means to avoid multiple claims based on multiple documents entitling their holders to demand performance. Bearing that in mind, it was noted that the requirements for achieving uniqueness might change in light of technology used and other circumstances. Reference was made to article 9, paragraph 1, of the Rotterdam Rules as an example of achieving uniqueness by setting out the procedure for the use of negotiable electronic transport records.

34. However, a view was expressed that the main goal of uniqueness was to ascertain the content of the obligation contained in the electronic transferable record, while the problem of multiple claims could be prevented through the notion of control that allowed identification of the rightful holder.

35. The view was expressed that registry-based systems might be designed in a manner to provide a higher level of reliability of the uniqueness of the electronic transferable record, while token-based systems might not provide that same level of reliability based on their technical features only. In response, it was noted that equally effective token-based systems were available and other factors, such as the number of entities having access to the electronic transferable record, might have an impact on the level of reliability of the uniqueness of the electronic transferable record.

36. Reference was made to current practices envisaging the use of multiple originals in the paper-based environment. The case of paper-based bills of lading, issued in three originals, was cited. It was asked whether the replication of such practice in the electronic environment would be technically feasible or desirable in light of the higher transmission speed and security offered by the use of electronic means. Reference was made to article 36, paragraph 2 (d), of the Rotterdam Rules, which allowed the issuance of multiple originals of negotiable transport documents but not of negotiable electronic transferable records. It was recalled that during the negotiations of the Rotterdam Rules, it was observed that needs covered in the paper-based environment through the issuance of several originals could be satisfied in the electronic environment through the issuance of one single original.

37. The Working Group agreed that future consideration of uniqueness should take into due account relevant UNCITRAL texts. It also agreed that uniqueness should aim at entitling only one holder of the electronic transferable record to performance.

38. The Working Group continued its discussion under the assumption that the notion of “control” over electronic transferable records would achieve the functional equivalence of the notion of “possession” of paper-based documents. It was

explained that control was necessary to designate the holder of the record in a reliable manner.

39. It was added that the type of procedure used to achieve control was a secondary issue. Different examples of legislative provisions dealing with control were mentioned. It was noted that, while some provisions referred only to the existence of adequate procedures, other provisions set forth in more detail the requirements of those procedures. It was also mentioned that in registry-based systems, the holder of the electronic transferable record might not have actual control.

40. It was asked whether it was desirable to associate a presumption of reliability to procedures satisfying certain requirements, to be described in a technology neutral manner. In response, the need for a cautious approach to avoid favouring any system or technology was stressed.

41. After discussion, the Working Group agreed that rules on control should aim at establishing the functional equivalence of possession in the paper-based environment by effectively identifying the holder entitled to performance. It was further agreed that there should not be any specific reference to the type of system or technology to be adopted to generate such reliability.

42. It was indicated that any obligation to disclose the identity of the issuer or of the first holder would be contained in the applicable substantive law. Therefore, it was added that anonymity should be permitted to transpose existing business practices for paper-based documents in the electronic environment. At a general level, it was suggested that provisions on electronic signatures, including those prepared by UNCITRAL, would be relevant in establishing the link between electronic transferable records and concerned parties.

43. It was further said that the identification of the holder as the entity entitled to performance was distinct from the disclosure of the identity of that entity. The example was given of the use of a personal identification number (PIN) for the consignment of goods, a practice that reliably identified the party entitled to performance without necessarily disclosing its identity.

44. It was indicated that where prior identification of the party was required to access the electronic transferable records management system, the disclosure of that party's identity could be achieved based on that prior identification. On the other hand, in a system that did not require such prior identification, satisfying such disclosure requirement might demand the use of additional measures.

2. Circulation of electronic transferable records

45. In light of current business practice, it was suggested that rules should be prepared to provide for the amendment of electronic transferable records. The need for amendments to be clearly identifiable as such was stressed. It was further noted that the transfer of control over an electronic transferable record, discussed below, would generally be achieved through the amendment of that record.

46. It was suggested that the holder in control of the electronic transferable record would often be the party having the right to make such amendments. However, caution was urged in the sense that any rule on this matter should not have the effect of allowing the holder to make amendments that affect the issuer's underlying

obligation without the consent of the issuer. As such, it was suggested that reference should instead be made to the party with the authority to make amendments, as determined by substantive law.

47. The need to include a requirement to inform parties affected by the amendment, when such an amendment was made, was suggested. However, it was stated that notice requirements did not necessarily exist in the paper-based environment and that it would be more appropriate to maintain the same notice requirements for electronic transferable records as set for paper-based transferable documents. Similar comments were expressed on the question of when amendments could be made to electronic transferable records.

48. As to how to give effect to amendments, it was suggested that that was a technical issue which was largely system dependent. It was indicated that rules on amendments should recognize that an electronic transferable record could be amended and let the system determine how this was put in practice.

49. After discussion, it was agreed that the rule to be prepared should acknowledge the need to address amendments and their effectiveness, while the issues of establishing which party could make such amendments and under what circumstances should be left to substantive law. In that context, it was suggested that it would be useful to have a definition of the term “amendment”.

50. Thereafter, the Working Group engaged in a discussion on transfer of control. It was explained that transfer of control over an electronic transferable record should have the same effect as delivery and, when required, endorsement of a paper-based transferable document.

51. It was suggested that the elements contained in article 9, paragraph 1, of the Rotterdam Rules might provide a useful starting point for drafting rules on transfer of control. However, it was also said that provisions contained in chapter 3 of the Rotterdam Rules, including article 9, needed further specification in order to offer the desirable level of guidance, and that rules setting forth the procedures for achieving functional equivalence to the transfer of paper-based documents were necessary to that end.

52. Other possible legislative models, such as the Uniform Commercial Code (UCC) Section 7-106 of the United States of America, were mentioned. In particular, it was suggested that the general approach taken in subsection (a) of that provision might provide general guidance.

53. With respect to third-party service providers such as registry operators, it was indicated that the obligations of those third parties could arise from the requirements of the procedures put in place to establish and transfer control, as well as from qualities of the electronic transferable records management system such as reliability and security. Therefore, it was said, additional duties or obligations for those third-party service providers should not be created in the rules.

54. It was suggested that providing a definition of control over an electronic transferable record could be useful for future deliberations. In particular, it was noted that, while typically the holder would have the right to transfer control over the electronic transferable record, a more detailed discussion of that right demanded prior consensus on the definition of control.

55. It was asked whether rules on transfer of control should allow for change in the manner of transmission to the bearer, if the record had been issued to a named party, and vice versa. It was replied that all options available for paper-based transferable documents should also be applicable to electronic transferable records.

56. A question was raised with regard to the moment in time when the transfer of control took place. In that respect, the possibility of using a rule similar to that contained in article 10 of the Electronic Communications Convention to determine the time of dispatch and receipt of electronic communications, and therefore the time of the transfer of the electronic transferable record, was mentioned.

57. It was suggested that establishing a consistent terminology, possibly through definitions, would be useful in identifying those instances relating to the identification of the legal capacity of the party (e.g., holder) as opposed to other instances relating to disclosure of its identity.

58. After discussion, the Working Group agreed that a definition of control as well as rules on the transfer of control, taking into account existing legislative models and bearing in mind technology neutrality, should be prepared for future consideration. In particular, it was noted that limitations on the number of transfers should be avoided if not applicable to paper-based documents.

59. It was said that rules on the correction of transferable documents were excessively influenced by the paper medium, and that therefore new rules, specific to input errors in the electronic environment, would be desirable. It was suggested that those rules could contemplate correction before and after the issuance of that record. In the latter case, it was added, the consent of all concerned parties might be necessary. With respect to registry-based systems, the distinction between input errors of the parties and of registry operators was highlighted.

60. It was said that the consequences of allowing for corrections of electronic transferable records might be particularly serious, given that those records were used in international trade between remote parties, and that strict parameters were required by financial institutions upon their presentation. The need to protect all involved parties, including by requiring their consent to the correction, where appropriate, was stressed.

61. The possibility of introducing a rule akin to that contained in article 14 of the Electronic Communications Convention was discussed. It was said that that article had a narrow scope but could nevertheless be useful in addressing issues specific to the use of electronic means. In particular, it was explained that that article would apply only to cases when an input error was made during the interaction between a natural person and an automated message system, and when that message system did not provide an opportunity to correct that error. Moreover, other conditions had to be fulfilled, including that the natural person had received no benefit from the relevant transaction. It was said that, in practice, that rule was unlikely to find application if the electronic transferable records management system foresaw the use of the same procedure, be it automated or manual, for all participants.

62. It was added that electronic transferable records management systems would usually allow for the treatment of input errors, and that competition among different providers of those systems would give businesses an opportunity to choose a system offering such an option. Given the desirability to avoid interfering with substantive

law, it was agreed that a cautious approach should be taken when considering specific rules on the correction of electronic transferable records.

63. It was noted that existing examples of guarantees on, and pledges of, electronic transferable records were generally found in registry-based systems used in the finance sector. It was added that the need for guarantees and pledges also arose for other transferable documents. For instance, it was explained that bills of lading were often offered as a guarantee to financial institutions. In that case, it was added, a mechanism could be devised under which the guarantee would be able to override the holder in control of the record.

64. Reference was made to the UNCITRAL Legislative Guide on Secured Transactions, which provided guidance on the substantive law dealing with secured transactions involving negotiable documents and instruments.

65. The Working Group agreed that rules on guarantees and pledges of electronic transferable records should be prepared, that those rules should accommodate all types of records, and that they should be technology and system neutral.

66. It was noted that splitting and consolidation of transferable documents existed in business practice, and that a general rule providing such possibility for electronic equivalents could be particularly beneficial.

67. With respect to current practice relating to splitting and consolidation of bills of lading, it was illustrated that, in some cases, existing bills ceased to have legal effect and new bills were issued. It was added that, while the involvement of the carrier and the shipper was necessary, different practices existed with respect to requiring the consent of other parties.

68. It was suggested that requirements for and effects of splitting and consolidation of electronic transferable records should be determined by substantive law, and that related modalities should reflect current practice.

69. The Working Group agreed that, for the time being, there was no need to prepare a general rule on the involvement of the issuer of the electronic transferable record during the circulation of that record.

3. End of life cycle of electronic transferable records

70. With respect to the “presentation” of electronic transferable records for performance, it was pointed out that presentation in the electronic environment introduced significant practical challenges due to remoteness and possible lack of familiarity between the parties and the need to address issues regarding partial performance and the obligor’s refusal to perform was raised.

71. The Working Group agreed that a rule should be prepared aimed at achieving the functional equivalence of physical delivery of paper-based documents. It was further agreed that such a rule should not address the legal consequences of presentation, which were matters of substantive law.

72. As regards the “conversion” of electronic transferable records, it was said that providing convertibility was critical for the wider acceptance and use of electronic transferable records for example electronic bills of lading which were used across borders, due to the different levels of readiness in various States and business communities.

73. It was noted that the legal effect of, and information contained in, the document or record to be converted should remain unchanged so as to be media-neutral. It was therefore agreed that conversion should not refer to a situation where a document or record was terminated and a new record or document was issued, but instead to where there was a mere change in the medium. It was also stressed that the document or record in its original form, once converted, should cease to have any legal effect in that original form, so as to prevent the possibility of multiple claims.

74. A suggestion was made that only conversion of paper-based documents to electronic records should be allowed, as this would generally promote the broader use of electronic means. In response, it was stated that conversion in both ways should be permitted to reflect current business practice and to allow for the use of paper-based documents by parties with limited access to information and communication technology. It was stated that the inability to convert back an electronic record to a paper-based document after its conversion into the electronic form could be an obstacle for parties when deciding to convert the paper-based document to an electronic form. Support was expressed for the more comprehensive and flexible approach.

75. A question was raised whether termination of an electronic record upon its conversion would need to be distinguished from termination of the legal effect of the record upon performance of the underlying obligation. In response, it was stated that the two instances should be treated differently, particularly because termination due to conversion did not entail the termination of the underlying obligation. It was suggested that terminology be carefully chosen to prevent any ambiguity, for instance, by referring to “substitution” in the case of conversion.

76. It was further suggested that the following issues would need to be considered: (i) whether the document or record would need to include information about the conversion; (ii) which parties should consent to or otherwise be involved in the conversion; and (iii) whether the substituted document or record could be restored in specific circumstances such as when the substitute document or record had not been effectively created or had been lost. It was noted that substantive law seldom dealt with these issues.

77. After discussion, it was agreed that a general rule to provide for the possibility of converting paper-based documents into electronic transferable records and vice versa should be prepared taking into consideration the various aspects mentioned above.

78. With regard to “termination”, it was reiterated that the terminology should be carefully chosen to avoid any confusion, particularly as some terms might imply legal consequences. It was clarified that the issue at hand did not deal with the termination of the underlying obligation, which was a matter of substantive law, but rather with the circumstances whereby the electronic transferable record would cease to have any legal effect, for instance in the case of performance by the obligor. In that context, the need to prevent further circulation of the electronic transferable record, which could result in additional claims even after performance, was stressed.

79. It was further clarified that the circumstances in which transferable documents or records would cease to have legal effect was a matter of substantive law and thus could differ according to the type of the instrument.

80. Reference was made to article 9, paragraph 1(d), of the Rotterdam Rules which referred to a mechanism for providing confirmation that delivery to the holder had been effected, or that the electronic transport record had ceased to have any effect or validity.

81. During the discussion, the following issues were raised: (i) whether partial performance by the obligor could be effected as partial termination or amendment of the record, or rather through the termination of the existing record and the issuance of a new record; and (ii) whether there was the need to replicate the functional equivalent of annotations indicating termination in a paper-based document. As to the storage of the record, it was suggested that article 10 of the Model Law on Electronic Commerce on the retention of data messages could provide a starting point for discussion.

82. After discussion, it was agreed that a general rule should be prepared to address the need to replicate, in a functionally equivalent manner, the circumstances whereby a paper-based transferable document would cease to have any legal effect.

C. Other issues with respect to electronic transferable records

1. Third-party service providers

83. The Working Group moved to consider legal issues relating to third parties providing services for the issuance and use of electronic transferable records, such as registry operators. In that context, it was indicated that repositories and providers of other services should be distinguished.

84. It was said that the inclusion of the topic in the rules to be prepared could lead to favouring a specific system, thus violating the principle of technology and system neutrality. In that respect, the provisions on certification service providers in the UNCITRAL Model Law on Electronic Signatures were mentioned. In response, it was noted that it might be possible to develop rules encompassing all third parties providing services relating to the management of electronic transferable records, without specific reference to any technology or system.

85. It was suggested that liability of third parties was a matter of substantive law or contractual agreements, and that users of existing systems were adequately protected by the insurance covering the operators of those systems. It was further said that, while it might be possible to identify some parameters that could provide guidance in establishing the trustworthiness of third-party service providers, caution should be exercised when addressing the questions of whether and what level of regulation was appropriate. It was specified that there was no need to subject third parties to a mandatory licensing system or a mandatory dispute resolution system.

86. On the other hand, it was indicated that in certain jurisdictions, especially those belonging to the civil law tradition, registries were public and subject to rules set forth in the law as well as to licensing requirements. It was suggested that that

approach was the most appropriate to build trust in international trade, where parties were in remote locations and sometimes not otherwise acquainted. It was suggested that different types of registries should be developed for the various types of electronic transferable records, following the example set in the registries established by the Convention on International Interests in Mobile Equipment (“Cape Town Convention”) and protocols thereto. It was stressed that leaving the development of liability regimes for such registries entirely to the market would expose commercial operators to excessive risks.

2. Cross-border recognition of electronic transferable records

87. The importance of cross-border aspects of the legal recognition of electronic transferable records was reiterated. It was indicated that cross-border aspects were particularly prevalent in electronic transferable records used in the maritime transport industry.

88. The view was expressed that enabling the cross-border use of electronic transferable records required addressing certain aspects, such as enforcement matters, but did not call for a broader harmonization effort. Reference was made to article 12 of the UNCITRAL Model Law on Electronic Signatures as an example of a provision specifically aimed at enabling cross-border recognition.

89. In response, it was indicated that enabling the effective cross-border use of electronic transferable records demanded dealing not only with the specific aspects of the operation of those records, but also with the broader international legal framework for electronic communications.

D. Future work

90. The Working Group engaged in a preliminary discussion on the possible future outcome of its deliberations on electronic transferable records.

91. At a general level, it was indicated that the content of the rules to be prepared would guide in the choice of the appropriate form it would take. It was added that the level of legal harmonization deemed desirable would also be relevant to that choice.

92. In light of the progress made, it was suggested that a possible outcome of the work could result in a model law based on and complementing existing UNCITRAL texts. It was explained that a model law would allow for flexibility when addressing differences in national substantive laws. Some support was also expressed for the preparation of guidance texts, such as a legislative guide. The possibility of considering in the future the preparation of a more binding instrument, of a treaty nature, was also mentioned.

93. Broad support was expressed for the preparation of draft provisions for consideration at the next session of the Working Group. It was added that those provisions should be presented in the form of a model law, without prejudice to the decision on the form of its work to be made by the Working Group.

V. Technical assistance and coordination

94. The Working Group was informed of the entry into force of the Electronic Communications Convention on 1 March 2013, with the Dominican Republic, Honduras and Singapore as its States parties. It was further noted that sixteen other States have signed the Convention. Noting the significance of the Convention in facilitating the use of electronic communications in international trade, the Working Group encouraged other States to consider becoming parties to the Convention and, in that context, several States expressed their interest and informed the Working Group that domestic consultations and preparatory legislative work were underway.

95. Then the Working Group was informed of the developments undertaken in the promotion of UNCITRAL texts on electronic commerce. In particular, initiatives at the regional level were illustrated, as well as resulting legislative enactments (for further details, see A/CN.9/753, paras. 19 and 33-35). The Working Group expressed appreciation for the work undertaken by the Secretariat in the field of technical assistance and highlighted the importance of that work in furthering the mandate of UNCITRAL. The Working Group benefited from a presentation on the legal, technological and functional aspects of current initiatives relating to the use of electronic communications in the Russian Federation with a view to facilitating cross-border recognition at the international and regional levels.

96. The Working Group was then informed of the ongoing cooperation with various organizations with regard to legal issues relating to electronic single window facilities. The Working Group first took note of Resolution 68/3 adopted by the Economic and Social Commission for Asia and the Pacific (ESCAP) entitled “Enabling paperless trade and the cross-border recognition of electronic data and documents for inclusive and sustainable intraregional trade facilitation” which encouraged the adoption of available international standards, such as those contained in UNCITRAL texts, to facilitate interoperability. The Working Group also took note of the publication “Electronic Single Window Legal Issues: A Capacity-Building Guide” prepared jointly by the United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UNNExT), ESCAP and the United Nations Economic Commission for Europe (UNECE). The Secretariat was requested to continue working closely with ESCAP, including through the UNCITRAL Regional Centre for Asia and the Pacific and in particular on the implementation of ESCAP Resolution 68/3, as well as with other relevant organizations.

97. The Working Group took note of a statement by the secretariat of the WCO, in which it noted the growing importance of single window facilities for trade facilitation, including for developing and least developed countries, and welcomed the contribution of UNCITRAL in establishing related legal standards. In that statement, the WCO secretariat also noted that electronic transferable records were a key component of the paperless supply chain and stressed the importance of the availability of those records to increase the quality of the data submitted to single window facilities, therefore enabling seamless electronic exchanges between private and public entities.

98. With respect to legal issues relating to identity management, the Working Group heard a summary of the working paper submitted by the Identity

Management Legal Task Force of the ABA (A/CN.9/WG.IV/WP.120) which provided an overview of identity management, its potential role in electronic commerce and relevant legal issues. Particular reference was made to the adequate legal treatment of risks involved in identity management systems in relation to the liabilities of third-party service providers.

99. Thereafter, the Working Group was informed of the Secretariat's cooperation with UNECE and the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT). It was noted that the Secretariat was currently involved in two projects: (i) revision of UN/CEFACT recommendation 14 which dealt with authentication of trade documents by means other than signature; and (ii) preparation of UN/CEFACT recommendation 36 on single window interoperability, which aimed at complementing the existing UN/CEFACT recommendations 33 to 35 on that topic.

100. Finally, the Working Group was informed of a proposal made by the European Commission in June 2012 for a "Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market". It was noted that the Secretariat had been involved in the consultation process to ensure a coordinated approach on that matter.

VI. Other business

101. The Working Group was informed that the forty-seventh session of the Working Group will be held in New York from 13 to 17 May 2013.

**B. Note by the Secretariat on legal issues relating to the use of
electronic transferable records, submitted to the Working Group on
Electronic Commerce at its forty-sixth session**

(A/CN.9/WG.IV/WP.118 and Add.1)

[Original: English]

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I. Introduction

1. This note provides an overview of key legal issues relating to the creation, use and transfer of electronic transferable records. It does not aim at addressing substantive legal issues that would apply regardless of the medium used.

II. Scope of work

2. As to the scope of work, the Working Group, at its forty-fifth session, agreed that a broad approach should be taken, taking into consideration all possible types of electronic transferable records, while leaving open the possibility to differentiate the treatment of those records, when so desirable.¹ However, at the forty-fifth session of the Commission (25 June-6 July 2012, New York), the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.²

3. Taking note of the decision and suggestion mentioned above, the Working Group may wish to discuss the scope of work at a later stage when it has been able to identify the relevant issues and has had the opportunity to address them. The Working Group may also wish to consider the actual needs of the relevant industries.

¹ A/CN.9/737, para. 22.

² *Official records of the General Assembly, Sixty-seventh session, Supplement No. 17 (A/67/17)*, para. 83.

A. Electronic transferable records

4. The term “electronic transferable record” generally refers to the electronic equivalent of both a transferable instrument and a document of title. The term electronic transferable “record” is used instead of “document” to highlight its digital nature.

5. “Transferable instrument” generally refers to a financial instrument that may contain an unconditional promise to pay a fixed amount of money to the holder of the instrument, or an order to a third party to pay the holder of the instrument. Examples of transferable instruments may include promissory notes, bills of exchange, cheques and certificates of deposit. “Document of title” generally refers to a document which, in the regular course of business or financing, is treated as adequately evidencing that the person in its possession is entitled to receive, hold and dispose of the document and the goods indicated therein, subject to any defences to enforcement of the document. Examples of documents of title may include bills of lading and warehouse receipts.³

6. A key common feature of transferable instruments and documents of title is the possibility to “transfer” the entitlement to the performance referred to in the instrument or document with the physical transfer of the paper support on which the instrument or document is reproduced. An additional common feature, at least in some jurisdictions, is that those paper-based instruments or documents are usually issued individually and not en masse.⁴

7. However, fundamental differences exist among the various legal systems on the treatment of transferable instruments and documents of title. For instance, the law may limit the freedom of parties in devising such instruments so that, to be valid, they must conform to predefined models (*numerus clausus* rule).

8. While the terms “transferable” and “negotiable” have been used jointly in venerable case law precedents,⁵ their use has subsequently given rise to significant discussion on the distinction between the two.⁶ It may generally be said that “transferability” refers to the possibility to transfer entitlement to performance together with the possession over the instrument or document, while “negotiability” provides the holder of the instrument or document with a more valid title to performance than the one of the transferor, to the extent that the law limits the exceptions to the enforcement of the negotiable document vis-à-vis the good faith bearer of the negotiable document.⁷

9. Yet, whether an instrument or document is “transferable” or “negotiable” pertains to the applicable substantive law. In the past, uniform texts had been prepared to address substantive issues, namely: (i) the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 1930),⁸ (ii) the

³ A/CN.9/WG.IV/WP.115, para. 3.

⁴ A/CN.9/WG.IV/WP.116, Section 1(a).

⁵ *Lickbarrow v. Mason* (1794) 5 T. R. 683, p. 685.

⁶ For a summary of the discussion on the use of the term transferable and negotiable and their distinction, see Torsten Schmitz, “The bill of lading as a document of title”, *Journal of International Trade Law and Policy*, Vol. 10 No. 3, 2011, p. 255, at pp. 262-263.

⁷ A/CN.9/737, paras. 51 and 53.

⁸ League of Nations, *Treaty Series*, vol. 143, p. 257.

Convention Providing a Uniform Law for Cheques (Geneva, 1931)⁹ and, (iii) the United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988).¹⁰ It should also be noted that the notion of negotiability and in particular, its relevance for the use of electronic records, has been challenged.¹¹

10. Existing legislation dealing with electronic transferable records varies in scope and approach. In some cases, provisions have been adopted enabling the general use of electronic transferable records, at least in theory. In other cases, a sectoral approach has been adopted dealing, in particular, with the use of electronic transferable records in the financial and transport sectors.

11. The following legislations deal with financial transactions: (i) the Electronically Recorded Monetary Claims Act (Act No. 102 of 2007, “ERMCA”) of Japan;¹² (ii) the Act on Issuance and Negotiation of Electronic Bills of Exchanges and Promissory Notes (Act No. 7197 of 22 March 2004, and subsequent amendments) of the Republic of Korea; (iii) article 7 (Documents of Title) of the Uniform Commercial Code (UCC) of the United States of America; (iv) article 9 (Secured Transactions) of the UCC; (v) section 16 of the Uniform Electronic Transactions Act (UETA)¹³ of the United States; and (vi) title 7 (Agriculture) of the Code of Federal Regulations of the United States of America, particularly the part dealing with electronic warehouse receipts (Part 735: Regulations for the United States Warehouse Act).

12. Other significant developments are as follows: (i) in Australia, upon review of its Bills of Exchange Act 1909 in July 2003, which aimed at addressing requests from industry for legislation enabling dematerialised bills of exchange and promissory notes, there was substantive discussion on the potential use of electronic transferable records.¹⁴ As to options for reform, a statutory approach based on functional equivalence was recommended; (ii) in Brazil, article 889 of the Brazilian Civil Code (Law No. 10.406 of 10 January 2002) dealing with documents of title (Dos Títulos de Crédito) includes a separate provision dedicated to

⁹ League of Nations, *Treaty Series*, vol. 143, p. 355.

¹⁰ United Nations Sales Publication No. E.95.V.16 (treaty not into force).

¹¹ Ronald J. Mann, Searching for Negotiability in Payment and Credit Systems, 44 *UCLA L. Rev.* (1997), 951.

¹² ERMCA came into force in Japan on 1 December 2008, for the purposes of facilitating businesses’ financing activities. Electronically recorded monetary claims refer to monetary claims for which electronic records in the registry are required for their assignment.

¹³ The UETA was prepared by the National Conference of Commissioners on Uniform State Laws of the United States of America. It has been enacted by forty-seven states, the District of Columbia, Puerto Rico, and the Virgin Islands.

¹⁴ Working Group of Officials, National Competition Policy Review of the Bills of Exchange Act 1909, July 2003 and available at <http://archive.treasury.gov.au/documents/688/PDF/Final%20Bills%20of%20Exchange%20Act%20Review.pdf>.

electronically-generated instruments;¹⁵ and (iii) in China, Administrative Rules for the Operation of Electronic Commercial Bill of Exchange as well as Administrative Rules for Electronic Commercial Draft System (ECDS) were adopted in 2009¹⁶ and in October 2009, ECDS was put into operation by the People's Bank of China, supporting the development of commercial draft business and facilitating the reduction of processing costs and risks.

13. The use of electronic transferable records in developing countries focuses on electronic warehouse receipts, which are considered an effective means to provide financing to farmers therefore contributing, in the long term, to food security on a more predictable and sustainable basis.¹⁷ Article 11 of the Warehousing (Development and Regulation) Act, 2007 of India explicitly foresees the use of warehouse receipts in electronic format.¹⁸ However, article 2 of the Warehousing Development and Regulatory Authority (Negotiable Warehouse Receipt) Regulations, 2011 currently excludes from its scope negotiable warehouse receipts in the electronic form.¹⁹ In Brazil, the Agribusiness Certificate of Deposit (CDA) and Agribusiness Warrant (WA), which may exist in electronic form, have been

¹⁵ Paragraph 3 of article 889 states that the instrument may be issued from characters created on a computer or equivalent technical medium and appearing in the records of the issuer, provided compliance with the minimum requirements set forth in that article. However, as to the interpretation of that paragraph, some experts have cautioned that it does not necessarily enable the issuance of electronic transferable records, but rather simply recognizes that negotiable instruments may be originally prepared in electronic form, then followed by "materialization" in non-electronic form. Such interpretation relies on the definition set forth in article 887 of the Brazilian Civil Code, which qualifies the instrument as a "document", generally associated with non-electronic media.

¹⁶ See 2009 Annual Report of the PBC, pp. 62, 68, 78. Available at www.pbc.gov.cn/image_public/UserFiles/english/upload/File/Annual%20Report%202009.pdf.

¹⁷ Henry Gabriel, Warehouse Receipts and Securitization in Agricultural Finance, *Uniform Law Review/Revue de droit uniforme* 2012, p. 369.

¹⁸ The Act came into force with effect from 25 October 2010 (full text of the Act is available at http://dfpd.nic.in/fcamin/sites/default/files/userfiles/Warehouse_Act_2007.pdf). Besides mandating the negotiability of warehouse receipts, the Act prescribes the form and manner of registration of warehouses and issue of negotiable warehouse receipts including in electronic format and prescribes the establishment of the Warehousing Development and Regulatory Authority (WDRA), a regulatory body under the Act. It was predicted that the introduction of the negotiable warehouse receipt system will not only help farmers avail better credit facilities and avoid distress sales but also safeguard financial institutions by mitigating risks inherent in credit extension to farmers. The pledging/collateralisation of agricultural produce with a legal backing in the form of negotiable warehouse receipts was expected to increase the flow of credit to rural areas, reduce cost of credit and spur related activities like standardization grading, packaging and insurance and in the development of a chain of quality warehouses (see <http://pib.nic.in/newsite/erelease.aspx?relid=66574>).

¹⁹ Full text of the Regulations is available at <http://wdra.nic.in/>.

developed in the agricultural sector to commercialize stocks deposited in warehouses and they may exist in an electronic form.²⁰

14. The development of warehouse receipt systems has emerged as an important means of improving the performance of agricultural marketing systems in Africa and electronic warehouse receipts are becoming popular in certain African states. The Ethiopia Commodity Exchange Proclamation No. 550/2007 (A Proclamation to Provide for the Establishment of the Ethiopia Commodity Exchange) provides for electronic warehouse receipts system²¹ and similar regimes exist in Ghana, South Africa and Uganda. For example, in 2004, the South African Futures Exchange (SAFEX) announced that it would accept electronic as well as paper-based warehouse receipts for settlement of future contracts.²²

15. The following legislation deals with the use of electronic transferable records in the transport sector: (i) article 862 of the revised Commercial Act and implementing legislation enabling the use of electronic bills of lading of the Republic of Korea (the “electronic bill of lading legislation of the Republic of Korea”)²³ and (ii) article 7 (Documents of Title) of the UCC. Also of relevance are (i) articles 16 (Actions related to contracts of carriage of goods) and 17 (Transport documents) of the 1996 UNCITRAL Model Law on Electronic Commerce (Model Law on Electronic Commerce);²⁴ and (ii) chapter 3 and other relevant provisions of the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”).²⁵

16. The Legislative Assembly of Ontario introduced the Electronic Commerce Amendment Act, 2012 (“Bill 96”) in May 2012 to facilitate the use of electronic

²⁰ CDA and WA, created by Law No. 11.076/04, are credit instruments pegged to the production deposited in warehouses. CDA represents the promise of delivery of deposited goods, and WA grants the lien right on the goods described in CDA. Those instruments are twins, in that they are issued in the same moment and refer to the same lot of goods. They are issued by the depository of goods that belong to the owners of the stocks or to the successive buyers of those instruments. It must be registered and held in an entity authorized by the Central Bank. From that moment on the negotiation of the instruments necessarily becomes electronic. The WA allows its holder to pledge the product as collateral for a bank loan, while the CDA allows its holder to sell the goods, without any tax being due until the owner of the instruments, as economic agent, effectively desires to use the stored product for processing or sale.

²¹ Full text of the proclamation is available at www.ecx.com.et/downloads/rules/ecexproclamation.pdf.

²² Sarel F. du Toit, Reflections on Bills of Lading and Silo Receipts used in the South African Futures Market, 2 *Journal of International Commercial Law and Technology* 3 (2007) 105; Gideon Onumah, Promoting Agricultural Commodity Exchanges in Ghana and Nigeria: A Review Report, Report to UNCTAD, pp. 8-9; Gideon Onumah, Implementing Warehouse Receipt System in Africa — Potential and Challenges prepared for the Fourth African Agricultural Markets Program Policy Symposium (6-7 September 2010, Malawi), text available at www.aec.msu.edu/fs2/aamp/sept_2010/aamp_lilongwe-onumah-warehouse_receipt_systems.pdf; Ghana Grains Council Warehouse Receipt System Rules and Regulations, article 26(3): “GGC Warehouse Receipts shall be paper or electronic documents”.

²³ A/CN.9/692, paras. 26-47.

²⁴ United Nations publication, Sales No. E.99.V.4. Articles 16 and 17 of the Model Law on Electronic Commerce have been enacted in national legislation, for example articles 26 and 27 of Law 527 (1999) of Columbia and articles 31 and 32 of Decree No. 47 of Guatemala (2008). However, those provisions do not seem to find application in practice.

²⁵ United Nations publication, Sales No. E.09.V.9.

means in real estate transactions.²⁶ If adopted, Bill 96 will amend the Electronic Commerce Act, 2000 of Ontario (S.O. 2000, Chapter 17: an act inspired by the Model Law on Electronic Commerce, 1996)²⁷ and enable the use of electronic transferable records equivalent to documents of title, although not the use of those equivalent to negotiable instruments.²⁸

17. Notwithstanding the sectoral approaches mentioned above, adopting a broader definition of electronic transferable records for the purpose of discussion at the Working Group would allow for a more comprehensive approach to its work. A useful starting point might be article 2, paragraph 2, of the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (Electronic Communication Convention)²⁹ which sets out the types of transferable instruments or documents excluded from the scope of that Convention. Under such an approach, electronic transferable records may refer to “the electronic equivalent of bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money”.

18. Moreover, the fact that the treatment of electronic payments and electronic money would generally not fall under the above-mentioned scope may need further clarification, as they may be correlated with electronic transferable records for practical and operational purposes.

B. Management of electronic transferable records

19. Currently, there are at least two systems available for the management of electronic transferable records. One, which is more prevalent in practice, is based on the use of electronic registries (“registry-based system”). The other is based on the use of electronic tokens, incorporated in the electronic transferable record (“token-based system”).³⁰

20. A registry-based system is based on the establishment of a registry that contains information about the electronic transferable records. Similar to registries established for the assignment of title or ownership rights, the registry would indicate the identity of the owner of the electronic transferable record and transfer of the electronic transferable record would be reflected in the registry. Such a registry-based system satisfies the control requirement (see below paras. 51-61) by ensuring the identification of a sole owner of the record and of the rights incorporated in that record at any time.

21. A token-based system may be described as being more similar to operation in a paper-based system. It is based on the identification of the original and unique record that can be recognized as such by software or a technology and can therefore

²⁶ Available at www.ontla.on.ca/web/bills/bills_detail.do?locale=en&Intranet=&BillID=2644.

²⁷ Available at www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_00e17_e.htm#BK37.

²⁸ Subsection 31 (1), paragraph 5, of the Electronic Commerce Act states that the Act does not apply to negotiable instruments and Bill 96 does not contain any proposals to amend this paragraph.

²⁹ United Nations Publication, Sales No. E.07.V.2.

³⁰ A/CN.9/WG.IV/WP.116, Section 3.

be transmitted from one information system to another without losing any of the aforementioned qualities. In this way, it is possible to replicate the approach taken in the paper-based environment in the electronic environment, whereby the transfer of an electronic transferable record involves the transfer of the record itself (or of the control of the record).

22. In both systems, the determination of the existence of the electronic transferable record, its qualities and its effects, as well as its ownership and transfer, is based on the exchange of information. Again in both systems, in order for an electronic transferable record (recognized as original and authentic) to be transferred, control of that record must be transferred.

23. While a system-neutral approach should be adopted to the extent possible, a number of the provisions compiled hereinafter refer to the operation of registry-based systems. Therefore, preparation of specific provisions for such a system could be desirable, yet mindful of the principle of technological neutrality.

24. With respect to registry-based systems, the following questions would need to be addressed: (i) whether they would operate at a national or an international level;³¹ (ii) whether the registry would be tailored to specific types of electronic transferable records or would encompass multiple types;³² and (iii) whether a registry-based system adopting a specific technology could accommodate all types of electronic transferable records and operate in States with varying levels of available information and communication technology.³³

25. As to those questions, existing examples of relevant national registries show that each registry is tailored to a single type of electronic transferable record. In some instances, more than one registry may exist for the same type of electronic transferable record, which, for instance, is the case for electronically recorded monetary claims in Japan. However, the possibility of designing an electronic registry capable of managing multiple types of electronic transferable records should not be discarded.

III. Legal issues with respect to electronic transferable records

26. Currently, there is no internationally accepted, generalized and harmonized legal framework addressing the various issues involved in the use of transferable instruments or documents of title (apart from the texts mentioned above in para. 9) including the use of their electronic equivalent, electronic transferable records.³⁴

27. National legal frameworks are necessary to enable and facilitate the use of electronic transferable records and to generate confidence in its users. Lack of such provisions has prevented the development of practice in this area.³⁵

28. The following part discusses the challenges and obstacles arising from the use of electronic transferable records, which would need to be addressed in an

³¹ A/CN.9/737, para. 72.

³² Ibid., para. 73.

³³ Ibid., para. 74.

³⁴ Ibid., para. 14.

³⁵ Ibid., para. 46.

international or national legal framework on electronic transferable records. It also provides a general overview of the life cycle of such records and various methods for identification of the holder.

A. Creation and release of electronic transferable records

29. In a paper-based environment, transferable instruments and documents of title may be easily issued directly by the issuer. Yet, the modalities for release³⁶ of their electronic equivalent would depend on the system chosen. Whereas electronic transferable records may be released directly by the issuer in a token-based system, a registry-based system would require a third-party registry operator. Therefore, the issuer would need to submit a request for the release of the electronic transferable record to the registry operator.

30. For instance, under section 9-105 (Control of Electronic Chattel Paper) of the UCC, an electronic chattel paper is created when the secured party communicates the authoritative copy of that electronic chattel paper to the designated custodian (i.e. the registry operator). The debtor does not create the electronic transferable record directly, though its consent is necessary for the use of electronic means.

31. Requesting the release of an electronic transferable record may be an obligation for the issuer. For instance, under article 35 of the Rotterdam Rules, the shipper may be entitled to receive from the carrier a negotiable electronic transport record, in which case, if a registry-based system is adopted, the carrier would be obliged to request the release of that electronic negotiable transport record to the registry operator.

32. This approach has been implemented in the electronic bills of lading legislation of the Republic of Korea, which has opted for a registry-based system.³⁷ Under that legislation, the carrier needs to submit a request to the registry operator in order to release an electronic bill of lading, and that request also constitutes the authorization to issue an electronic bill of lading.

33. Article 15 of ERMCA provides that electronically recorded monetary claims accrue by way of making an accrual record. To do so, both the debtor (i.e. electronically recorded claim obligor) and the creditor (i.e. electronically recorded claim holder) have to make the request to the registry³⁸ and the registry generates the record.³⁹ This means that the generation of a record, instead of the manifestation of intention, is the necessary condition for the creation of electronically recorded monetary claims.

34. With respect to the content of the electronic transferable record (i.e. the information contained therein), a common rule demands that the record shall contain

³⁶ The term “release” of an electronic transferable record is used to refer to the technical step of putting that electronic record into circulation, while the terms “issuance” and “issuer” are used in their well-established meaning under applicable substantive law. The Working Group may wish to consider whether to proceed with using the term “release” for electronic transferable records.

³⁷ A/CN.9/692, paras. 30-32.

³⁸ Article 5(1) and 7 of the ERMCA.

³⁹ Article 7(1) of the ERMCA.

the same substantive information required for its paper-equivalent. At a general level, requesting more substantive information for electronic transferable records would be contrary to the principle of non-discrimination of electronic communications. Terms and conditions may be incorporated in the electronic transferable record by reference, in line with the provision contained in article 5 bis of the Model Law on Electronic Commerce.

35. However, there are instances where certain information may be omitted in the paper-based document, but not in the electronic transferable record. For instance in the Republic of Korea, the release of blank promissory notes is allowed if the document is paper-based,⁴⁰ but it is forbidden if in an electronic form.⁴¹

36. Information may be contained in an electronic transferable record, but not in its paper-equivalent, due to its electronic nature. While some of that information may be of a technical nature only, the consent of the parties to the use of the electronic form is a substantive element. In fact, the law may allow a general agreement on the use of electronic means, or may require specific consent to the issuance of each electronic transferable record.

37. In some cases, additional information may be available only in the electronic transferable record due to its dynamic nature, as opposed to the static one of paper-based documents. For instance, the location of a vessel at a given moment may be relevant for certain commercial documents and may be verified through automated systems able to locate and track that vessel.

38. Information contained in the electronic transferable record may be used for purposes other than the management of that record. For example, electronic bills of lading may be used to submit information to the national electronic single window facility, according to a model that is currently being tested in the Republic of Korea. In addition, information contained in financial instruments may be aggregated to monitor credit exposure and the dematerialization of the financial instrument could simplify the collection of data. Article 87, paragraph 1, of ERMCA provides that interested parties of the record may request disclosure of the data of the record. Furthermore, paragraph 2 of that article permits data use by those who are not interested parties as long as those who requested the generation of the record had agreed at the time of request. For example, the rating agencies or investors may make requests for disclosure of the data of the record according to that provision.

1. Uniqueness

39. An issue particularly relevant to electronic transferable records is the need to satisfy the functional equivalence of the paper-based concept of “uniqueness” (or singularity). “Uniqueness” is guaranteed for transferable instruments and documents of title to prevent the circulation of multiple records relating to the same performance, which may result in a sum of money being paid or goods delivered to a party not entitled to that payment or delivery.

⁴⁰ Article 10 of the Bills of Exchange and Promissory Notes Act, Act No. 1001 of 1962, and subsequent amendments.

⁴¹ Article 6, paragraph 6, of the Act Relating to the Issuance and Negotiation of Electronic Promissory Notes.

40. Uniqueness is a requirement that should be satisfied independently of the effective circulation of the electronic transferable record. In fact, the issuance of multiple electronic transferable records, all of them presented to the debtor by their first holder, would equally expose the debtor to multiple requests for performance and to the possibility of payment or delivery to a party not entitled.

41. It has often been noted that concerns regarding the guarantee of uniqueness arise from the fact that an electronic record generally can be copied in a way that creates a duplicate record identical to the first and thus, indistinguishable from it.⁴² Moreover, electronic copies may be produced in large quantity, in a short period of time and at limited cost.

42. However, it should also be noted that paper-based documents do not always provide an absolute guarantee of uniqueness. In fact, it may not be possible to find a single legislative definition of uniqueness. Furthermore, fraud based on illegal duplication of those documents is common.⁴³ Additional issues may arise due to difficulties in collecting a full set of paper-based documents for presentation if more than one original has been issued. Hence, setting a higher standard of uniqueness for electronic transferable records in order to address the concerns mentioned above and to maximize security might be discriminatory when compared to the level of security offered by their paper-based equivalent, and may ultimately hinder the diffusion of those electronic transferable records in business practice.

43. Currently, two approaches are available to satisfy the functional equivalent of uniqueness in an electronic environment. One approach is based on technical uniqueness, i.e. the assurance that the electronic record may not be reproduced. Yet, such assurance may not be technologically feasible for electronic records, as it is not for paper-based documents. In theory, it may be technically possible to create a truly unique electronic document that cannot be copied (at least without the copy being distinguishable as a copy) and that can be transferred. If and when technology that is capable of ensuring the uniqueness of an electronic record and of enabling its transfer is widely available, it would provide a basis for rendering an electronic record unique. Technologies possibly relevant for achieving technical uniqueness might include digital object identifiers (DOI) and digital rights management (DRM).⁴⁴

44. Another approach relies on the designation of an authoritative copy, providing sufficient guarantee of uniqueness. Designating an authoritative copy of an electronic transferable record may address concerns regarding the integrity of the record (i.e. establishing “what” the holder has an interest in) without the need for absolute guarantee of the existence of a unique record. This approach is currently prevalent both in system-neutral legislation and in legislation utilizing a registry-based system.⁴⁵ The designation of an authoritative copy of the electronic

⁴² A/CN.9/WG.IV/WP.115, paras. 14 and 36.

⁴³ For example, Clayton P. Gillette & Steven D. Walt, *Uniformity and Diversity in Payment Systems*, 83 Chicago-Kent Law Review 499 (2008), at 529, compare security of two concurrent payment systems, paper-based checks and debit card transactions. They find a fraud ratio of 6:1, i.e., losses due to fraud were six times more frequent in check transactions than in debit card transactions, in the year 2004. The average value of losses was also significantly higher for check transactions than for debit card transactions.

⁴⁴ A/CN.9/WG.IV/WP.115, para. 37.

⁴⁵ *Ibid.*, paras. 37-38.

transferable record may take place through different methods, namely, based on storage in a specific secure system, and based on verifiable content or location.⁴⁶ That designation may occur in a registry-based system or in a token-based system, according to the technology used.⁴⁷

45. As noted, one of the methods for the designation of an authoritative copy is based on the existence of a specific secure system, i.e. an electronic registry, where the registry operator assigns a unique identification number at the moment of the creation of an electronic transferable record. The unique identification number does not per se provide assurance of uniqueness, but the system ensures that each unique identification number is matched with only one corresponding record. This approach is used in the ERMCA of Japan,⁴⁸ the electronic bill of lading legislation of the Republic of Korea,⁴⁹ and in the electronic warehouse receipt legislation of the United States of America.⁵⁰

46. A system-neutral approach is adopted in the UCC, the provisions of which deal with uniqueness in the context of the requirements to establish control, respectively, over electronic documents of title⁵¹ and electronic chattel

⁴⁶ Ibid., para. 40.

⁴⁷ A/CN.9/WG.IV/WP.116, section 3.

⁴⁸ Article 16(1)(vii) of ERMCA.

⁴⁹ A/CN.9/692, para. 31.

⁵⁰ Code of Federal Regulations, Title 7: Agriculture, Part 735-Regulations for the United States Warehouse Act, Subpart D-Warehouse receipts, Section 735.303(b)(5).

⁵¹ UCC Section 7-106 Control of Electronic Document of Title

(a) A person has control of an electronic document of title if a system employed for evidencing the transfer of interests in the electronic document reliably establishes that person as the person to which the electronic document was issued or transferred.

(b) A system satisfies subsection (a), and a person is deemed to have control of an electronic document of title, if the document is created, stored, and assigned in such a manner that:

(1) a single authoritative copy of the document exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;

(2) the authoritative copy identifies the person asserting control as:

(A) the person to which the document was issued; or

(B) if the authoritative copy indicates that the document has been transferred, the person to which the document was most recently transferred;

(3) the authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) copies or amendments that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) any amendment of the authoritative copy is readily identifiable as authorized or unauthorized.

papers.⁵² The safeguards aiming at ensuring uniqueness under that approach consist of the ability of the system to create a single authoritative copy that is unique and identifiable, the possibility for the person asserting control over the single authoritative copy of the electronic transferable record of controlling the issuance of any non-authoritative copy thereof, and the ready ascertainability of any copy of the single authoritative copy of the electronic transferable record and of any amendment thereto as such.

47. A hybrid approach seems to have been adopted in the legislation relating to electronic promissory notes of the Republic of Korea. Article 8 of the Presidential Decree on the Issuance and Negotiation of the Electronic Promissory Note⁵³ deals with the functional equivalence of the electronic promissory note. In particular, paragraph 2 of that article indicates that the electronic promissory note shall be accompanied by a device that does not permit the creation of duplicate copies. The electronic promissory notes system of the Republic of Korea is managed through a registry (“UNote”).⁵⁴ However, that registry system interacts with users through the electronic banking network, due to the fact that electronic promissory notes are issued, endorsed and paid through that network. Therefore, the registry system may benefit from additional trust arising from the fact that electronic banking clients are subject to strict identification procedures, and use authentication and authorization methods conferring a higher level of security. A higher level of assurance over the identity of the users may have a positive impact on the risks associated with the notion of uniqueness of the electronic transferable record.

48. Other methods of dealing with uniqueness are also available. One of them is adopted in the Check Clearing for the 21st Century Act (the “Check 21 Act”) of the United States of America. The Check 21 Act facilitates check truncation, i.e. the suppression of the paper-based check in favour of an electronic copy during the check collection process. More precisely, it allows for the creation of a negotiable instrument, called “substitute check”, replacing the paper-based check. The substitute check is actually also paper-based, and represents the print out of the electronic image of the original paper-based check. The Check 21 Act declares the substitute check equivalent to the original check for all purposes.

49. The Check 21 Act deals with uniqueness by demanding the bank that transfers, presents, or returns a substitute check and receives consideration for that check to

⁵² UCC Section 9-105. Control of Electronic Chattel Paper

A secured party has control of electronic chattel paper if the record or records comprising the chattel paper are created, stored, and assigned in such a manner that:

- (1) a single authoritative copy of the record or records exists which is unique, identifiable and, except as otherwise provided in paragraphs (4), (5), and (6), unalterable;
- (2) the authoritative copy identifies the secured party as the assignee of the record or records;
- (3) the authoritative copy is communicated to and maintained by the secured party or its designated custodian;
- (4) copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the participation of the secured party;
- (5) each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and
- (6) any revision of the authoritative copy is readily identifiable as an authorized or unauthorized revision.

⁵³ Presidential Decree No. 18637 of 31 December 2004 and subsequent amendments.

⁵⁴ Additional information is available at www.unote.or.kr.

warrant to other interested parties that they will not receive presentment or return of the substitute check or of the original check, in any form, and therefore will not be asked to make a double payment (section 5). Hence, the mechanism to ensure uniqueness is based on allocation of risk, and not on a legal standard reliably assuring uniqueness of the document. Furthermore, it aims at ensuring the uniqueness of the performance of the debtor rather than the uniqueness of the document entitling that performance.

50. An alternative approach to electronic check truncation may be found in the Imaged Cheque Clearing and Archive System (ICAS) recently developed by the Bank of Thailand. While the purpose and mechanism of ICAS is generally similar to that of the Check 21 Act, ICAS is being implemented without adoption of dedicated legislation, relying solely on the Electronic Transactions Act of Thailand that represents an enactment of the Model Law on Electronic Commerce.⁵⁵

2. Control of the electronic transferable record

51. The concept of “control” over an electronic record is used in most legal systems dealing with electronic transferable records as the functional equivalent of “possession”. That is, the person in control of the electronic transferable record is considered the holder capable of enforcing the electronic transferable record. Where control of an electronic transferable record is used as a substitute for possession, transfer of control serves as the substitute for delivery of an electronic transferable record, just as delivery (plus endorsement where required) serves as transfer of a paper-based document.

52. In short, the ability to transfer the electronic transferable record and of the performance embodied therein is referred to as “control”. Whereas the rights embodied in an electronic transferable record are governed by the substantive law applicable to that electronic transferable record, the discussion below focuses on the concept of “control” equivalent to that of possession for paper-based documents.

53. Existing legislation enabling the use of electronic transferable records through control over that record may be divided into three groups. The first group is drafted in a manner accommodating both paper-based documents and electronic records. The second group provides generic rules for recognizing functional equivalence between paper-based documents and electronic records. The third group implements the notion of control based on a registry-based system. Therefore, while the first two groups are system-neutral, the third one is not.

54. The Rotterdam Rules offer an example of the first group of legislation where the definition of document of title contained in the substantive law (i.e. the Rotterdam Rules themselves) already foresees media-neutrality. Article 1 (paragraphs 21 and 22) of the Rotterdam Rules indicates that the notion of control is closely related to both issuance and transfer of the negotiable electronic transport record.⁵⁶ Article 9, paragraph 1, of the Rotterdam Rules further provides a general

⁵⁵ Bank of Thailand, Imaged Cheque Clearing and Archive System, sub. 9, available at www.bot.or.th/English/PaymentSystems/PSServices/ChequeClearingSys/ICAS/Pages/ImagedCheque.aspx.

⁵⁶ Article 1, paragraph 21. The “issuance” of a negotiable electronic transport record means the issuance of the record in accordance with procedures that ensure that the record is subject to exclusive control from its creation until it ceases to have any effect or validity.

rule to establish functional equivalence between possession of a paper-based document and control over an electronic record.⁵⁷

55. Section 7-106 (Control of Electronic Document of Title) of the UCC is an example of the second group of legislation.⁵⁸ That provision establishes the functional equivalence between control in the paper-based environment (normally exercised with actual or constructive possession of the paper-based document) and control in the electronic environment by using a system that reliably establishes an entity to which the electronic transferable record was issued or transferred (i.e., the holder). To do so, the system must provide for the existence of a single authoritative copy, which is the functional equivalent for the notion of uniqueness. Moreover, the system must reliably identify the first holder of the electronic transferable record, or the transferee.

56. As section 7-106 (b)(3) of the UCC permits the authoritative copy to be communicated and maintained by the person asserting control or its designated custodian, the provision is compatible with the registry-based system, where the designated custodian would be the registry operator, and with the token-based system, where the person asserting control could communicate and maintain the copy either on its own or through a third-party custodian. As already noted above (see para. 46 above), section 7-106 (b)(4)-(6) of the UCC details certain conditions to achieve and maintain uniqueness of the electronic transferable record.

57. The details of the implementation of the system foreseen above have been discussed in the literature with regard to section 9-105 of the UCC, containing a similar provision applicable to electronic chattel papers.⁵⁹ It is important to stress that the determination of the factual existence of those elements establishing control should not aim at absolute perfection: rather, it is a matter of achieving a sufficient degree of reliability. That determination should examine the intersection of law and technology to ascertain whether the system used, in its human and technological components and in the related processes, offers that sufficient level of reliability.

58. More detailed parameters for the evaluation of the reliability of a system for the management of electronic transferable records may come from the consideration of all applicable provisions. In other words, rules such as those contained in section 7-106 of the UCC need to be completed and specified with contractual provisions, as well as voluntary industry standards, co-regulatory tools, etc.

59. A third group of legislation is based on the use of electronic registries. In closed systems, such as those of electronic registries, the legislation assumes that

Article 1, paragraph 22. The “transfer” of a negotiable electronic transport record means the transfer of exclusive control over the record.

⁵⁷ Article 9, paragraph 1. The use of a negotiable electronic transport record shall be subject to procedures that provide for:

- (a) The method for the issuance and the transfer of that record to an intended holder;
- (b) An assurance that the negotiable electronic transport record retains its integrity;
- (c) The manner in which the holder is able to demonstrate that it is the holder; and
- (d) [...].

⁵⁸ *Supra* note 51.

⁵⁹ Working Group on Transferability of Financial Assets, Framework for Control over Electronic Chattel Paper — Compliance with UCC § 9-105, 61 *The Business Lawyer* (2006), 2.

uniqueness of the record and adequate identification of the party may suffice to entitle the holder to transfer the electronic transferable record. Control as such may not be specifically addressed, but is implicit in the mechanisms set for the operation of the registry. For instance, article 9, paragraph 2, of the ERMCA of Japan states that the electronically recorded person⁶⁰ shall be presumed to legitimately hold the right to the electronically recorded monetary claim pertaining to the electronic record in question.

60. A similar approach is adopted in the legislation on electronic bills of lading and on electronic promissory notes of the Republic of Korea.⁶¹ In particular, article 6, paragraph 3, of the Act on Issuance and Negotiation of Electronic Bills of Exchanges and Promissory Notes indicates that, when the issuer signs the electronic promissory note with a digital certificate, that note shall be regarded as being duly stamped or signed pursuant to article 75, paragraph 7, of the Bills of Exchange and Promissory Notes Act. This provision, which seems to be technology specific with respect to electronic signatures, establishes control based on identification and guarantee of uniqueness equivalent to that provided by an electronic registry.

61. Specific provisions may be envisaged for the case of multiple holders, so that control could be exercised jointly or separately according to applicable substantive law. The existence of multiple debtors, jointly and severally liable, seems to pose fewer challenges to the extent that those debtors do not need to exercise control. However, as they may be involved in the circulation of the electronic transferable record (e.g. as recipients of notices) dedicated provisions may also be useful.

3. Identification of the issuer and of the first holder

62. For the creation of the electronic transferable record to be effective, the identification of the issuer and of the first holder of the record is necessary. In fact, the functional equivalent of possession should identify the sole holder entitled to performance and exclude all other persons from demanding performance.⁶² The system should also identify with a similar level of reliability the debtor, if such identification is necessary under applicable law.

63. The reliability of the mechanisms for the identification, authentication and authorization of the holder of that record (so-called “level of assurance”) is of paramount importance to ensure the acceptance of electronic transferable records in business practice. However, it seems also relevant to note that, similarly to what takes place in the paper-based environment, trust among parties to an electronic transaction is based on a number of factors, including some relating to the transaction itself such as its value, and others relating to the relationship between the parties, including past exchanges and direct interaction. Those considerations apply to all phases of the life cycle of the electronic transferable record.

64. In a paper-based environment, the issuer would create the document and identify in that document the first holder, unless the document is supposed to circulate anonymously (“to bearer”). In an electronic environment, these

⁶⁰ The term “electronically recorded person” in ERMCA means the person recorded in the monetary claims record as the obligee or pledgee of the electronically recorded monetary claims.

⁶¹ A/CN.9/692, para. 32.

⁶² A/CN.9/737, para. 66.

operations may not necessarily be replicated in the same exact terms due to technical requirements. For instance, if the system relies on the services provided by a third party, such as a registry operator, that third party will release the electronic transferable record on behalf of the issuer.⁶³ Moreover, anonymity might not be allowed or achievable in an electronic environment, and therefore, such electronic transferable records might not be issued to bearer.⁶⁴

65. Thus, in the legislation on electronic bills of lading of the Republic of Korea, which has opted for a registry-based system, the carrier submits a request to the registry operator for the release of the electronic bill of lading.⁶⁵ However, article 5, paragraph 1, of the ERMCA of Japan demands a request from both the electronically recorded claim holder and the electronically recorded claim obligor. The latter approach may ensure that all parties agree on the use of electronic means.

66. The reliable identification, authentication and authorization of the parties involved in the creation of the electronic transferable record, as well as in the subsequent phases of its life cycle, are critical to build confidence in the system. At least in part, the matter is currently dealt with by the law on electronic signatures. That law could leave to the parties to determine the adequate level of authentication, or enumerate the requirements for authentication.⁶⁶ The UNCITRAL Model Law on Electronic Signatures, 2001, may provide initial guidance on the issue.

67. It should be noted that registry-based systems typically presuppose a strong offline identification of the users admitted to those systems. On the other hand, token-based systems may not require or foresee specific previous identification of the parties, requiring reliable identification only at the time of the transaction involving the electronic transferable record. Future developments in the field of identity management could be particularly relevant in this respect.

68. Existing legislation on electronic transferable records refers to general provisions on electronic signatures, rather than setting specific standards.⁶⁷ In certain cases, it might be possible to benefit from additional authentication elements available from other information technology systems. For instance, the legislation on electronic promissory notes of the Republic of Korea relies on the intermediation of banks for the identification of the bank accounts of the parties involved in the issuance and transfer of the electronic promissory notes. The Bolero system also allows users to become members through their banks.⁶⁸ In these cases, the possibility to use identification factors extrinsic to the electronic transferable records may significantly increase the level of assurance.

69. In current practice, especially for high-value transactions, due to legislative or contractual choice, the use of PKI-based technologies seems prevalent. However, if legislation on electronic signatures prescribes the use of specific technologies, difficulties in cross-border recognition of those electronic signatures may arise. Such difficulties may be avoided with the adoption of adequate provisions, similar

⁶³ Ibid., para. 59.

⁶⁴ Ibid., para. 34.

⁶⁵ A/CN.9/692, para. 30.

⁶⁶ A/CN.9/737, para. 69.

⁶⁷ See for example, legislation on electronic bills of lading of the Republic of Korea on the choice for a PKI-based system for electronic signatures (A/CN.9/692, para. 28).

⁶⁸ www.bolero.net/en/home/enrolment.aspx.

to article 12 of the Model Law on Electronic Signatures and article 9, paragraph 3, of the Electronic Communications Convention.

70. Due consideration should be given to the system architecture chosen. In fact, under certain approaches, users may be requested to register with the system operator before being granted access to the system. In that case, the desirability of providing guidance on standards for identification of the parties by the system operator might need to be considered.

(A/CN.9/WG.IV/WP.118 and Add.1) (Original: English)

Note by the Secretariat on legal issues relating to the use of electronic transferable records, submitted to the Working Group on Electronic Commerce at its forty-sixth session**ADDENDUM****Contents**

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III. Legal issues with respect to electronic transferable records
(continued)**B. Circulation of electronic transferable records**

1. An electronic transferable record may need to be amended in order to reflect the legal acts involving it. A common reason is its transfer. Other possible reasons include subrogation, succession (heritage or merger), guarantee, splitting or combining the record. In registry-based systems, the amendment may not affect the electronic record itself, but rather its attributes stored in the registry.

1. Amendment of an electronic transferable record

2. In general, the amendment of an electronic transferable record requires the consent of the entity exercising control. Depending on the type of amendment, and on the type of transaction to be recorded in the amendment, the consent of other parties might also be required. Thus, for instance, transfer of an electronic

transferable record might require the consent of the transferee for perfection. Those requirements are common to paper-based documents and therefore relevant rules may be found in substantive law.

3. General rules on the amendment of electronic records are not common in existing laws. This might be due to the fact that electronic records are seen as evidence of contractual agreements and therefore amendments may be agreed by the parties to the contract at any time, provided basic principles on the use of electronic communications are respected.

4. Article 26 of ERMCA provides that alteration (i.e. amendments) of the contents of electronically recorded monetary claims shall not be effective without the making of an alteration record, with article 27 prescribing the content of an alteration record. Furthermore, article 29(1) provides that all persons that have an interest in the electronic records may make requests for alteration records.

5. The cooperation of a third party to amend the electronic transferable record may be needed if the system, e.g., an electronic registry, assumes the existence of such third party.¹

2. Transfer of control

6. The transfer of the right to the performance of an obligation embodied in a paper-based document takes place with the transfer of the actual or constructive possession over that document. In an electronic environment, that transfer takes place with the transfer of control over the electronic transferable record. This transfer of control needs to address two elements: the perfection of the transfer between transferor and transferee; and the perfection of the transfer vis-à-vis all other parties, which are third parties with respect to that transfer.

7. An additional complication may arise from the necessary involvement under certain technologies of a special type of third party, in charge of assisting with the technical aspects of the transfer, such as an electronic registry operator. The electronic registry operator has special duties towards the transferor and the transferee by virtue of the services it has undertaken to perform.

8. In the media-neutral system of the Rotterdam Rules, article 57, paragraph 2 provides that when a negotiable electronic transport record is issued, its holder may transfer the rights incorporated in it, whether it be made out to order or to the order of a named person, by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1 (procedures for use of negotiable electronic transferable records). An element of interest in that provision is offered by the possibility of having the transfer effected by blank endorsement and not by endorsement to a named person (article 57, paragraph 1). In an electronic environment, this would require the ability of the system to accommodate electronic transferable records without a named holder.²

¹ See, for example, the mechanism adopted in the legislation on electronic bills of lading of the Republic of Korea (A/CN.9/692, paras. 35-36).

² A/CN.9/WG.IV/WP.118, para. 64.

9. Section 7-501(b) of the UCC deals specifically with the transfer of electronic transferable records.³ It implements the principle that transfer of control, as evidenced in the single authoritative copy of the electronic transferable record, is equivalent to delivery and, if need be, endorsement of the paper-based document of title. This provision seems to reaffirm the effectiveness of the principles of the substantive law of documents of title in an electronic environment.

10. Section 7-501(b) also seems to allow for an electronic equivalent of a document of title to bearer, as the official commentary to this provision indicates that negotiation under this section may be made by any holder no matter how the holder acquired possession or control of the document.⁴ However, the possibility to implement this rule may need to be carefully considered against the requirements for authentication of the parties.

11. In that respect, paragraphs 4 to 6 of section 7-106(b) of the UCC require, in line with general rules, that the amendment of the electronic transferable record, including for the purpose of transfer of control, should be easily identifiable as authorized.⁵ This is especially necessary for the protection of third parties. The satisfaction of that requirement while preserving the total anonymity of the holder might result in a technical challenge.

12. In registry-based systems, the transfer of control takes place with the substitution of the person entitled to exercise that right according to registry entries. Article 17 of the ERMCA specifies that assignment of an electronically recorded monetary claim shall not be effective until the assignment record is made. Article 18 sets forth the content of the assignment record.⁶

13. The legislation on electronic bills of lading of the Republic of Korea specifies that endorsement of an electronic bill of lading takes place with the transmission of a message from the holder of that bill of lading to the registry operator containing the order to transfer the control over the bill of lading to a named transferee and the identification of the bill of lading through its unique identification number. The

³ Section 7-501(b) “The following rules apply to a negotiable electronic document of title:

(1) If the document’s original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. Indorsement by the named person is not required to negotiate the document.

(2) If the document’s original terms run to the order of a named person and the named person has control of the document, the effect is the same as if the document had been negotiated.

(3) A document is duly negotiated if it is negotiated in the manner stated in this subsection to a holder that purchases it in good faith, without notice of any defense against or claim to it on the part of any person, and for value, unless it is established that the negotiation is not in the regular course of business or financing or involves taking delivery of the document in settlement or payment of a monetary obligation.”

⁴ National Conference of Commissioners on Uniform State Laws — The American Law Institute, Revision of Uniform Commercial Code Article 7 — Documents of Title, with Prefatory Notes and Official Comments, 2004, p. 63.

⁵ A/CN.9/WP.IV/WP.118, footnote 51.

⁶ Article 26 of the ERMCA provides, as a general rule, that “manifestation of intention” to alter the contents of an electronically recorded monetary claim shall not be effective until the record of that claim is altered, unless otherwise prescribed by ERMCA. The assignment of the claim is one of the cases of “otherwise prescribed by this Act”.

transferee begins to exercise control over the bill of lading upon receipt of a message informing him or her of the transfer.⁷

14. Some legislation may set a ceiling to the number of possible transfers. For instance, article 7(5) of the Act on Issuance and Negotiation of Electronic Bills of Exchanges and Promissory Notes of the Republic of Korea sets a maximum of twenty endorsements for each electronic promissory note. In registry-based systems, such a ceiling may also be determined by virtue of contractual agreement or by decision of the registry operator; in that case, the ceiling must be annotated on the electronic transferable record to be valid and enforceable. In that line, article 16(2) of the ERMCA states that the accrual record may record agreements to restrict the number of times assignment records may be made.

15. An additional aspect relates to the possibility for the transferee to refuse the transfer upon inspection of the electronic transferable record or as otherwise appropriate. This possibility seems to be foreseen in article 11(2) of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea. According to that article, the refusing party shall complete a dedicated form and inform the registry operator of the refusal. The registry operator will then attach a certificate of refusal to the record of the electronic promissory note, the legal effect being that the intended recipient will not receive the electronic promissory note.

16. Reliable identification of the holder of the electronic transferable record is important not only to allow exercise of control but also to verify the validity of the chain of transfers of the electronic transferable record.⁸ Reliable and complete data regarding amendments to the electronic transferable record might also be needed for other purposes.

17. At a general level and absent contractual provisions to the contrary, the time of the transfer should be determined under general rules applicable to dispatch and receipt of electronic communications, as reflected in article 10 of the Electronic Communications Convention. Communications exchanged in the context of an electronic registry might be considered as “not leaving the system under the control of the party who has sent the electronic communication on behalf of the originator” for the purpose of the application of those rules.

18. Finally, the entity exercising control may not want the electronic transferable record to be further circulated. In the registry-based system, this would require a request to the registry operator.⁹

3. Corrections

19. Article 10 of the ERMCA lists the cases that justify corrections to the electronic record. They include input errors (i.e., the information provided by the requesting party is different from the one that has actually been recorded), issuance of electronic records without a request, omission of details to be recorded and incorrect early termination of the electronic record.

⁷ A/CN.9/692, paras. 33-34.

⁸ A/CN.9/737, para. 68.

⁹ With respect to electronic promissory notes in the Republic of Korea, see article 14 of the UNote Registry Service Agreement, a document of contractual nature.

20. Under that article, if a third-party has an interest in the electronic record to be corrected, the correction may be made only with the consent of that third-party. Moreover, the registry operator is required to notify both the entity exercising control over the corrected electronic record and the electronically recorded claim obligor (i.e., the debtor) of the correction, once it is effected.

21. In other cases, absent statutory provisions, detailed rules on the correction of electronic transferable records are set forth in contractual stipulations. That is the case, for instance, of the Mortgage Electronic Registration Systems (MERS) in the United States of America.¹⁰

4. Guarantees and pledges

22. The treatment of guarantees and pledges on electronic transferable records is usually discussed in legislation relating to the electronic equivalent of transferable instruments.

23. Section 6 of the ERMCA provides for the legal treatment of electronically recorded guarantees. Article 32 of the ERMCA sets forth the information to be indicated in the electronic guarantee record: a statement of intent to provide the guarantee; name and address of the guarantor; information necessary to identify the principal obligation; and the date. And additional information may be added to reflect contractual agreements. Article 35(1) of the ERMCA, indicating that the guarantor that makes a payment against the principal obligation acquires an electronically recorded monetary claim of corresponding amount, is an application of the general principle of subrogation of the guarantor in an electronic environment.

24. Section 7 of the ERMCA deals with pledges of electronically recorded monetary claims. According to article 36(1) of the ERMCA, the creation of a pledge on the electronically recorded monetary claim is not effective until the related electronic record is made. Thus, the perfection of the record indicating the existence of the pledge is the equivalent of dispossession in the physical world. Sub-pledges are also specifically foreseen in article 40. Article 37(1) of the ERMCA lists the elements that need to be indicated in the pledge record: a statement of intent to create the pledge; name and address of the pledge; information necessary to identify the secured claim; unique identifier of the pledge; and date.

25. Article 8 of the Act relating to the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea enables the provision of a guarantee on an electronic promissory note. The elements that need to be present on the guarantee record are listed in article 20(1) of the relevant Service Agreement, which include: identification of the guaranteed electronic promissory note; amount of the guarantee; the term “guarantee” itself; and identification of the relevant parties through their designated bank accounts.

¹⁰ MERS serves several mortgage industry purposes. It permits lenders and investors to transfer mortgages without recording assignments in local public registries, saving them recording fees. It enables consumers, title companies and other real estate professionals to easily identify the current holders of registered mortgages and obtain discharges despite any transfers of the mortgages or mergers or acquisitions of the lenders and investors in interest that may otherwise make it difficult to trace ownership.

5. Splitting and consolidating electronic transferable records

26. Splitting and consolidating electronic transferable records may be necessary, for instance, in connection with the circulation of electronic equivalents of bills of lading. Similar operations may occur when pooling negotiable instruments in the context of their transfer or securitization.

27. Section 8 of the ERMCA provides rules for the division of electronically recorded monetary claims, including for cases of separation with respect to multiple obligees or obligors. According to article 43(3) of the ERMCA, only the obligee may request the division of an electronic record. Article 44, listing the information to be entered in the division record, specifies that the unique identifiers of both the original electronic monetary claim record and of the electronic monetary claim record resulting after the division should be indicated.

28. In the Republic of Korea, only the person exercising control over the electronic bill of lading may submit a request to the registry operator to split or consolidate the bill of lading. However, the consent of the carrier is also required if, as a result of splitting or consolidating, the electronic bill of lading is terminated.¹¹

6. Involvement of issuer during the life cycle

29. The extent to which the issuer should remain involved in the transfer of electronic transferable records is addressed in relevant substantive law. While the electronic transferable record, once issued, should be subsequently circulated without the involvement of the issuer,¹² there may be instances where the issuer would need to be involved, for example, when converting the electronic transferable record to a paper-based document. The involvement of the issuer during the life cycle of the electronic transferable record would also depend on the type of technology used.

C. End of the life cycle of electronic transferable records

1. Presentation for performance

30. Presentation of a paper-based document may require a verification of the chain of endorsements in order to ensure that performance is given to the entity entitled to it by virtue of circulation of that document. In an electronic environment, the chain of transfers is documented in the authoritative copy of the electronic transferable record or in the attributes of that record stored in a registry. Nevertheless, the debtor may have to follow specific rules to ascertain the validity and enforceability of the presented electronic transferable record.¹³

31. Under article 47(1)(a)(ii) of the Rotterdam Rules, reference is made to the necessity for the holder to demonstrate that the procedures establishing control have been followed. The carrier may refuse delivery if those procedures were not satisfied.

¹¹ Article 19 of the Service Agreement of the e-Bill of Lading Korea Portal.

¹² A/CN.9/737, para. 80.

¹³ *Ibid.*, para. 67.

32. Section 7-501(b)(1) of the UCC on negotiable electronic documents of title states that if the document's original terms run to the order of a named person or to bearer, the document is negotiated by delivery of the document to another person. It is further stated that endorsement by the named person is not required to negotiate the document. The mechanism for practical implementation of that provision, envisaging an anonymous transfer of the electronic transferable record, may deserve careful study.

33. The termination of the electronic transferable record following presentation of that record and performance by the debtor is a fundamental aspect of the life cycle of the electronic transferable record. The obligation to terminate may be satisfied directly by the holder, if control is so exercised, or through cooperation of a third-party registry operator. The holder and the registry operator may be required to securely store the electronic record after its termination for the period of time required by substantive law (e.g., article 86 of the ERMCA of Japan).

34. Detailed rules have been drafted for the termination of records in registry-based systems. Section 4 of the ERMCA lists various causes for termination of an electronic record relating to partial or total performance of the obligation: payment, set-off and merger.

35. The legislation on electronic bills of lading of the Republic of Korea also provides specific provisions on the presentation of the electronic bill of lading for delivery of goods. The holder of the electronic bill of lading requests the delivery of the goods to the carrier through the registry operator. The intervention of the registry operator is necessary to amend the electronic record so as to prevent its further circulation, and to transmit the delivery request to the carrier. Upon verification of the validity of the request, the carrier communicates to the registry operator its acceptance of the delivery request and delivers the goods. After delivery, the carrier transmits to the registry operator the actual name of the recipient of the goods and the date of actual delivery. The registry operator then terminates the electronic record and communicates the termination to the carrier and to the consignee.¹⁴

36. The legislation on electronic promissory notes of the Republic of Korea contains similar provisions. The presentation of the electronic promissory note takes place when the holder of that note transmits the request for payment to the financial institution responsible for paying the note on behalf of the debtor. Notice of payment must be given to the registry operator, so that the electronic promissory note may be terminated.¹⁵ Consequently, the registry operator makes an annotation of the payment on the electronic promissory note and transmits the note to the obligor.¹⁶

37. As performance may be partial, legislative provisions would need to address the partial termination of the electronic transferable record and the annotation of that partial performance. Partial performance could also be treated as a case for

¹⁴ A/CN.9/692, paras. 38-40.

¹⁵ Articles 9 and 10 of the Act relating to the Issuance and Negotiation of Electronic Promissory Notes.

¹⁶ Article 9 of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes.

splitting records, by creating one record for the remaining performance and terminating the original record.

38. However, the legislation on electronic promissory notes of the Republic of Korea explicitly prohibits partial payment of an electronic promissory note,¹⁷ while partial payment of paper-based promissory notes is possible.¹⁸ This approach should be carefully considered since it might reduce the appeal of the use of electronic means for commercial operators and also result in a violation of the principle of non-discrimination of electronic communications.

39. Relevant legislation should also address circumstances where the debtor refuses to perform as requested with the presentation of the electronic transferable record. With respect to electronic promissory notes in the Republic of Korea, the financial institution that receives the note may refuse the payment (e.g., for lack of funds). Notification to the registry operator of the refusal to pay, and subsequent annotation by the operator of that refusal on the electronic promissory note, is equivalent to the notarised notice of protest for paper-based documents.¹⁹ After refusal of payment, the electronic promissory note is terminated.²⁰ However, depending on applicable law and possible uses of the refused electronic transferable record, it may be possible to return that record to its holder for further legal action (e.g., against an endorser or a guarantor) instead of terminating it.

40. Similarly, according to the legislation on electronic bills of lading of the Republic of Korea, in case of refusal to deliver the goods, the carrier shall inform the registry operator of the reasons. In turn, the registry operator shall communicate the refusal to the holder of the electronic bill of lading.²¹

41. Finally, it should be noted that there might be other manners in which the obligation may be performed (e.g., by set-off). Article 22 of the ERMCA provides a special rule for cases when the obligor acquires the electronically recorded monetary claim, and article 23 refers to extinction of the obligation and termination of the related electronic record due to the running of the limitation period.

2. Conversion/Replacement

42. Existing legislation reflects various approaches regarding conversion of paper-based documents into electronic records and vice versa.

43. At a general level, legislation may be totally media-neutral. The Act concerning the Legal Framework for Information Technology (*Loi concernant le cadre juridique des technologies de l'information*) of Québec, Canada (L.R.Q., chapitre C-1.1) might be an example of such an approach. Article 17 of that Act defines the notion of document in media-neutral terms, allowing the exchange of paper and electronic support at any time without affecting the legal status of the

¹⁷ Article 11 of the Act relating to the Issuance and Negotiation of Electronic Promissory Notes.

¹⁸ Article 39 of the Bills of Exchange and Promissory Notes Act, Act no. 1001 of 1962, and subsequent amendments.

¹⁹ Article 12(2) of the Act relating to the Issuance and Negotiation of Electronic Promissory Notes and article 10(2) of the Presidential Decree on the Issuance and Negotiation of the Electronic Promissory Note.

²⁰ Article 10(3) of the Presidential Decree on the Issuance and Negotiation of the Electronic Promissory Note.

²¹ A/CN.9/692, para. 41.

information contained in the document, provided that the conversion procedure is documented in order to ensure integrity of that information.

44. A more common approach relies on general rules establishing functional equivalence between electronic and paper-based documents similar to those contained in UNCITRAL texts, namely article 6 of the Model Law on Electronic Commerce, and subsequent provisions inspired by that article. Article 17(5) of the Model Law on Electronic Commerce provides an early example of a provision on conversion between different supports of electronic negotiable documents and records used in the transport field.

45. Article 10 of the Rotterdam Rules deals with the replacement of a negotiable transport document or negotiable electronic transport record. The replacement may take place if there is agreement between the holder of the existing document or record and the carrier (i.e., the obligor and issuer, in a legal if not technological sense, of the electronic transferable record). In that case, the document or record to be replaced is surrendered by the holder to the carrier (in all copies, if multiple originals of the paper-based document exist). That document or record is terminated and ceases to have any effect or validity. The carrier issues directly or through a third party a new document or record on the desired medium that includes a statement that it replaces the previous one on a different medium.

46. Rules on the reissuance in another medium similar to those foreseen in article 10 of the Rotterdam Rules are contained in section 7-105 of the UCC as well as in the legislation on electronic bills of lading of the Republic of Korea.²²

47. An additional element contained in section 7-105(d)(2) of the UCC pertains to the requirement that the person requesting issuance of the electronic document should warrant to all subsequent persons entitled under the electronic document that it was exercising control over the paper document when it surrendered control of that document for conversion. A similar provision, *mutatis mutandis*, applies for the case of substitution of an electronic document with a paper-based one.²³

48. As mentioned,²⁴ the mechanism for check truncation devised in the Check 21 Act aims at substituting the paper-based check with its digital image or a print-out of that image, the substitute check. Section 4 of the Check 21 Act requires that, for a substitute check to be the legal equivalent of the original paper-based check for all purposes, it accurately represent all of the information on the front and back of the paper-based check as of the time it was truncated and include the following statement: "This is a legal copy of your check. You can use it the same way you would use the original check."

49. Among information to be reproduced on the substitute check is the magnetic ink character recognition (MICR) line, a unique identifier of the check that is, on paper-based checks, magnetic and hence machine-readable.²⁵ Moreover, the substitute check should also bear all endorsements, and identify the reconverting bank, the bank issuing the substitute check, or, if the substitute check was not issued

²² *Ibid.*, para. 37.

²³ Section 7-105(b)(2) of the UCC.

²⁴ A/CN.9/WG.IV/WP.118 paras. 48-49.

²⁵ Check 21 Section 3(16)(B).

by a bank, the first bank that transferred or presented that substitute check.²⁶ In fact, truncation may occur at an early stage of the check processing cycle since the Check 21 Act allows for the deposit in the bank of the electronic image of the paper-based check.²⁷

3. Termination

50. Once the obligation contained in the electronic transferable record is discharged, the electronic transferable record needs to be terminated to avoid its further circulation and possible multiple requests for performance. Akin to what happens in the paper-based environment, control over the electronic transferable record is relinquished to the debtor or to a third party on behalf of that debtor.

51. Section 9-208(b)(3) of the UCC sets forth provisions applicable to electronic chattel papers when there is no outstanding secured obligation and the secured party is not committed to make advances, incur obligations, or otherwise give value.²⁸

52. Termination of the electronic transferable record in a registry-based system takes place with the annotation of the full performance of the obligation on that record. Article 24(1) of the ERMCA of Japan lists the information to be inserted on that annotation: cause of performance (payment, set off, merger, etc.); amount of performance (including principal); identification of the performer (if third party, including reason for performance); and date of performance.

53. A similar mechanism is foreseen in the legislation on electronic promissory notes of the Republic of Korea. Once the electronic promissory note is paid, an annotation of the payment is made on the record of that electronic promissory note, and the registry operator transfers control over the annotated record to the issuer of the electronic promissory note.²⁹

54. After termination of the record, its custodian, i.e. the debtor or a third party, depending on the system chosen, has a duty to store it for archival purposes. The

²⁶ Check 21 Section 4(c) and (d).

²⁷ Legal aspects of the process, called “remote deposit capture”, are discussed in J. Kopchik, “Remote Deposit Capture: A Primer”, 6 *Supervisory Insights* 1 (2009), 19-24.

²⁸ Section 9-208(b) [Duties of secured party after receiving demand from debtor]
Within 10 days after receiving an authenticated demand by the debtor:

...

“(3) a secured party, other than a buyer, having control of electronic chattel paper under Section 9-105 shall:

(A) communicate the authoritative copy of the electronic chattel paper to the debtor or its designated custodian;

(B) if the debtor designates a custodian that is the designated custodian with which the authoritative copy of the electronic chattel paper is maintained for the secured party, communicate to the custodian an authenticated record releasing the designated custodian from any further obligation to comply with instructions originated by the secured party and instructing the custodian to comply with instructions originated by the debtor; and

(C) take appropriate action to enable the debtor or its designated custodian to make copies of or revisions to the authoritative copy which add or change an identified assignee of the authoritative copy without the consent of the secured party;”.

²⁹ Article 10 of the Act relating to the Issuance and Negotiation of Electronic Promissory Notes and article 9 of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes.

period of record retention may be specified in the law³⁰ and should be in line with what is prescribed for the equivalent paper-based documents. Article 10 of the Model Law on Electronic Commerce provides guidance on the retention of electronic records.

IV. Other issues with respect to electronic transferable records

A. Third-party operators of electronic transferable records registry

55. In registry-based systems, the presence of a third-party registry operator is typically required. Hence, laws foreseeing the use of electronic registries have specific provisions on registry operators.

56. One of the issues relates to the existence of a licensing system for the operation of the electronic registry. Such a system is foreseen in the electronic warehouse receipts legislation of the United States of America,³¹ article 51 of the ERMCA of Japan, and legislation on bills of lading³² and on electronic promissory notes of the Republic of Korea.³³ A licensing system is compatible with the existence of a single or multiple operators.

57. Where a licensing system is foreseen, an authority is designated for approval of licences as well as oversight of the operation of licensed registry operators. The relevant legislation may set forth minimum requirements for applicants for a licence as registry operators. Those requirements may include capital, form of incorporation and information on technological, financial, human and other resources to be employed.³⁴ The provision of an insurance to cover damages arising from errors and omissions as well as fraud and dishonesty may also be demanded.³⁵ In this respect, it should be noted that article 10 of the Model Law on Electronic Signatures contains a list of factors relevant in establishing the trustworthiness of certification service providers.

58. The registry operator may be liable for damages arising from its operations, yet such liability might be limited by statute or contractual provisions. Articles 11 and 14 of the ERMCA of Japan deal, respectively, with liability for errors of the registry operator in creating, amending and terminating the electronic records, and in issuing electronic records based on a request from a non-legitimate entity. In both cases, the liability rule contains a reversal of burden of proof, and the registry operator may be exempted by proving that there was no negligence.

59. Duties are also imposed on users of the electronic registry. These obligations are often defined contractually in service agreements. Particularly relevant may be

³⁰ Article 86 of the ERMCA of Japan and article 13 of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea; legislation on electronic bills of lading of the Republic of Korea (A/CN.9/692, para. 46).

³¹ United States Code of Federal Regulations, Title 7, Section 735-401.

³² A/CN.9/692, para. 42.

³³ Article 3 of the Act Relating to the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea.

³⁴ Articles 3 and 4 of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea (A/CN.9/692, para. 42).

³⁵ United States Code of Federal Regulations, Title 7, Section 735-401(2).

the duties of the users to maintain secure access to the system, as well as those relating to prompt updating of changes in user information, as found in the legislation on electronic bills of lading of the Republic of Korea.³⁶ Violation of those duties may give rise to liability.³⁷ In turn, the registry operator has the duty to disclose the general conditions of contract to users.³⁸

60. A dedicated dispute settlement mechanism may be established to adjudicate disputes arising from the use of the electronic registry.³⁹

B. Cross-border recognition of electronic transferable records

61. At the forty-fifth session of the Commission, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.⁴⁰

62. While examples of national legislation enabling the successful market use of electronic transferable records are available, specific legal obstacles might exist in a cross-border context, where such a market has not yet fully developed. Those obstacles might be adequately addressed by uniform international rules dealing with international aspects of the use of electronic transferable records.

63. An example of an international instrument explicitly envisaging the use of electronic transferable records is the Rotterdam Rules, although limited to the use of electronic transport records.

64. From the perspective of the law of electronic transactions, the pioneer work carried out by UNCITRAL has initially focused on the preparation of uniform model laws. That approach allowed for an alignment of national legal systems without a formal mechanism for recognition of foreign electronic communications. Thus, the Model Law on Electronic Commerce has been a remarkable success, having already been adopted in more than 40 States and being used as inspiration for regional legislation; however, that Model Law does not contain explicit provisions on cross-border transactions. This applies also to its article 17 that offers an early treatment of electronic transferable records.⁴¹

65. The lack of specific cross-border provisions does not prevent the application of domestic enactments of the Model Law on Electronic Commerce to cross-border

³⁶ A/CN.9/692, paras. 43-45.

³⁷ Article 8 of the Model Law on Electronic Signatures on the conduct of the signatory.

³⁸ Article 18 of the Act relating to the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea and Article 15 of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea.

³⁹ Article 16 of the Presidential Decree on the Issuance and Negotiation of Electronic Promissory Notes of the Republic of Korea.

⁴⁰ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83. At the forty-fifth session of the Working Group, it was noted that text(s) to be prepared should address issues relating to cross-border recognition of electronic transferable records (A/CN.9/737, para. 44).

⁴¹ A/CN.9/WG.IV/WP.118, para. 15.

transactions.⁴² The fact that those cases are still rare should not necessarily be understood as a sign of limited relevance of electronic communications for international trade. In fact, empirical evidence suggests the opposite conclusion. Rather, the relative lack of case law could be due to the fact that there is limited attention for collecting those cases, which typically are reported in connection with legal issues arising from other legal fields (e.g., sale of goods). Moreover, in certain jurisdictions, especially those belonging to the common law tradition, legal issues relating to the use of electronic communications may be considered non-controversial and therefore are not raised during litigation.

66. Article 12 of the Model Law on Electronic Signatures, dealing with recognition of foreign electronic signatures, offers an example of uniform model provision devoted exclusively to cross-border issues. It adopts a technology-neutral approach and is based on the principle of non-geographic discrimination. However, that article has not yet been widely enacted by national jurisdictions, and other model provisions, based on more prescriptive approaches, may also be found (e.g., article 7 of the Directive 1999/93/EC of the European Parliament and of the Council of 13 December 1999 on a Community framework for electronic signatures;⁴³ that Directive is currently under review⁴⁴).

67. The desirability of addressing cross-border issues, especially those arising from the application of international agreements drafted before the widespread use of electronic communications, was one of the reasons leading to the preparation and adoption of the Electronic Communications Convention. While the Convention will enter into force on 1 March 2013, the rate of adoption of that Convention by States has been slower than expected.⁴⁵ Several reasons have been identified for that trend, including limited awareness of, and therefore demand for, the adoption of the Convention, in business and the legal sector, and difficulties in coordinating the position of regional economic integration organizations so as to allow the adoption of the Convention by member States of those organizations.

68. Moreover, an evaluation of the actual influence of that Convention on the global law of electronic transactions should take into account that a number of developing countries have adopted the substantive provisions of the Convention but

⁴² See, e.g., Federal Court of Australia, *Olivaylle Pty Ltd v Flottweg GMBH & Co KGAA*, [2009] FCA 522 (CLOUT case no. 956); High Commercial Court of Ukraine, case no. 2009/17/140-3571 (9/56-1492); *LLC Horizont Marketing-Finance-Logistika v. LLC Terkyrii-2* (CLOUT case no. 1051).

⁴³ Available at http://europa.eu/legislation_summaries/information_society/other_policies/124118_en.htm.

⁴⁴ On 4 June 2012, the European Commission adopted a proposal for a "Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market". The new framework aims at ensuring mutual recognition and acceptance of electronic identification across borders and giving legal effect and mutual recognition to trust services including enhancing current rules on e-signatures and providing a legal framework for electronic seals, time stamping, electronic document acceptability, electronic delivery and website authentication. The text of the proposal and additional information is available at http://ec.europa.eu/information_society/policy/esignature/eu_legislation/regulation/index_en.htm.

⁴⁵ See press release available at www.univie.ac.at/uncitral/pressrels/2012/unisl172.html. The status of the Convention is available at www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention_status.html.

have not formally adopted the treaty. This may be due to a number of reasons, including the difficulty of coordinating the domestic process of preparation of legislation on electronic transactions with the formal adoption of an international instrument, and the lack of a trailing effect stemming from the early wider adoption of the Convention by jurisdictions seen as more advanced in the use of electronic communications for cross-border commercial purposes.

69. Article 20 of the Electronic Communications Convention has an explicit enabling effect on a number of treaties prepared by UNCITRAL; however, it does not list among those treaties the United Nations Convention on International Bills of Exchange and International Promissory Notes, 1988, and the United Nations Convention on the Carriage of Goods by Sea, 1978 (“Hamburg Rules”), due to the fact that both treaties deal with the paper-based equivalent of electronic transferable records.⁴⁶ Accordingly, electronic transferable records were excluded from the scope of application of the Electronic Communications Convention (article 2, paragraph 2). One possible mechanism to address such a gap could consist of the preparation of a protocol to the Electronic Communications Convention dealing specifically with electronic transferable records. That protocol could also contain rules on private international law aspects, if so desired.

70. Additional considerations useful in the formulation of a policy on cross-border aspects of electronic transferable records relate to the experience in the two industry segments most directly interested in the use of those records, i.e. maritime transport and financial services.

71. In the field of maritime law, enabling the cross-border use of paper-based documents of title has historically been a leading motivation in the preparation of international instruments, as evidenced by the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 (the “Hague Rules”). Most recently, accommodating cross-border use of negotiable electronic transport records has been a major goal of the Rotterdam Rules.

72. In the field of financial services and, more specifically, of negotiable instruments, attempts at harmonizing the international legal framework have had limited success. In particular, the United Nations Convention on International Bills of Exchange and International Promissory Notes has not yet entered into force. The ascertainment of current needs and practices of that business sector may require additional attention.

73. In conclusion, a number of possibilities exist to overcome legal obstacles to cross-border use of electronic national laws. Available options include the preparation of uniform provisions or other guidance texts on cross-border issues, and the preparation of a binding international law instrument. The choice of appropriate solutions may also vary in light of the concerned industry segment.

⁴⁶ A/CN.9/527, paras. 45 and 65.

**C. Note by the Secretariat on legal issues relating to the use of
electronic transferable records — Proposal by the Governments of
Colombia, Spain and the United States, submitted to the Working
Group on Electronic Commerce at its forty-sixth session**

(A/CN.9/WG.IV/WP.119)

[Original: English]

Within the framework of preparation for the forty-sixth session of Working Group IV (Electronic Commerce), the Governments of Colombia, Spain and the United States have submitted to the Secretariat the attached document.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

Annex

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I. Introduction

1. At its forty-fifth session (Vienna, 10-14 October 2011), Working Group IV (Electronic Commerce) urged member States to provide relevant information to the Secretariat to assist the Secretariat in preparing working documents for its next session.¹ The delegations of Colombia, Spain and the United States of America have prepared this document for that purpose.

2. At its forty-fifth session, the Working Group observed that there is no generalized, internationally accepted legal framework for electronic transferable records.² However, as discussed in this working paper, electronic transferable records currently are used in a variety of domestic and international commercial transactions and many of the legal issues relating to electronic transferable records have already been addressed and resolved in domestic and international laws.³ What is missing is an appropriate degree of harmonization at the cross-border level so as to make international transactions, financing and commerce more effective. These existing models can be used as possible templates for the work of the Working

¹ A/CN.9/737, para. 95.

² A/CN.9/737, para. 14.

³ A/CN.9/WG.IV/WP.115.

Group. The Working Group now has the opportunity to prepare international standards to provide legal certainty in the use of electronic transferable records.

3. It is precisely the success achieved in a number of domestic systems that suggests the need for an internationally recognized legal framework for electronic transferable records. Yet, without an international legal framework, the benefits achieved through the domestic systems cannot accrue to the ever-growing realm of international trade.⁴

4. It is also important to note that the use of electronic transferable records is only a part of a broader set of legal issues associated with electronic commerce. Related issues include identity management and single windows.⁵ Thus, the current consideration of electronic transferable records by the Working Group is not to the exclusion of other important work in other areas of electronic commerce, but is, in fact, an element of a larger comprehensive project in electronic commerce.

II. Electronic transferable records

A. Transferable records

5. A “transferable record” is a general term that refers both to a transferable instrument as well as to a transferable document of title. An electronic transferable record is the electronic equivalent of a transferable record.

6. Transferable instruments are financial instruments that may contain either an unconditional promise to pay a fixed amount of money to the holder of the instrument or an order to a third party to pay the holder of the instrument. Examples of transferable instruments include promissory notes, bills of exchange, checks, and certificates of deposit.

7. Transferable documents of title are documents that, in the regular course of business or financing, are treated as adequately evidencing that the person in possession of or named in the document is entitled to receive, hold, and dispose of the document and the goods represented by the document (subject to any defences to enforcement of the document). Examples of documents of title include certain transport documents, bills of lading, dock warrants, dock receipts, warehouse receipts, or orders for the delivery of goods.

8. The fundamental distinction between an instrument and a document of title is that an instrument represents money while a document of title represents goods. For

⁴ Although the practical business concerns regarding electronic transferable records will be mostly similar in different states, part of the challenge will be to have uniform international legal standards that would satisfy differing legal traditions. As the Working Group noted at its last session, this is not likely to be a major problem as legal standards for transferable records are generally consistent among legal traditions (A/CN.9/737, para. 53). Moreover, as the underlying substantive law of transferable records is sufficiently settled, the concern of the Working Group should be to provide a mechanism to allow these existing substantive rules to work in an electronic milieu.

⁵ For example, an examination of the liability of trusted third parties and other service providers is an issue for not only electronic transferable records, but also identity management and single windows.

example, a promissory note is a transferable instrument that evidences an obligation to repay a debt. A negotiable warehouse receipt is a document of title that represents an obligation by the warehouse operator to deliver goods stored in the warehouse to the holder of the warehouse receipt.

B. Distinguishing “negotiable” from “non-negotiable”

9. Transferable instruments and transferable documents of title may be either negotiable or non-negotiable. A negotiable transferable record is one where, by its terms, the money is payable (instrument) or the goods are deliverable (document) to the bearer of the record or to the person named in the record. Thus, the essence of negotiability is the ability to convey the rights in the money or goods by the transfer of the record itself. A transferable record that does not provide these rights is a non-negotiable transferable record.

10. Normally a negotiable transferable record can be “negotiated” (the rights pass with the record) independent from claims in the underlying transaction. In other words, the rights acquired from a negotiable transferable record are not subject to the defences that arise from the underlying transaction that was basis for the creation of the negotiable transferable record.⁶ It is this ability to convey the rights established by the record free of underlying defences that is the essential difference between the “transfer” of a transferable record and the “negotiation” of a transferable record.

C. Electronic transferable records

11. Traditionally, both transferable instruments and transferable documents of title have been paper-based. There are presently both existing and developing models for electronic transferable records in various domestic and international laws.

12. For example, certain negotiable electronic transferable instruments are recognized under United States law.⁷ Negotiable electronic transferable documents are also recognized under United States law.⁸ The use of electronic transferable

⁶ Thus, for example, if a buyer paid for goods with a promissory note, the fact that the buyer may have a claim against the seller for defects in the goods would have no effect on the rights of the holder of the promissory note. The holder would not be subject to the defense of the buyer as to the quality of the goods.

⁷ Uniform Electronic Transactions Act, Article 16. This only provides for electronic promissory notes (two party instruments) and not electronic three-party instruments (e.g., checks and drafts). Electronic promissory notes are also provided for under the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001-7031, however in this Act the electronic promissory notes are limited to use in real estate transactions. Three-party electronic transferable instruments are not provided for in either the Uniform Electronic Transactions Act or the Electronic Signatures in Global and National Commerce Act. However, for purposes of near instantaneous transfer of funds, this has been achieved by the now ubiquitous use of money wire transfers. Also common today, and continuing in development, is the use of check truncation (the use of a digital copy in lieu of the original instrument in the bank collection system).

⁸ United States Uniform Electronic Transactions Act (Article 16), Uniform Commercial Code (Article 7: Documents of Title), and Warehouse Act.

records goes back almost 20 years in the United States, with federal regulations providing for the use of electronic warehouse receipts for the cotton industry.⁹

13. Activities in some countries indicate the usefulness of, and expected benefits from, the use of negotiable or transferable electronic records. Korea has enacted legislation and has established infrastructure for the creation of electronic notes and bills based on a registry. Japan's Electronically Recorded Monetary Claims Act¹⁰ provides what is considered an electronic replica or electronic substitute of paper negotiable instruments. This legislation, and the corresponding registry-based infrastructure, regulates a new concept (the Electronically Recorded Monetary Claim — ERMIC) that, while being typified as a new category of personal rights corresponding to a money debt (including account receivables), is to work in many respects like electronic financial instruments and is to replace paper bills and notes with a swifter and more functional and useful alternative.¹¹ As negotiable money claims documented in electronic records, ERMICs provide a more flexible financial instrument, not only because it is in an electronic form (with all ensuing advantages), but also because the substantive regime of negotiability has been slightly modified and adjusted to take advantage of the electronic form. To that extent, it is expected that ERMICs will revolutionize the financing of business, particularly for small and medium size enterprises.

14. Colombia has also enacted relevant legislation. The current Colombian legislation on electronic commerce provides for the recognition of electronic records and electronic signatures. These rules are, to a large extent, based on the relevant UNCITRAL model laws. Rules on electronic commerce already allow for the issuance and storage of commercial invoices in electronic form.¹² One particular feature of the Colombian legislation is that a paper commercial invoice is considered a negotiable instrument. A commercial invoice may therefore be transferred with all the consequences attached to its negotiable character, which eases access of the issuer to financial services based on invoice discount. On these grounds, Colombian legislation also permits the issuance and transfer of electronic invoices as negotiable instruments.¹³ Regulations addressing the issuance and negotiation of electronic invoices are currently being drafted. The drafting process has provided a clear indication of the interest and benefits of having rules on electronic transferable records for both the commercial and the financial sector. Although specific rules on the matter have not yet been approved, and precisely in light of the mandate given by the Commission to the Working Group, Colombian Decree 19 (10 January 2012) modifies the Colombian legislation on electronic commerce so as to enable Certification Authorities to issue certificates for the use of electronic transferable records, as well as to provide services for their registration, custody, recording and storage.

⁹ United States Code of Federal Regulations Title 7—Agriculture, Part 735—Regulations for the United States Warehouse Act.

¹⁰ Act no. 102 of June 27, 2007.

¹¹ An ERMIC is created in an electronic record that is registered with a recording institution and is freely transferable to a third party. Such transfer is substantially equivalent to a negotiation.

¹² Act no. 962, July 8, 2005.

¹³ Act no. 1231, July 17, 2008.

15. There is also a growing body of international law that recognizes electronic transferable records. As stated below, this includes UNCITRAL texts.¹⁴ It is important to note from the outset that the Working Group, in its work on the United Nations Convention on the Use of Electronic Communications in International Contracts (Electronic Communication Convention), specifically chose not to include transferable records within its scope.¹⁵ It is hoped that the Working Group can now complete this postponed work in transferable records.

III. Previous consideration of electronic transferable records by UNCITRAL

16. The topic of electronic transferable records has been before the Working Group practically since it started addressing matters in the field of electronic commerce. While the Working Group highlighted and discussed the relevance of this topic on several occasions, a specific line of work thereupon has been repeatedly postponed for different reasons.

17. In preparing the 1996 UNCITRAL Model Law on Electronic Commerce, the Working Group addressed electronic transferable records at a rather late stage.¹⁶ The problems attached to the regulation of the electronic replica of negotiable instruments or documents were quickly perceived, and it became clear that the mere formulation of the general principles for media neutrality would not address all difficulties and the related issues. However, it was proposed that an article dealing with negotiable transport documents, which operate as documents of title to goods in some jurisdictions, could be included in the Model Law. The transport industry had undertaken steps to use electronic versions of negotiable transport documents, but this was occurring in the absence of a regulatory system.¹⁷ On this basis, Articles 16 and 17 of the Model Law provided a model for the regulation of the use of electronic negotiable documents in the context of the contracts for the carriage of goods.¹⁸

18. In light of the many questions raised by electronic transferable records, and the expected benefits of an instrument addressing the topic, the Working Group encouraged consideration of the issue as a possible subject of future work. Some documents were issued with this purpose, again focusing the analysis on documents of title, but at the same time broadening the scope to the existing systems for the electronic transfer of rights and interests in goods.¹⁹

¹⁴ UNCITRAL Model Law on Electronic Commerce (1996); United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008).

¹⁵ Electronic Communications Convention, Art.2(2): "This Convention does not apply to bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts or any transferable document or instrument that entitles the bearer or beneficiary to claim the delivery of goods or the payment of a sum of money."

¹⁶ A/CN.9/387, para. 177; A/CN.9/406, paras. 178-179.

¹⁷ See in this regard proposals by the United Kingdom (Annex II to the A/CN.9/WG.IV/WP.66) and the United States of America (Annex to A/CN.9/WG.IV/WP.67); A/CN.9/407, paras. 115-117; A/CN.9/WG.IV/WP.69.

¹⁸ Part Two of the 1996 Model Law on Electronic Commerce has been followed in, e.g., Part 3 of the Uniform Electronic Commerce Act of Canada.

¹⁹ A/CN.9/421, para. 106; A/CN.9/WG.IV/WP.90.

19. As the issue of electronic transferable records was relevant to the maritime transportation industry, it was addressed by the 2008 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”). The Rotterdam Rules provide a legal framework for the use of negotiable (and non-negotiable) electronic transport records that has extensively benefitted from the works and discussions previously undertaken in UNCITRAL on the topic and on models provided by some national rules. The Rotterdam Rules may provide a useful framework for the Working Group to continue work on transferable records more generally. However, the Rotterdam Rules are just one possible model that deserves the attention of the Working Group as they deal only with transport documents and do not address all potential problems relating in general to negotiable instruments and documents.²⁰

20. As stated earlier (para. 15 above), electronic transferable records were also addressed during the negotiation of the Electronic Communications Convention. In this Convention, negotiable documents were again left aside and expressly excluded from the scope of application in Article 2.²¹ The primary reasons for this exclusion were that the issue was considered as going beyond the mandate of the Working Group as well as the belief that the elements needed in a legal regime governing electronic transferable records had not yet been fully developed.²² The Working Group believed that the topic was an important one that required additional consideration. In consequence, the Explanatory Note to the Electronic Communications Convention specifies: “the Convention does not apply to negotiable instruments or documents of title, in view of the particular difficulty of creating an electronic equivalent of paper-based negotiability, a goal for which special rules would need to be devised.”²³ The task now entrusted to the Working Group is the logical and natural continuation of a line of work that was left open in previous sessions, and in respect to which significant advances have taken place in national rules and in practice.

IV. Issues to be addressed by the Working Group

A. Issues identified in other work of UNCITRAL

21. During the discussions of the previously referenced instruments, some of the issues and problems that will need to be addressed in relation to feasible rules applicable to electronic transferable records were identified. Some of these issues directly relate to the features that a legal framework dealing with the issuance and

²⁰ Private, closed systems of electronic records (transport documents) include the Bill of Lading Electronic Registry Organization (BOLERO) system, which is run by a consortium of banks and has matured to the point where it may provide useful guidance for further work regarding transferable records. Experience with BOLERO suggests that, should the Working Group consider registry issues, it could consider third-party rights that may be asserted against the holder of rights in a registry system.

²¹ See note 15 *supra*.

²² Electronic Communications Convention, Text and Explanatory Note, para. 81.

²³ Electronic Communications Convention, Text and Explanatory Note, para. 7. See also A/CN.9/484, paras. 88 *et seq.*

use of electronic transferable records should address.²⁴ These refer to the conditions for the creation of an electronic transferable record, the types of transferable negotiable documents that may be issued in electronic form (financial instruments, documents of title, etc.), the conditions for the transfer, the identification of the holder and the standards required for that purpose, as well as the precise determination of the rights attached to the record (something which, however, relates to the substantive aspects of negotiable instruments).²⁵

22. Other questions raised refer to problems that may be seen as ancillary to the topic of electronic transferable records and common to the use of electronic means for business purposes, but which could ideally be discussed by the Working Group. These topics include the liability of third party service providers, liability for errors in communications performed through the employment of “electronic agents” (automated systems),²⁶ or in general the role and liability of trusted third parties and other intermediaries in the transfer of documents or rights (or in the completion of similar transactions). The work that the Working Group may undertake in relation to these questions would have a beneficial impact in other matters that are closely related to the use of electronic transferable records, including identity management in an electronic environment (something that is crucial for negotiability in the digital space) or the completion of documentary formalities in export/import operations (involving customs and any systems feasibly based on single windows facilities).

23. Previously in the Working Group, the legal regime for the use of electronic transferable records was discussed in connection with other topics, such as trade documentation, including bills of lading, identity management, single windows systems, etc., because of the many legal issues that they all share. These related topics generally encompass issues relating to the transfer of personal rights or of property rights in tangible or intangible property through electronic means.²⁷ Some aspects of each will be relevant to considering issues under transferable records.

B. Basic Principles

24. The Working Group during its deliberations at its forty-fifth session identified at least five basic principles that are necessary for electronic transferable records: (i) electronic equivalence of writing; (ii) electronic equivalence of signature; (iii) uniqueness and guarantee of singularity; (iv) transfer of rights; and (v) identification and authenticity of the holder.²⁸

25. For each of these concerns there are existing models that the Working Group may want to consider.

²⁴ See section IV(b) of this paper. See also A/CN.9/484, paras. 88 *et seq.*

²⁵ The Working Group would not address substantive legal rights underlying these instruments and documents.

²⁶ See A/CN.9/WG.IV/WP.104/Add.4, paras. 11-13.

²⁷ See A/CN.9/WG.IV/WP.69, para. 83; A/CN.9/421, para. 61.

²⁸ A/CN.9/WG.IV/WP.115.

1. Writing

26. Although likely one of the least problematic issues that needs to be addressed, the question of the electronic equivalent of a writing is an essential aspect of electronic transferable records. In the past, it has been understood that transferable records must be in writing and signed. The UNCITRAL Model Law on Electronic Commerce recognized that the flexible doctrine of “functional equivalence” suffices as a substitute for the requirement that a record be in writing.²⁹ Electronic Communication Convention and the Rotterdam Rules have also adopted this principle.³⁰ This outcome is well established in several domestic electronic commerce laws as well, many of these derived from the UNCITRAL Model Law on Electronic Commerce.

2. Signature

27. As with writing, there is substantial domestic and international law adopting a “functional equivalence” standard for signatures. This includes the UNCITRAL Model Law on Electronic Signatures as well as the Electronic Communications Convention.

28. Yet, there is also support, including in the Rotterdam Rules, for dispensing with the signature requirement altogether for transferable records. In this latter case, the assumption is made that the function of the signature is to prove the right of ownership and transfer, and since the concept of “control”, which is embedded in these rules, meets these concerns, a signature is not required.

29. Either approach has much to commend it, and there are numerous functional models in both international and domestic law for the Working Group to consider.

3. Uniqueness and guarantee of singularity

30. With traditional paper transferable records, there is the assumption that there is only one unique and singular copy of a record.³¹ This assumption is not necessarily consistent with electronic transferable records. At present, there are two models relevant to the uniqueness and guarantee of singularity of electronic transferable records: (i) registry system and (ii) token system.

31. In a registry system, the creation, issuance and transfer of electronic transferable records are recorded in a central registry. Because the registry records the entitlements of the electronic transferable record for the party who has these rights, there is no reason to require a unique and singular record for these rights. In addition, to the extent that the doctrine of control replaces the need for physical possession, as discussed below, the registry also meets the requirements of control.

²⁹ UNCITRAL Model Law on Electronic Commerce (1996), Articles 5-10.

³⁰ Electronic Communications Convention and the Rotterdam Rules.

³¹ There are, of course, whole bodies of the law that deal with questions of fraud and forgery with the paper copy of the record.

32. Registry systems are quite common today and are well developed and effective.³² For example, Section 16 of the United States Uniform Electronic Transactions Act provides for a registry system for electronic transferable instruments.³³ The United States Uniform Commercial Code also provides for electronic chattel paper in response to requests from the automobile financing industry to foster wider use of electronic chattel paper.³⁴ Both of these laws have provided the basis for the success of electronic transferable records in the United States.

33. The United States experience with registries for electronic negotiable records goes back twenty years to the introduction of the federally mandated electronic registry for cotton warehouse receipts.

34. Another example of a domestic registry system for electronic transferable records is provided in the Commercial Act of the Republic of Korea, which enables electronic bills of lading and establishes the legal equivalence between paper-based and electronic bills of lading managed in an electronic title registry.³⁵

35. For the question of uniqueness and singularity, a second model is the “token” system; a token being the electronic equivalent of a unique paper document. The possibility of an electronic token as the equivalent of a paper document has long been recognized as a possibility. Thus, for example, Article 17 of the Model Law on Electronic Commerce recognizes the need for a unique electronic record but does not specify how this is to be done: it simply requires that “a reliable method is used to render such data message or messages unique.”³⁶

36. Likewise, Article 9 of the Rotterdam Rules provides for the possibility of a unique and singular electronic transferable document. Eschewing any specifics on how this could be achieved, the Rotterdam Rules provide discretion to the parties in developing procedures that satisfy certain requirements rather than identifying a particular mechanism that must be followed in all cases.³⁷

37. By contrast, while the Working Group, in drafting the Electronic Communications Convention, recognized uniqueness as a requirement for electronic transferable records, the Working Group acknowledged that finding a solution for that problem required a combination of legal, technological and business solutions, which had not yet been fully developed and tested. Thus, as discussed above, the

³² The discussion in this paper is limited to registry systems for electronic transferable records. There are also examples of successful international registries for security rights. Most prominent is the aircraft registry for the Convention on International Interests in Mobile Equipment (“Cape Town Convention”), which provides a registry for leases and security rights for aircraft. Another example is United States Uniform Commercial Code Article 9: Secured Transactions section 9-105 (governing electronic chattel paper), which was enacted as a response to requests from the auto financing industry to foster the use of electronic chattel paper.

³³ The Official Comments state that “A system relying on a third party registry is likely the most effective way to satisfy the requirements ... that the [electronic] transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.”

³⁴ United States Uniform Commercial Code Section 9-105.

³⁵ A/CN.9/692, paras. 26-46.

³⁶ UNICTRAL Model Law on Electronic Commerce, Article 17.

³⁷ Rotterdam Rules, Article 9 (“[t]he use of a negotiable electronic transport record shall be subject to procedures”).

Electronic Communications Convention avoided the issue when it excluded electronic transferable records from its scope.³⁸

4. Physical possession and transfer of rights by delivery

38. There are developed and functioning models for the functional equivalent of physical possession and the transfer of rights by delivery. This is achieved by the concept of “control” in most legal models that govern electronic transferable records. The person in control of the electronic transferable record is considered the holder who is capable of enforcing the rights contained in that electronic transferable record. Where control of an electronic transferable record is used as a substitute for possession of transferable paper, transfer of control serves as the substitute for delivery of the electronic transferable record. Under current models, control may also be achieved through the token and the registry systems.³⁹

39. Under the token model, the identity of the person in control of the electronic transferable record (the holder) is contained in the electronic transferable record itself, and changes in ownership (e.g., assignments) are noted by modifications made directly to the electronic transferable record. Under this model, establishing the owner of the electronic transferable record requires a system to maintain careful control over the electronic record itself, as well as the process for transfers of control. As with transferable paper record, there may be a need for technological or security safeguards to ensure the existence of a unique “authoritative copy,” that cannot be copied or altered and can be referenced to determine the identity of the owner (as well as the terms of the electronic transferable record itself).

40. Under the registry model, the identity of the owner of the electronic transferable record is contained in a separate independent registry. Under this model, establishing the owner of the electronic transferable record requires control over the registry. The uniqueness of a copy of the electronic transferable record itself becomes less important or irrelevant as long as there is a means to verify the integrity of the electronic transferable record recorded in the registry.

41. The control model has proven to be an effective and efficient method for substituting the requirement of physical possession of documents in electronic transactions. For example, in the field of investment securities, acknowledging that in modern business practices it is impractical to transfer millions of physical shares of securities daily, since 1992, the United States provided in their law for the concepts of “control” to substitute explicitly for the physical possession and transfer

³⁸ Electronic Communications Convention, Article 2(2).

³⁹ Several legal systems for electronic transferable records have adopted, or accommodate, a registry model. One example under United States law is section 16 of the Uniform Electronic Transactions Act (which governs electronic transferable instruments), which provides for systems based on registries. The Official Comments state that “A system relying on a third party registry is likely the *most effective way* to satisfy the requirements ... that the [electronic] transferable record remain unique, identifiable and unalterable, while also providing the means to assure that the transferee is clearly noted and identified.”

Another domestic law that accommodates registry systems include Article 862 of the revised Korean Commercial Act, enacted on 3 August 2007 (Law No. 9746), which enables electronic bills of lading. It establishes the legal equivalence between paper-based and electronic bills of lading managed in an electronic title registry.

of investment securities.⁴⁰ Importantly, the Unidroit Convention on Substantive Rules for Intermediated Securities (Geneva, 2009) provides for recognition of a “control agreement.”

42. Likewise, for the last decade, the United States law that governs secured transactions in personal property has provided for “control” over intangible assets that would be tangible if not in electronic form.⁴¹

43. Specifically as for negotiable electronic transferable records, the United States law has extended the concept of control to cover both electronic transferable instruments⁴² as well as electronic transferable documents.⁴³ Other domestic laws such as the Commercial Act of the Republic of Korea also provide for “control” as a means for the possession and transfer of electronic documents of title.⁴⁴

44. The Rotterdam Rules also provide for control as a basis to meet the possession and transfer requirements for electronic transferable documents.⁴⁵ Thus, in addition to existing domestic models, there is also international recognition of the doctrine of “control” as meeting the possession and transfer elements of transferable records in electronic transactions. Although the Rotterdam Rules are not yet in force and do not provide practical experience in this area, the aforementioned domestic examples have a long and successful history of use.

5. Identification and authentication of holder

45. When control is used as a substitute for possession, the party who has the right of control is automatically identified, and therefore the ability and need to identify the holder that would otherwise be achieved by possession of the instrument or document is effectively achieved. This may be accomplished by having evidence of the identity of the person integrated into the authoritative copy itself, or by having the authoritative copy logically associated with a method for tracking the identity of the person, such as a registry, so that a person examining the authoritative copy is also alerted, and has evidence of control. Thus, the concept of “control” is typically defined in a manner that focuses on the identity of the person entitled to enforce the rights embodied in the electronic transferable record.

⁴⁰ United States Uniform Commercial Code § 8-106.

⁴¹ Uniform Commercial Code Article 9: Secured Transactions.

⁴² Uniform Electronic Transactions Act, section 16 (Transferable Records), and the Electronic Signatures in Global and National Commerce Act, section 201 (Transferable Records). Since the enactment of the Uniform Electronic Transactions Act, a whole real estate industry has evolved in the United States that provides for real estate mortgages and the promissory notes that accompany them to be effectuated electronically through the Mortgage Electronic Records System.

⁴³ Uniform Commercial Code (UCC), Articles 7-106 (Control of Electronic Document of Title), 7-501 (b) (Warehouse Receipts and Bills of Lading: Negotiation and Transfer).

⁴⁴ Article 862 of the revised Korean Commercial Act, enacted on 3 August 2007 (Law No. 9746) (article enabling electronic bills of lading).

⁴⁵ Rotterdam Rules, Article 1, paragraphs 21 and 22, and Articles 50 and 51.

V. Industries that would potentially benefit from the work in the field

46. Work by UNCITRAL in the field of electronic transferable records will both improve practices in industries that currently utilize electronic transferable records and create an environment in which other industries may begin to use electronic transferable records. Examples of some of the relevant industries are identified below. It should be expected that other industries may be identified through discussion in the Working Group.

47. It should be noted that achieving greater harmonization and efficiency in these areas of commerce and trade can provide a significant boost for developing economies both through adoption of modern efficient e-commerce laws, and through facilitation of trade by removing obstacles resulting from differences between the commercial laws of trading partners.

A. Documents of title

48. In agricultural economies, electronic warehouse receipts will allow for increased financing based on warehoused goods.⁴⁶ Experience in domestic agricultural markets where electronic warehouse receipts have been used indicates that the benefits of electronic warehouse receipts over paper warehouse receipts includes reduced transaction costs, easier transferability, greater security for holders, and a wider use of warehouse receipts in general. For agricultural producers, this equates to a significant increase in the benefits that accrue from the use of warehouse receipts. Benefits include increased access to, and larger amounts of, credit, the ability to respond to different levels of supply and demand from fluctuating market conditions, and the ability to sell in bulk and thereby gain additional profits from volume. Buyers likewise gain by being able to buy in volume and regulate the quality of the goods. These benefits all suggest the importance of electronic warehouse receipts, particularly in developing agricultural economies where they are not widely used today.

49. The preamble of the Rotterdam Rules expressed concern that the current legal regime governing the international carriage of goods by sea fails to adequately take into account modern transport practices, including the use of electronic transport documents. As a result, the Rotterdam Rules contains a chapter (Chapter 3) devoted to electronic transport records that recognizes that parties may use either paper or electronic bills of lading. This Working Group might wish to consider rules applicable to the use of electronic transport documents outside of the scope of the Rotterdam Rules as well as rules that could bolster the relevant provisions of the Rotterdam Rules.

⁴⁶ Henry Gabriel, "Warehouse Receipts and Securitization in Agricultural Finance," 17 Uniform Law Review 369 (2012).

B. Instruments

50. Electronic transferable records are currently being used in financial transactions that rely on payment deferment or credit discount, such as discount lines offered by banks.⁴⁷ A negotiable instrument (such as a promissory note) is usually issued; however, the use of a negotiable instrument is sometimes avoided because of the administrative burden associated with the processing of the paper required in these transactions. In these cases, entities have instead resorted to the simple “invoice discount” or “account receivables,” which are based on a mere credit assignment. The ability to issue valid electronic negotiable instruments would create more secure conditions for the transfer of credit and more effective payment claims mechanisms that rely on means that would be immune to encumbrances attached to the paper form.⁴⁸

51. Electronic issuance and transfer of negotiable records will also have an impact in services or transactions that rely on the use of personal credits or negotiable instruments as collateral. In general, all services or transactions that entail the deferment of payments as a way of financing the debtor benefit from the possibility of the electronic transfer of rights.

52. Electronic transferable records may also benefit the mortgage industry.⁴⁹ The borrower mortgagee issues electronic promissory notes that are bundled in a set of electronic documents that relate to the loan. The security provided by the use of negotiable instruments for payments, among other things, makes possible the purchase of the loan by intermediaries and its re-sale in the secondary market.⁵⁰ The systems currently operating use registries that are audited and accredited by the purchasing or intermediary institutions. In essence, the substantive regime utilized in this electronic system is the same as the one applicable to paper notes. Likewise, many educational institutions offer the possibility of financing tuition fees utilizing promissory notes that are issued electronically.⁵¹ It is important to note that the mortgage industry did not begin to use electronic transferable records until there was a legal framework that provided for them. Likewise, electronic transferable

⁴⁷ As a way of financing commerce, commercial credits are often discounted by a banking entity. This structure is also used in factoring services. These kinds of services usually require the presentation of invoices or other documents that evidence the transactions from which the credit arises.

⁴⁸ In a survey conducted among Spanish banking entities (which included the Spanish Banking Association and the Spanish Confederation of Savings Banks), 100 per cent of respondents stated that they provide financial services dependent on the use of negotiable instruments. Out of them, 83 per cent stated that such services are “very frequent” (the other 17 per cent qualified them as “common”). Likewise, 100 per cent stated that they provide services for credit discount (or entailing the use of credits as collateral) that do not resort to the issuance and transfer of negotiable documents. Out of them, 66 per cent stated that they do so by reason of the inconveniences stemming from the need to depend on the paper for the exercise or transfer of rights. All stated that they found, or would find, benefit from legislation expressly addressing the use of electronic negotiable instruments or the electronic transfer of rights with equivalent conditions or results.

⁴⁹ See note 42 *supra* for relevant experience in the United States.

⁵⁰ As stated in a previous section, this is done through the Mortgage Electronic Registration System under the legal framework provided by the United States.

⁵¹ The U.S. Department of Education’s Office of Federal Student Aid administers a programme for financing education expenses and fees that relies on the use of promissory notes.

records may provide a basis for the development of new modes of financing that that have not yet been envisaged.

53. There are other sectors that may benefit from electronic transferable records, and electronic transfer of rights. The Working Group may wish to consider those businesses whose services to any extent rely on the transfer of documents or rights. For example, transactions involving an independent guarantee or a letter of credit also benefit from the use of transferable documents.

**D. Note by the Secretariat — Overview of identity management —
Background paper submitted by the Identity Management Legal Task
Force of the American Bar Association, submitted to the Working
Group on Electronic Commerce at its forty-sixth session**

(A/CN.9/WG.IV/WP.120)

[Original: English]

Within the framework of preparation for the forty-sixth session of Working Group IV (Electronic Commerce), the Identity Management Legal Task Force of the American Bar Association submitted the attached document to the Secretariat.

The document in the attached annex is reproduced in the form in which it was received by the Secretariat.

I. Introduction

1. In 2011, an OECD report noted that “digital identity management is fundamental to the further development of the Internet economy.”¹ It is a foundational requirement for all substantive forms of e-commerce.
2. This paper provides an overview of identity management, its role in e-commerce, the legal issues it raises and the legal barriers it presents.² It is based on the ongoing work of the Identity Management Legal Task Force of the American Bar Association (ABA),³ and is submitted as background to inform the Working Group of relevant issues.⁴
3. At its forty-fourth session, in 2011, the Commission agreed that Working Group IV (Electronic Commerce) should be convened to undertake work in the field of electronic transferable records.⁵ At the same time, the Commission agreed that the extension of the Working Group’s mandate to other topics discussed in document A/CN.9/728 and Add.1 as discrete subjects (as opposed to their incidental relation to electronic transferable records) would be further considered at a future

¹ OECD (2011) “Digital Identity Management for Natural Persons: Enabling Innovation and Trust in the Internet Economy — Guidance for Government Policy Makers,” *OECD Digital Economy Papers*, No. 196, OECD Publishing, at p. 3; available at www.oecd-ilibrary.org/science-and-technology/digital-identity-management-for-natural-persons_5kg1zqsm3pns-en.

² This paper focuses on commercial identity management systems intended for use in a business context, including business-to-business (B2B), business-to-government (B2G), and business-to-consumer (B2C) communications.

³ Identity Management Legal Task Force, Cyberspace Law Committee, American Bar Association, Section of Business Law; <http://apps.americanbar.org/dch/committee.cfm?com=CL320041>. The views expressed in this paper have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the ABA.

⁴ Additional materials are also available from the proceedings of the UNCITRAL Colloquium on E-Commerce, 14-16 February 2011 New York at www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

⁵ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 250.

session.⁶ Those topics included identity management, single window, and mobile payments.⁷

4. As discussed below (paras. 6-7), identity management is a fundamental requirement for each of the topics considered by the Commission at its forty-fourth session (electronic transferable records, single window, and mobile payments). Thus it will be important for the current work of the Working Group on electronic transferable records, as well as for any possible future work on the other topics.

5. The critical importance of identity management in facilitating trustworthy e-commerce is well-recognized. Numerous intergovernmental groups, states, private international groups, and commercial entities are actively exploring identity management issues and opportunities, developing technical standards and business processes, and seeking ways to implement viable identity systems. For example:

(a) Inter-governmental groups actively working on identity management issues and standards include the Organization for Economic Cooperation and Development (OECD),⁸ the International Organization for Standardization (ISO)⁹ and the International Telecommunications Union (ITU);¹⁰

(b) A survey undertaken by the OECD¹¹ identified 18 OECD countries actively pursuing national strategies for identity management (Australia, Austria, Canada, Chile, Denmark, Germany, Italy, Japan, Luxembourg, Netherlands, New Zealand, Portugal, Republic of Korea, Slovenia, Spain, Sweden, Turkey, and United States of America).¹² Several other countries, such as Estonia, India, and Nigeria are also actively pursuing such strategies;

(c) Several regional identity projects are underway in the European Union, including PrimeLife (a project of the European Commission's Seventh Framework Programme),¹³ the Global Identity Networking of Individuals — Support Action (GINI-SA),¹⁴ STORK (to establish a European eID Interoperability Platform),¹⁵ and the European Network and Information Security Agency (ENISA);¹⁶

(d) Private organizations working on identity standards and policy at an international level include the Organization for the Advancement of Structured

⁶ Ibid., para. 251.

⁷ Ibid., paras. 241-49.

⁸ www.oecd.org/document/38/0,3746,en_2649_34255_49319782_1_1_1_1,00.html.

⁹ www.iso.org/iso/standards_development/technical_committees/list_of_iso_technical_committees/iso_technical_committee.htm?commid=45306.

¹⁰ www.itu.int/ITU-T/studygroups/com17/fgidm.

¹¹ Bernat, L. (2011), "National Strategies and Policies for Digital Identity Management in OECD Countries", OECD Digital Economy Papers, No. 177, OECD Publishing. doi: 10.1787/5kgdzvn5rfs2-en; at www.oecd-ilibrary.org/content/workingpaper/5kgdzvn5rfs2-en.

¹² Ibid., at pp. 28-35 for a list of links to national documents.

¹³ www.primelife.eu.

¹⁴ www.gini-sa.eu.

¹⁵ <https://www.eid-stork.eu>.

¹⁶ www.enisa.europa.eu.

Information Standards (OASIS),¹⁷ the Open Identity Exchange (OIX),¹⁸ the Kantara Initiative,¹⁹ the Open ID Foundation,²⁰ tScheme,²¹ and The Internet Society;²²

(e) Some commercial identity systems have been established and operate on a global scale in limited areas. These include those operated by the Transglobal Secure Collaboration Program (TSCP)²³ and CertiPath²⁴ for the aerospace and defence industries, the SAFE-BioPharma Association²⁵ for the biopharmaceutical industry, IdenTrust²⁶ for the financial sector, the CA/Browser Forum²⁷ for website EV-SSL certificates, and FiXs — Federation for Identity and Cross-Credentialing Systems (FiXs).²⁸ The work of these groups is focused primarily on technical standards and business process issues, rather than legal issues.

II. How does identity management relate to e-commerce?

6. Identity management is a foundational issue for most e-commerce transactions and other online activities. Verifying the identity of remote parties, such as determining who is seeking access to an online database of sensitive information, who is trying to do an online transfer of funds from an account, who signed an electronic contract, who remotely authorized a shipment of product, or who sent an email, is a fundamental concern. While participants in many low-risk online transactions are willing to trust that they are dealing with a specific person or entity, as the sensitivity or value of the transaction increases, the importance of ensuring the availability and reliability of accurate information about the identity of the remote party in order to make a trust-based decision increases as well.

7. Identity management is a basic requirement for electronic signatures, for the topic of electronic transferable records, and for any possible future work on the other topics (single window and mobile payments).²⁹

(a) Establishing identity of the signer is one of the requirements for creating a valid electronic signature. Both Article 7 of the UNCITRAL Model Law on Electronic Commerce (1996) and Article 9 of the United Nations Convention on the Use of Electronic Communications in International Contracts (2005, Electronic Communication Convention) require, as a condition of a valid electronic signature, that a “method is used to identify” the signer that is as reliable as was appropriate for the purpose for which the data message was generated or communicated. Article 2 of the UNCITRAL Model Law on Electronic Signatures also requires

¹⁷ www.oasis-open.org/home/index.php.

¹⁸ www.openidentityexchange.com.

¹⁹ <http://kantarainitiative.org>, formerly known as the Liberty Alliance, www.projectliberty.org.

²⁰ <http://openid.net/foundation>.

²¹ www.tscheme.org.

²² www.internetsociety.org.

²³ www.tscp.org.

²⁴ <https://www.certipath.com>.

²⁵ www.safe-biopharma.org.

²⁶ www.identrust.com.

²⁷ www.cabforum.org.

²⁸ www.fixs.org.

²⁹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 241-252.

data “which may be used to identify the signatory” as a component of an electronic signature;

(b) Verification of identity is also a critical requirement for electronic transferable records, single window, and mobile payments. Current law regarding electronic transferable records requires establishing the identity of both the signer of the record as well as the holder entitled to enforce it.³⁰ Single window processes will require establishing the identity of the signer of customs documents, as well as the identity of the person or entity filing them and the person or entity entitled to enforce them.³¹ And mobile payments, like all other payment systems, require (for purposes of authorization) the identity of the person purporting to transfer funds.³²

III. What is identity management?

8. At its essence, identity management is designed to provide the answer to two simple questions that each party to an online transaction asks about the other party: “Who are you?” and “How can you prove it?” The ability to provide a reliable and trustworthy answer to these questions is fast becoming a critical requirement for electronic business activities, especially as the nature, significance, and sensitivity of those transactions increases. With the answers to those two questions, a party to an online transaction can decide whether or not to engage in the transaction (e.g., whether to enter into a contract with the other party, whether to allow the other party to access a sensitive database, or whether to extend some other privilege or access to the other party).

9. Every entity that engages in digital transactions could set up its own system to identify and authenticate each of its business partners (as many businesses currently do through the use of individual registration processes coupled with a username and password system), but this is increasingly proving expensive and inadequate, producing challenges to scaling the system to broader populations. Moreover, the increasing need for cross-organization collaboration, concerns about security, and the problem of user password management suggest that the traditional company-issued or vendor-issued username and password approach is no longer adequate.

10. As a consequence, identity systems whereby a third party identity provider (or attribute provider) plays a key role are emerging as a preferred approach. The goal is to allow businesses and government agencies to conduct electronic transactions with remote parties in reliance on identity information and authentication processes provided by any one of several unrelated third party providers. This is often referred to as a “federated” identity system. In other words, identity information verified by one entity is made available in an agreed-upon and managed fashion to multiple parties across different systems that have a need for identity information for various purposes. This would, for example, allow individuals and businesses to use an identity credential of their choosing to conduct online transactions with numerous enterprises, just as an individual might use a driver’s licence for a variety of different offline transactions with different entities, such as buying alcohol, gaining admission to an airport boarding area, or opening a bank account.

³⁰ A/CN.9/WG.IV/WP.115, paras. 24-26 and 45-48.

³¹ A/CN.9/728/Add.1, paras. 42 and 45.

³² See, A/CN.9/728, para. 52.

11. To develop a federated identity system requires a combination of technical standards and systems,³³ business processes and procedures, and legal rules that, taken together, establish a trustworthy system for: (i) verifying identity and connecting that identity to an individual human, legal entity, device, or digital object, (ii) providing that identity information to a party that requires it to authorize a transaction, and (iii) maintaining and protecting that information over its life cycle. Critical to making it work in a commercial context is the requirement for an appropriate, and typically contract-based legal framework that defines the rights and responsibilities of the parties, allocates risk, and provides a basis for enforcement. This legal framework is often referred to as “operating rules” or a “trust framework”.

IV. Identity management basics

12. Although the term “identity management” is relatively new, the concept is not. The underlying processes have long been in use in an offline environment. Passports, driver’s licences, and employee ID cards are all components of identity systems (i.e., they are credentials issued by an entity to verified individuals so those individuals can later validate their identity). The process of identifying a person and issuing the credential can be done by the party that also accepts the credential (as in the case of a company-issued employee ID card), or by a third party (as in the case of a driver’s licence or passport). A key element of federated systems, where there is a third party issuer, is that the use of these identity credentials is not limited to transactions with the entities that issued them. Rather, they are designed and deployed with the anticipation that the credentials will be accepted by third parties (such as airport security, a bank, or a bartender in the case of a driver’s licence) when proof of certain attributes of one’s identity (e.g., name or age) is required.

13. The challenge is to implement a similar capability in an online environment. That is, to create a system for secure, reliable and trustworthy digital identity credentials that can be used remotely across different systems and entities (i.e., to develop a federated identity system). This allows data subjects to use the same identity credential to identify themselves in order to access resources or conduct transactions with multiple organizations.

14. While there are many different approaches to identity management, it essentially involves two fundamental processes: (i) the process of collecting and verifying certain identity attributes about a person (or entity, device, or digital object)³⁴ and issuing an identity credential to reflect those attributes (“identification”), and (ii) the process of later verifying that a particular person presenting that credential and claiming to be that previously identified person is, in fact, such person (“authentication”). Each of these basic processes can involve various sub-processes, depending on the nature of the data and context in which the two processes take place. Once identity attributes about an individual are successfully authenticated, a third set of processes, referred to as “authorization,” is

³³ A public-key infrastructure (PKI) is one approach that can be used to build an identity system.

However, many other technologies and approaches are also being developed, and implemented.

³⁴ Identity information can be collected and verified, and identity credentials can be issued, for individuals, legal entities, devices, and digital objects. This paper focuses only on identity systems with respect to individuals.

engaged in by the entity that intends to rely on the authenticated identity to determine what rights and privileges are accorded to such person (e.g., whether to enter into a contract with such person, or whether such person should be granted access to a database, an online bank account).

A. Identification

15. The identification process is designed to answer the question “who are you?” Performed by someone filling the role of an identity provider³⁵ it involves associating identifying attributes (such as name, membership number, address, or birth date) with a person in order to identify and define that individual to the level sufficient for the contemplated purpose. Sometimes called “identity proofing” or “enrolment,” this process is often a one-time event. It typically involves the collection by an identity provider of information about the person to be identified (referred to as the “subject”), and often relies on a patchwork of government-issued documents (e.g., a birth certificate, social security card, driver’s licence, and passport), as well as credentials issued by private sector entities (e.g., an employee badge, mobile wireless SIM card, and credit cards). Although such identity documents and credentials were issued for other purposes, they can often be re-used to facilitate later identification processes in new contexts. This occurs, for example, when someone provides a driver’s licence to prove their identity in the context of receiving an employee identity badge.

16. At the end of the identification process, the subject’s relevant identity attributes are typically represented by data in an electronic document issued by the identity provider and referred to as an identity credential. A credential presents (or links to or correlates with) data that is used to authenticate the claimed digital identity or attributes of a person, entity, or device.³⁶ A credential can be embodied in a variety of media. In the physical world, examples of an identity credential include a royal seal, a driver’s licence, a passport, a library card, or an employee identification badge. In the online world the identity credential might be as simple as a user ID, or as complex as a cryptographically-based digital certificate that might be stored on a computer, cell phone, smart card, ATM card, flash drive or similar device.

B. Authentication

17. When a person presents an credential (such as by presenting a driver’s licence at an airport or entering a user ID on a corporate network), claims to be the person identified by the credential, and seeks to exercise a right or privilege granted to such individual (e.g., to board a plane, to access the corporate network or a sensitive database), an authentication process is used by a “relying party” to determine whether that person is, in fact, who they claim to be. In other words, once someone makes a declaration of who they are (by claiming to be the person identified in the

³⁵ In some case, where only selected attributes are required for the identification process, an entity known as an attribute provider fills this role.

³⁶ OECD Guidance for Electronic Authentication (2007), at page. 12, available at: <http://www.oecd.org/dataoecd/32/45/38921342.pdf>.

identity credential), authentication is designed to answer the question “OK, how can you prove it?” It is a transaction-specific event that involves associating a person with an identity credential to verify that the person trying to engage in the transaction really is the person that was previously identified by the credential.

18. Authentication typically requires something to tie the person to the credential, generally referred to as an authenticator. If the credential is a driver’s licence or passport, the authenticator is the picture and the association is typically done by comparing the picture on the licence or passport to the person presenting it. With electronic credentials, the authenticator is typically something the individual “knows” (e.g. a secret password, or personal identification number), something the individual “possesses” (e.g., a private cryptographic key, a physical device such as a smart card, USB, or other type of token), or something the individual “is,” such as a physical characteristic (e.g., a picture, fingerprint, or other biometric data).

C. Authorization

19. Once a person is successfully authenticated, the relying party may use its own authorization process to determine what rights and privileges are accorded to such person (e.g., whether such person should be granted access to a website, a database, a bar, or an airport boarding area). This process addresses the question “What can you do?” Thus, authentication of identity is not just an end in itself. It is often used to facilitate the relying party’s authorization decisions such as to grant rights or privileges (e.g., to access online system resources), or to enter into a transaction. For example, once the identity of someone seeking access to a computer network has been authenticated, the system owner (i.e., the relying party) may use an authorization process to determine what access rights should be granted to such person. Likewise, once the identity of someone seeking to enter into an electronic transaction (e.g., an electronic contract) has been authenticated, a relying party may use an authorization process to determine whether to proceed with a transaction with the subject or otherwise rely on the communication.

D. Federated identity

20. For online transactions, identification and credential issuance has traditionally been done by the same party that intended to also rely on the credential. For example, a business would identify an employee, and issue him a username and password so he could access the company’s network. In that case, the company acts as both the identity provider (since it identified the person as its employee and issued an identity credential) and the relying party (since it also accepts and relies on those identity credentials to grant access to its network).

21. In a “federated” identity system, the functions of the identity provider and relying party not necessarily performed by the same entity. Instead, multiple unrelated relying parties can rely on identity credentials provided by any one of several independent identity providers. Under such a model, a single identity credential can be relied on by numerous organizations that had no direct involvement with the original issuance of the credential.

22. A familiar offline example of a federated identity management process is the way driver's licences are currently issued and used. Issued by a government agency, they are used by various unrelated relying parties to verify attributes about the identity of the subject of the licence. For example, they are used by a security agent to verify the name of a person seeking to enter an airport boarding area, or by a bartender to verify the age of a person ordering a drink.

23. An online example of a federated identity system is the ATM system. In a typical ATM transaction, an individual with an account at Bank A can use the identity credential issued by his bank (the ATM card) to obtain cash from an ATM machine operated by Bank B (with whom he has no relationship). To accommodate the transaction, notwithstanding the absence of such relationship, Bank B contacts Bank A through the ATM network to determine whether the individual is a valid customer of Bank A, to have Bank A authenticate the identity of the individual (i.e., did that person enter the correct password), and to obtain certain identity information about the individual from Bank A (e.g., whether that person's account has funds sufficient to cover the requested withdrawal, as well as the balance in that person's account so Bank B can print it on the transaction receipt).

IV. Identity system risks

24. There are several potential risks to participating in an identity system and relying on identity data. Those risks include:

(a) Identification risk: The reliability of the identity information collected and asserted about the subjects is critical to the use of any identity system. Identification risk is the risk that identity attribute data collected and associated with a specific subject is inaccurate. This risk is often a function of the quality of off-line identity credentials provided by the subject for identity verification;

(b) Authentication risk: Identification is of no value unless a relying party has the ability to authenticate it (i.e., associate the claimed identity attributes to the correct subject). Authentication risk includes both the risk that a legitimate subject cannot be properly authenticated, as well as the risk that an authentication process will incorrectly indicate that an imposter is a legitimate subject;

(c) Privacy risk: In the case of individuals, identity management involves the collection and verification of personal information about a subject by an identity provider and the sharing of that information with multiple relying parties. In addition, identity-based transactions may also facilitate tracking an individual's activities, thereby generating additional personal information. Privacy risk focuses on the unauthorized use or misuse of personal information about the subject by one of the parties who has access to it, as well as on their compliance obligations with respect to the processing and protection of such data;

(d) Data security risk: Protecting personal information about human subjects, as well as maintaining the security of the processes necessary to create secure identity credentials, communicate accurate identity information, verify the status of identity credentials, and authenticate subjects, is critical to any identity system. Security risk includes the risk that an unauthorized party can obtain access

to personal data, as well as the risk of compromise of any of the processes critical to the overall functioning of the identity system or any individual identity transactions;

(e) **Liability risk:** In any identity system, failures will inevitably occur, and damages will result. Participants in an identity system must address the risk that they will be held liable for damages suffered by someone else resulting from a problem they caused or for which they are deemed legally responsible. A key aspect of the liability risk is the legal uncertainty regarding the responsibility that attaches to any given act or failure to act by a participant in an identity system, particularly one that operates across multiple industry sectors and jurisdictions;

(f) **Enforceability risk:** Enforceability risk is complementary to liability risk. It is the risk that one participant will not be able to enforce (i) its right to compliance with the rules by another participant, or (ii) its right to collect damages in event it is actually harmed in a case where another participant is legally “liable.” This risk applies when something goes wrong and someone seeks to recover damages. It also applies in situations where a problem has not yet surfaced, but a failure of performance on the part of one or more participants can put the entire identity system at risk. This is particularly important in a cross-jurisdictional system. In such case, enforceability risk refers both to the ability to detect that problem, as well as the ability to require the participant to remedy its performance or withdraw from the system;

(g) **Regulatory compliance risk:** In many cases, participation in an identity system raises legal compliance issues for one or more of the participants (i.e., whether the conduct of the participant complies with applicable local law). In other cases, participation in the identity system is, in and of itself, pursued in an effort to comply with legal requirements imposed on a participant. For example, a financial institution may participate, and rely on identity credentials, in order to satisfy its legal obligations to properly authenticate individuals granted online access to bank accounts and payment facilities. In such cases, compliance risk focuses on whether such participation satisfies its legal obligations.

25. As with any system, the foregoing risks are a function of the technology used, the various processes implemented, and the manner or failure of performance of obligations by the participants themselves (and possible influence by outsiders). Building a reliable identity system will require measures to address these risks, that is, measures designed to ensure that participants can trust the technology used (i.e., that it works properly), the processes deployed (i.e., that they yield the correct result), and other participants (i.e., that they will properly perform their obligations).

V. Addressing functionality and risk: operating rules

26. Making a federated identity system work in an online environment, and addressing the risks such as those noted above, requires not only the implementation of appropriate technology, but also adherence by all participants (e.g., subjects, identity providers, and relying parties) to a common set of technical standards, operational requirements, and legal rules. Commercial identity systems typically seek to achieve that goal by developing appropriate “operating rules” (sometimes referred to as a trust framework) to which participants are contractually bound.

27. Identity system operating rules consist of two general categories of components: (i) the business and technical operational rules and specifications necessary to make the system functional and trustworthy, and (ii) the contract-based legal rules that, in addition to applicable laws and regulations, define the rights and legal obligations of the parties specific to the identity system and facilitate enforcement where necessary.

(a) The business and technical operational rules define the requirements for the proper operation of the identity system, define the roles and operational responsibilities of the participants, and provide adequate assurance regarding the accuracy, integrity, privacy and security of its processes and data (i.e., so that the various parties are willing to participate; so it is trustworthy). In many cases, such rules are built on existing standards;

(b) The contract-based legal rules consist of the contract-based agreements between or among the participants that define and govern the legal rights, responsibilities, and liabilities of the participants with respect to the specific identity system, clarify the legal risks parties assume by participating in the identity system (e.g., warranties, liability for losses, risks to their personal data); and provide remedies in the event of disputes among the parties, including methods of dispute resolution, enforcement mechanisms, termination rights, and measures of damages, penalties and other forms of liability. They also make the business and technical operational rules legally binding on and enforceable against the participants.

28. Both the business and technical operational rules and the contract-based legal rules are, of course, subject to, and typically constructed with reference to, other existing duties and obligations arising under the statutory and regulatory law that apply to the parties. Both components of the identity system operating rules (i.e., both the business and technical operational rules and the legal rules) are subject to the existing statutes and regulations that apply in the jurisdiction(s) where the identity system will operate or be used.

29. Identity system operating rules are much like the operating rules used for credit card systems or electronic payment systems, which must be able to accommodate numerous participants, in a variety of jurisdictions, in accordance with a common rule set. The credit card operating rules, for example, regulate issuers, processors, relying party merchants, and individual cardholders, and provide the specifications and rules applicable to the participants in online credit transactions and subsequent processing.³⁷ Likewise, electronic funds transfer system operating rules regulate the responsibilities of all of the banks in the payment process, as well as, to a limited extent, the consumers or other payers involved, and provide the specifications and rules applicable to the participants

³⁷ The credit card operating rules includes the credit card issuer specifications and rules (e.g., the Visa International Operating Regulations at http://usa.visa.com/merchants/operations/op_regulations.html and the Payment Card Industry Data Security Standards — PCIDSS at https://www.pcisecuritystandards.org/security_standards/index.php) that are made binding on the processing banks and the merchants, as well as the contracts between the credit card issuers and the processing banks, the contracts between the processing banks and the merchants, and the contracts between the processing banks and the cardholders. And it is supplemented by laws and regulations that govern credit card processing in each relevant jurisdiction.

whenever electronic funds transfers (e.g., SWIFT transfers) are used to facilitate payment in an online transaction.³⁸

30. Although the need for identity system operating rules containing appropriate legal rules is generally acknowledged, developing them is largely uncharted territory. Numerous legal issues and legal barriers must be identified and addressed.

VI. Law governing identity systems

31. In most jurisdictions, there are numerous existing laws and regulations that will have a significant regulatory impact (and which may impose barriers, compliance requirements, and/or liability risk) on participation in an identity system. In addition, differences among the laws of different jurisdictions, when considered in light of the global nature of the internet, create a patchwork regulatory landscape that can itself challenge legal structuring. Some of these laws and regulations focus specifically on identity-related activities. Most, however, were developed in a context completely unrelated to identity management (e.g., tort law, contract law, and warranty law), but may nonetheless have a significant impact, and often in ways that were unanticipated at the time of their original adoption.

32. Some of the categories of law applicable to identity systems (or participants in them), include the following:

(a) Law governing the accuracy of identity information: Identity system activities focus on the collection and verification by identity providers or attribute providers of information about subjects, and communication of some of that information to relying parties. This often occurs in situations where the accuracy and/or reliability of that information are important. Thus, laws regarding providing false or incorrect information, whether intentionally or negligently, will be relevant in the evaluation of the rights, obligations, and liabilities of the participants in identity systems. Key among those are the tort law governing negligent misrepresentation, negligent endorsement, and defamation, as well as warranty laws, identity theft laws, and laws governing unfair and deceptive business practices;

(b) Law governing the privacy of identity information: By its nature, identity management typically involves the collection (by an identity provider or its agents) and disclosure (to a relying party) of personal information about a subject.³⁹ Thus, data protection laws, privacy laws, and other laws and regulations governing the collection, use, processing, transfer and storage of the personal data will have a major impact on identity management activities. While many of such laws were written at a time prior to the advent of digital identity systems, and could not

³⁸ The electronic funds transfer operating rules includes the specifications and rules for EFT transactions (e.g., the Operating Rules and Guidelines of U.S.-based NACHA — The Electronic Payments Association, <http://www.nacha.org/>) that are made binding on the processing banks and the merchants, as well as the contracts between the merchants and the individual payers. And it is supplemented by laws and regulations that govern electronic funds transfers, such as (in the U.S.) the Electronic Funds Transfer Act and Regulation E.

³⁹ Except where the subject is not a human being — e.g., where the subject is a corporation, device, software application, etc.

therefore have anticipated the particular processes or potential harms involved in such systems, they can nonetheless have a direct impact on such activities;

(c) Law governing the collection of identity information: In addition to privacy and data protection laws, laws governing the re-use of public sector information affect businesses creating information products and services based on bulk data from the public sector. They may create legal barriers to the large-scale use of data maintained by public sector bodies in the context of identity services;⁴⁰

(d) Law governing the security of identity information and processes: Many laws impose obligations on companies with respect to the security of personal information (as variously defined in different jurisdictions, and under the particular laws of a given sector) and other data in their possession. In addition to laws and regulations imposing an obligation to implement security measures to protect data, many jurisdictions have also enacted laws and regulations that impose an obligation to disclose security breaches involving personal information to the persons affected;

(e) Laws focused on a duty to identify: Many laws and regulations require identity as a component element, particularly in an electronic environment. For example, the Electronic Communication Convention expressly requires identity as a component of a legally binding electronic signature. Specifically, where a law requires that a communication or a contract should be signed by a party, the Electronic Communication Convention provides that the signature requirement is satisfied if a method is used to identify the party and to indicate that party's intention in respect of the information contained in the electronic communication;⁴¹

(f) Laws focused on a duty to authenticate: Several laws regulate one or more elements of authentication. Some impose on businesses a duty to authenticate the persons with whom they deal remotely, and others regulate aspects of the authentication process. One prominent example is the requirements of the U.S. banking regulators for authentication in online banking activities. Specifically, financial institutions offering Internet-based products and services to their customers are required to "use effective methods to authenticate the identity of customers using those products and services."⁴² Other countries, such as Singapore, have also adopted similar requirements;⁴³

(g) Laws specifically regulating identity system activities: Some jurisdictions have statutes that expressly regulate some aspects of identity management activities. One example is the EU Electronic Signatures Directive,⁴⁴ which mandates that member states regulate the collection of personal data about subjects by certain identity providers (called certification service providers), and

⁴⁰ See generally, Global Networking of Individuals (GINI), Legal provisions for Deploying INDI Services (October 5, 2011) at Section 5, available at www.gini-sa.eu/images/stories/2011.11.06_GINI_D3.1_Legal%20Provisions%20for%20Deploying%20INDI%20Services_FINAL.pdf.

⁴¹ Electronic Communication Convention Article 9(3).

⁴² Federal Financial Institutions Examination Council ("FFIEC"), "Authentication in an Internet Banking Environment," October 12, 2005, at p. 1; available at www.ffiec.gov/pdf/authentication_guidance.pdf.

⁴³ Monetary Authority of Singapore, Circular No. SRD TR 02/2005, 25 November 2005.

⁴⁴ Directive 1999/93/EC of 13 December 1999 on a Community Framework for Electronic Signatures ("EU Electronic Signatures Directive"), Articles 6-8 and Annexes I and II, available at http://europa.eu/eur-lex/pri/en/oj/dat/2000/L_013/L_01320000119en00120020.pdf.

regulates the issuance of credentials.⁴⁵ Similarly, the UNCITRAL Model Law on Electronic Signatures (articles 8-12) sets forth rules for the issuance and use of the identity credentials required for the creation of certain electronic signatures.

H. Challenges and legal barriers

33. Existing laws and regulations of the types noted above, as well as others, pose several basic problems for the development and operation of private sector identity systems. These challenges include the following:

(a) Law not written to address identity management: Many novel issues raised by identity management processes are simply not addressed by existing law. Most existing laws that apply in these contexts were not written from the perspective of digital identity systems, and thus often inadequately or inappropriately address or regulate identity activities. For example, existing law is typically silent with regard to the duty of care an identity proofer must meet when evaluating the authenticity of identity proofing documents, or the scope of any disclosure duty owed by an identity provider to a data subject;

(b) Legal uncertainty/ambiguity: There are some identity management issues that existing laws and regulations may address, but the applicability of those laws is often unclear or ambiguous, leaving identity system participants with a great deal of legal uncertainty that can retard growth, innovation and investment. Thus, even where existing law applies to identity management, the manner in which it will apply to a specific issue or proposed approach in an identity system may not be clear. This is particularly true with respect to laws focused on a specific technology. This may limit the ability of parties entering into identity transactions to assess and manage the risks they assume by so doing;

(c) Privacy issues: By its nature, identity management typically involves the collection by an identity provider and disclosure to a relying party of some personal information about a subject. To participate in an identity system, subjects must disclose personal information, and thus expose themselves to the risk of the unauthorized or inappropriate use of such information. In addition, as subjects interact with multiple relying parties, the required communication or verification of their information by the identity provider allows it to track each subject's activities, giving rise to concerns about the collection and use of such transaction information. Thus, privacy is a key issue for any identity system. This may involve addressing questions such as: (i) What information may be collected by the identity provider?; (ii) How much information may be disclosed to relying parties?; (iii) What control does the subject have regarding disclosure?; (iv) How securely must the data be handled by the parties?; and (v) What limits are imposed on use of the information by the identity provider and relying parties? These questions are often addressed by existing laws, which may also be supplemented by contract-based operating rules;

(d) Liability issues: A legal concern of primary importance to the participants in any identity system is determining who will bear liability associated with any of the risks (see para. 24 above). Numerous statutory, common law, and contract theories have been advanced to identify, define, and clarify the source and

⁴⁵ EU Electronic Signatures Directive, Article 8.

scope of such potential liabilities.⁴⁶ Yet, these legal risks are often ill-defined and uncertain. The concerns around liability represent a key barrier to private sector adoption of interoperable identity solutions. Addressing liability issues by operating rules or other forms of contractual agreement among the participants is often the best approach, particularly because this permits the contract “customization” needed to address the appropriate risk allocation that will vary from case-to-case;

(e) Jurisdictional variations and conflicts: There are some key issues on which the application of existing laws and regulations to identity activities varies considerably across jurisdictions. This is often the case with respect to laws governing participant liability and data protection laws governing the privacy of personal information. Moreover, in some cases, regulation or licensing of identity system activities may pose additional barriers to the cross-border operation of identity systems. Thus, when identity systems operate across jurisdictional borders, the challenges of developing appropriate operating rules are compounded by the fact that existing laws and regulations vary (often significantly) between jurisdictions;

(f) Need for legal interoperability: Identity systems are challenged by the fact that applicable laws may differ from jurisdiction to jurisdiction. In the absence of uniform laws governing their activities, identity systems often seek to address this problem by developing operating rules that provide legal interoperability to the overall system. The variation of laws and regulations among jurisdictions will challenge construction of such operating rules and other contracts that are needed to render system participant performance more uniform across online systems;

(g) Restrictions on ability to modify law by contract: Some existing laws and regulations can be modified by contract. For example, many statutes incorporate doctrines of contract or commercial law that merely establish “default rules” which apply in the absence of express choice by the parties, but permit modification of those rules by agreement of the parties to a transaction. In such cases, parties to an identity system are free to modify default rules and fill-in the blanks by the use of appropriate contract-based operating rules. In other cases, however, mandatory rules of law cannot be disregarded by mere agreement of the parties, because they serve public policy purposes such as the protection of consumers or third parties.

34. As a consequence, existing laws may create barriers to the adoption of efficient, interoperable, and trustworthy identity systems that can operate cross-border. Developing contract-based operating rules for an identity system is the primary method of addressing these legal challenges and reducing uncertainty for participants. It also facilitates experimentation with different systems and different approaches as the marketplace works to solve to the issue of identity management.

35. All participants in a federated identity system have an interest in fairly allocating, in advance, the risk of liability that flows from participation in the process, as well as mitigating those risks to the extent possible. Without addressing how that liability should be allocated, or who is in the best position to bear the risks, the existing legal uncertainties are a major barrier to the implementation of a trustworthy identity system. As identity management processes are used for more

⁴⁶ See *Certification Authority Liability Analysis* (study for the American Bankers Association, discussing potential liability risks of an Identity Provider operating as a certification authority); available at <http://64.78.35.30/article/ca-liability-analysis.pdf>.

significant transactions, and the risks to the parties increase accordingly, the benefits to all parties of implementing appropriate operating rules to address those risks up front, as well as to mitigate those risks (to the extent possible) by requiring performance of specific obligations by each participant role, is significant.

36. Building private sector, cross-border, and interoperable identity systems for business transactions is the challenge that lies ahead. As with the credit card and electronic payment systems, the operating rules for identity systems are likely to be contract-based, particularly to the extent that they are intended to be deployed at internet scale across jurisdictional borders. Legislation designed to remove barriers to (rather than regulate) such systems may be appropriate for consideration.

* * *

DEFINITIONS

[NOTE: These definitions are general in nature and are provided solely to assist in understanding the foregoing text]

Attribute: A named quality or characteristic inherent in or ascribed to a subject, such as name, address, age, gender, title, salary, net worth, driver's licence number, Social Security number, etc. (for a human being), make and model, serial number, location, capacity, etc. (for a device), etc. Synonyms: identity attribute

Attribute provider: An entity that acts as an authoritative source of one or more attributes of a subject's identity and is responsible for the processes associated with collecting and maintaining such attributes. An attribute provider asserts trusted, validated attribute claims in response to attribute requests from identity providers and relying parties. Examples of attribute providers include a government title registry, a national credit bureau, or a commercial marketing database.

Authentication: The process of verifying the claimed identity of a subject by confirming its association with a credential. For example, entering a password that is associated with a username is assumed to verify that the user is the person to whom the username was issued. Likewise, comparing a person presenting a passport to the picture appearing on the passport verifies or confirms that he/she is the person described in the passport.

Authenticator: Something that is used to verify the relationship between a subject and a credential; usually an object, an item of knowledge, or some characteristic of its possessor that is used to tie a person to an identity credential. For example, a password functions as an authenticator for a user ID, a picture functions as an authenticator for a passport or driver's licence.

Authorization: A process of granting rights and privileges to authenticated subjects based on criteria determined by the relying party; designed to control access to information or resources so that only those specifically permitted to use such resources are granted access to them.

Credential: Data presented as evidence of a claimed identity of a subject. Examples of paper credentials include passports, birth certificates, driver's licences, and employee identity cards. Examples of digital credentials include usernames, smart cards, and digital certificates.

Federated identity system: An identity system in which a subject can use an identity credential issued by any one of several identity providers to authenticate to multiple unrelated relying parties across different systems.

Identification: The process of collecting, verifying, and validating sufficient attribute information about a specific subject to define and confirm its identity within a specific context. (Synonyms: enrolment; identity proofing)

Identity: Information about a specific subject in the form of one or more attributes that allow the subject to be sufficiently distinguished within a particular context. The set of the attributes of a person which allows the person to be distinguished from other persons within a particular context.

Identity management: The processes, functions, and capabilities for collecting, verifying, binding, and communicating identity information about a subject to a relying party, so that the relying party can verify that such identity information corresponds to a specific subject.

Identity provider: An entity responsible for the identification of persons, legal entities, devices, and/or digital objects, the issuance of corresponding identity credentials, and the maintenance and management of such identity information for subjects. (Synonyms: credential service provider (CSP); certification authority (CA); attribute provider (where limited attribute data is provided))

Identity system: An online environment for identity management governed by a set of operating rules where individuals, organizations, services, and devices can trust each other because authoritative sources establish and authenticate their identities.

Operating rules: The business processes, technical specifications, and contractually-defined legal rules that govern the operation of a specific identity system. They are typically privately developed (e.g., by the operator of the identity system), and made binding and enforceable on the participants via contract. (Synonyms: trust framework; system rules; common operating rules; operating regulations)

Relying party: The person or legal entity that is relying on an identity credential or assertion of identity to make a decision as to what action to take in a given application context, such as to process a transaction or grant access to information or a system. (Synonym: service provider)

Subject: The person, legal entity, device, or digital object that is identified in a particular credential and that can be authenticated and vouched for by an identity provider. (Synonyms: data subject; user)

E. Report of the Working Group on Electronic Commerce on the work of its forty-seventh session (New York, 13-17 May 2013)

(A/CN.9/768)

[Original: English]

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I. Introduction

1. At its forty-second session, in 2009, the Commission requested the Secretariat to prepare a study on electronic transferable records in the light of proposals received at that session (A/CN.9/681 and Add.1, and A/CN.9/682).¹

2. At its forty-third session, in 2010, the Commission had before it additional information on the use of electronic communications for the transfer of rights in goods, with particular regard to the use of registries for the creation and transfer of rights (A/CN.9/692, paras. 12-47). At that session, the Commission requested the Secretariat to convene a colloquium on relevant topics, namely, electronic transferable records, identity management, electronic commerce conducted with mobile devices and electronic single window facilities.²

3. At its forty-fourth session, in 2011, the Commission had before it a note by the Secretariat (A/CN.9/728 and Add.1) summarizing the discussions at the colloquium on electronic commerce (New York, 14-16 February 2011).³ After discussion, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.⁴ It was recalled that such work would be beneficial

¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 343.

² *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 250.

³ Information about the colloquium is available at the date of this document from www.uncitral.org/uncitral/en/commission/colloquia/electronic-commerce-2010.html.

⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 238.

not only for the generic promotion of electronic communications in international trade, but also to address some specific issues such as assisting in the implementation of the Rotterdam Rules.⁵ In addition, the Commission agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities.⁶

4. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on various legal issues relating to the use of electronic transferable records, including possible methodology for future work by the Working Group (A/CN.9/737, paras. 14-88). It also considered the work of other international organizations on that subject (A/CN.9/737, paras. 89-91).

5. At its forty-fifth session, in 2012, the Commission expressed its appreciation to the Working Group for the progress made and commended the Secretariat for its work.⁷ There was general support for the Working Group to continue its work on electronic transferable records and the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.⁸ In that context, the desirability of identifying and focusing on specific types of or specific issues related to electronic transferable records was mentioned.⁹ After discussion, the Commission reaffirmed the mandate of the Working Group relating to electronic transferable records and requested the Secretariat to continue reporting on relevant developments relating to electronic commerce.¹⁰

6. At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued its examination of the legal issues relating to the use of electronic transferable records. The Working Group confirmed the desirability of continuing work on electronic transferable records and the potential usefulness of guidance in that field and it was widely felt that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, paras. 17-18). Thereafter, the Working Group considered various legal issues that arise during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89). As to future work, broad support was expressed for the preparation of draft provisions on electronic transferable records to be presented in the form of a model law, without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 90-93).

II. Organization of the session

7. The Working Group, composed of all States members of the Commission, held its forty-seventh session in New York from 13 to 17 May 2013. The session was attended by representatives of the following States members of the Working Group: Algeria, Armenia, Austria, Brazil, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, Greece, India, Iran (Islamic Republic of),

⁵ Ibid., para. 235.

⁶ Ibid.

⁷ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 82.

⁸ Ibid., para. 83.

⁹ Ibid.

¹⁰ Ibid., para. 90.

Italy, Japan, Malta, Mexico, Pakistan, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

8. The session was also attended by observers from the following States: Andorra, Belgium, Democratic Republic of the Congo, Hungary, Indonesia, Kuwait, Oman and Sweden.

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

(a) Intergovernmental organizations: World Customs Organization (WCO);

(b) International non-governmental organizations: American Bar Association (ABA), Comité Maritime International (CMI), European Law Student Association (ELSA), Fédération Internationale des Associations de Transitaires et Assimilés (FIATA), Moot Alumni Association (MAA), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

10. The Working Group elected the following officers:

Chairman: Sr. Agustín MADRID PARRA (Spain)

Rapporteur: Mr. Atsushi KOIDE (Japan)

11. The Working Group had before it the following documents: (a) Annotated provisional agenda (A/CN.9/WG.IV/WP.121); and (b) A note by the Secretariat on draft provisions on electronic transferable records (A/CN.9/WG.IV/WP.122).

12. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. Consideration of draft provisions on electronic transferable records.
5. Technical assistance and coordination.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

13. The Working Group engaged in discussions on the draft provisions on electronic transferable records on the basis of document A/CN.9/WG.IV/WP.122. The deliberations and decisions of the Working Group on these topics are reflected in chapter IV below. The Secretariat was requested to revise the draft provisions to reflect those deliberations and decisions.

IV. Draft provisions on electronic transferable records

A. General remarks

14. The Working Group engaged in a general discussion about its work and reaffirmed that its work should be guided by the principles of functional equivalence and technology neutrality, and should not deal with matters governed by the underlying substantive law. It was noted that its work should generally be in line with existing UNCITRAL texts, take into account the coexistence of electronic and paper-based business practices, and facilitate conversion between those media.

15. It was indicated that rules enabling the use of electronic transferable records would interact with general provisions on the use of electronic transactions, and that further harmonization of those general provisions, in particular through broader adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”), was highly desirable.

16. It was suggested that future deliberations of the Working Group would benefit from a study providing a comparative analysis of substantive laws of various jurisdictions on areas relevant to its work and covering different types of transferable documents or instruments. However, it was indicated that such a study would require significant resources and that in-depth consideration of substantive law issues might be more appropriate at a later stage, if at all.

B. Draft provisions on electronic transferable records

Draft article 1. Scope of application

17. The Working Group then engaged in a discussion on whether instruments that existed only in the electronic environment should be included in the scope of the draft provisions.

18. One view was that they should be excluded as the mandate of the Working Group was limited to transposing what existed in the paper-based environment into an electronic environment and to providing rules that would achieve functional equivalence. It was further noted that a discussion on those instruments would entail matters of substantive law.

19. Another view was that those instruments should be included based on a functional approach. In other words, as long as those instruments performed the same or similar functions as a paper-based transferable document or instrument, they should be included in the scope of the draft provisions. It was noted that such an approach would provide more flexibility in addressing business practices which did not exist in the paper-based environment.

20. The question was raised with respect to the compatibility between the use of electronic transferable records, on the one hand, and the provisions contained in the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931). It was indicated that the paper-based provisions of those Conventions were not compatible with the use of electronic transferable records and

therefore bills of exchange, promissory notes and checks should be excluded from the scope of the draft provisions.

21. In response, it was noted that adequate legislative techniques had been developed to address the matter of functional equivalence between written and electronic form. The example of the interaction between the Electronic Communications Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) was mentioned. It was therefore suggested that bills of exchange, promissory notes and cheques should be included in the scope of the draft provisions. It was further noted that establishing functional equivalence to overcome obstacles to the use of electronic means arising from existing provisions requiring the use of paper-based documents, had been a constant goal of the Working Group.

22. With respect to paragraph 2, it was indicated that, at least in some jurisdictions, the application of law devised for paper-based transactions to electronic ones was extensive, and that therefore attention should be paid to avoid excessive pre-emption of that application.

Draft article 2. Exclusions

23. The Working Group agreed that “electronic equivalents of securities” in paragraph 2, subparagraph (a), should be clarified to refer to “electronic equivalents of securities such as shares, bonds and other financial instruments including financial derivatives”.

24. It was said that the phrase “electronic payment methods” in paragraph 2, subparagraph (b), needed further clarification. It was added that particular caution should be taken to ensure that the practice of using electronic transferable records as means of payment would not be excluded from the scope of application. In response, it was explained that that phrase intended to refer to the exclusion contained in article 2, paragraph 1, subparagraph (b), of the Electronic Communications Convention, which was justified by the fact that those areas of the law had already found comprehensive detailed contractual regulation.

Draft article 3. Definitions

25. It was noted that the scope of application contained in draft article 1 depended largely on the definition of electronic transferable records. Thus, the Working Group engaged in a preliminary discussion about the definition of the terms “paper-based transferable document or instrument” and “electronic transferable record” as provided in draft article 3.

26. As to the definition of “paper-based transferable document or instrument”, it was agreed that the general description of transferable documents and instruments contained in article 2, paragraph 2, of the Electronic Communications Convention should be the starting point for discussion and as such, the Working Group approved the definition as provided in draft article 3.

27. As to the definition of “electronic transferable record”, the Working Group agreed that the phrase in square brackets should be deleted.

28. Reflecting the discussion on the scope of the draft provisions (see paras. 17-19 above), differing views were expressed as to the definition of “electronic

transferable record”. In particular, proposals were made based on a functional approach, thus encompassing instruments that did not necessarily exist in the paper-based environment but would achieve similar functions, such as to evidence a right to claim performance of obligation and to allow for the transfer of rights with the transfer of the electronic record.

29. In response, a concern was expressed that such an approach could only make reference to a limited number of the functions performed by an electronic transferable record. Furthermore, it was suggested that the definition of an electronic transferable record as evidencing a right to claim performance of obligation touched upon substantive law.

30. Thereafter, it was suggested that the definition of “electronic transferable record” as provided in draft article 3 could be broadened to encompass instruments that did not exist in the paper-based environment by referring to an electronic record that performed the same functions as a paper-based transferable document or instrument. While there was support for this approach, it was noted that such a definition would not clearly identify the functions of a paper-based transferable document or instrument. It was stressed that the definition should refrain from making reference to a paper-based document or instrument to improve clarity and to allow for technological developments.

31. After discussion, it was agreed that the definition of “electronic transferable record” should be broadened by focusing on the key function of transferability and without reference to a paper-based document or instrument. Thus, the Working Group adopted the working assumption that “electronic transferable record” in the draft provisions would mean “a record used in an electronic environment that is capable of transferring the right to performance of an obligation incorporated in the record through the transfer of that record”. In that context, it was noted that draft article 3 provided a definition of “transfer” of an electronic transferable record that meant the transfer of control over an electronic transferable record.

32. It was further agreed that the above-mentioned decision by the Working Group did not in any way imply that the Working Group would prepare substantive provisions for instruments that did not exist in the paper-based environment.

33. As to the definition of “issuer”, it was noted that the term should be limited to refer only to the person issuing the electronic transferable record and not to any other entity that may be technically issuing the electronic transferable record on that person’s behalf, such as a third-party service provider. Therefore, it was suggested that the words in square brackets should be deleted from the definition with further clarifications that: (a) an issuer could issue an electronic transferable record using a third-party service provider; and (b) such third-party service provider would not fall under the definition of an issuer.

34. It was suggested that examples could be included in the definitions to provide more guidance to the readers. It was further suggested that definitions should be presented in a logical order and not alphabetically to preserve consistency in different language versions.

Draft article 4. Interpretation

35. It was suggested that paragraph 1 should be revised to state that the law would be an enactment of a model law with an international origin. The following text was suggested: “This Law is derived from a model law of international origin. In the interpretation of this Law, regard is to be had to the international origin of such model law and to the need to promote uniformity in its application and the observance of good faith”.

Draft article 5. Party autonomy

36. It was indicated that, while the principle of party autonomy was a cornerstone of UNCITRAL texts, its operation in connection with electronic transferable records should reflect the limitations to the use of the same principle in paper-based transferable documents or instruments. The need to respect the principle of *numerus clausus* was stressed. It was suggested that an approach allowing only derogation from certain draft provisions as a set should be adopted, and that each draft provision should be examined to identify those that could be derogated and varied by agreement. It was stressed that in any case those derogations and variations should not affect third parties.

37. In response, it was said that the principle of party autonomy could still find application in the use of electronic transferable records, and that therefore draft article 5 should be retained in square brackets, pending verification of which provisions could actually be derogated and varied by the parties.

Draft article 6. Information requirements

38. It was clarified that draft article 6 did not prevent the issuance of an electronic transferable record to bearer, as set forth in draft article 16, paragraph 4. It was also explained that the legal consequences of violating the disclosure requirements contained in other law were not a matter dealt in the draft provisions.

Draft article 7. Legal recognition of an electronic transferable record

39. A suggestion was made that draft article 7 should be redrafted as a positive rule. It was also suggested that a reference to the requirements set forth in the draft provisions should be included. However, it was noted that the current draft article stating the principle of non-discrimination was formulated on the basis of existing UNCITRAL provisions that had received numerous enactments, and that the interpretation and application of such rule had not posed any particular issue.

Draft article 8. Writing**Draft article 9. Signature**

40. It was recalled that the draft provisions would operate in the framework of the general legislative framework for electronic transactions (see para. 15 above). It was explained that draft articles 7, 8, 9 and 12 reproduced some of those general rules, and it was suggested that such rules should form a separate section of the draft provisions, possibly together with other rules of similar nature, such as those on time and place of dispatch and receipt of electronic communications.

41. It was suggested that, when different formulations of legislative provisions dealing with the same matter were available in UNCITRAL texts, the most recent should be used in the draft provisions, so as to fully benefit from refinements. However, it was noted that several jurisdictions had enacted earlier formulations of UNCITRAL legislative provisions, such as, for instance, those on electronic signatures. In response, it was explained that the insertion of general rules in the draft provisions was meant to provide guidance to those jurisdictions that had not yet adopted general legislation on electronic transactions, but that, in those jurisdictions having already done so, rules specific to electronic transferable records would interact with pre-existing general legislation.

42. With respect to draft article 8, a suggestion was made that information should be accessible so as to be usable for subsequent reference also when contained in an electronic transferable record with no paper-based equivalent.

43. It was suggested that definitions of “electronic record” and “electronic signature”, as well as provisions on electronic signature of electronic transferable records, should be introduced in the draft provisions. In response, it was noted that caution should be taken when departing from existing definitions contained in previous UNCITRAL texts, and that some of the suggested provisions touched upon substantive law.

44. The Working Group agreed that the words “a communication” in draft articles 8 and 9 should be retained outside square brackets while other bracketed texts should be deleted. The Working Group also agreed that draft articles of general nature should be placed together in a separate section.

Draft article 10. Possession

Draft article 11. Delivery

45. The Working Group agreed that draft articles 10 and 11, which established minimum standards on possession and delivery requirements, were generally acceptable, subject to its discussion of draft articles 17 and 19, which dealt with the notions of control and transfer of control.

46. With respect to the words “and endorsement” in square brackets in draft article 11, it was noted that the functional equivalence of endorsement could be achieved through draft articles 8 and 9 on writing and signature without being linked with delivery. Therefore, it was agreed that reference to endorsements would be deleted from draft article 11.

47. While a suggestion was made that draft articles 10 and 11 would be better placed following draft article 19, it was agreed that those draft articles would remain in their place until the Working Group was in a better position to discuss the overall sequence of the draft provisions.

Draft article 12. Original

48. It was explained that article 8 of the UNCITRAL Model Law on Electronic Commerce and article 9, paragraph 4, of the Electronic Communications Convention, which formed the basis of draft article 12, had been drafted to address matters such as originality of contracts, and that the life cycle of an electronic

transferable record deserved a different approach. Accordingly, it was suggested that the reference to “final form” in paragraph 1, subparagraph (a), should be deleted.

49. It was explained that the functional equivalent of the paper-based notion of original was of limited practical use with respect to the use of electronic transferable records since all related legal needs could be satisfied by establishing the functional equivalents of the paper-based notions of authenticity, uniqueness, and integrity, which were addressed, respectively, in draft articles 9, 13 and 14. It was also noted that there were some repetitions in draft articles 12 and 14.

50. After discussion, the Working Group agreed to retain only the first part of paragraph 1 and to further consider how such requirements would be met with respect to the use of electronic transferable records once it had discussed the relevant draft articles on uniqueness, integrity and control.

Draft article 13. Uniqueness of an electronic transferable record

51. With respect to draft article 13, it was noted that uniqueness was a notion in the paper-based environment, its aim being to entitle a single holder to the performance of an obligation. In that context, it was suggested that draft article 13 should be either deleted or recast in connection with draft article 17 on control. While it was further suggested that draft article 13 could be merged with draft article 17, it was also stated that there might be merit in retaining draft article 13 as a separate article.

52. The Working Group decided to continue its consideration of draft article 13 when discussing draft article 17.

Draft article 14. Integrity of an electronic transferable record

53. The Working Group agreed that draft article 14 was generally acceptable. With respect to paragraph 2, subparagraph (a), it was agreed that the words in square brackets should be retained outside square brackets.

54. It was explained that changes of purely technical nature, for instance, changes due to data migration, would not affect the integrity of an electronic transferable record and thus should fall under the “addition of any change” referred to in paragraph 2, subparagraph (a).

55. A question was raised whether draft article 12 (see para. 50 above) could include a reference to draft article 14. In that context, it was suggested that draft articles 12 and 14 could be merged. However, it was widely felt that draft article 12, which was a provision aiming at achieving functional equivalence of the paper-based notion of “original”, should not make reference to draft article 14 that required integrity of an electronic transferable record as such. It was stressed that “integrity” was a quality not necessarily linked to “original” and one that had to be assured throughout the life cycle of an electronic transferable record.

56. After discussion, it was agreed that draft article 14 should be retained without the square brackets in paragraph 2. It was further agreed that draft articles 12 and 14 should be retained separately.

Draft article 15. Consent to use an electronic transferable record

57. It was clarified that paragraph 1 purely stated the general principle that a person would not be required to use an electronic transferable record, while paragraph 2 dealt with the requirement of parties involved in the use of electronic transferable records to consent to their use. It was further clarified that the word “parties” was used in a generic manner to encompass different types of concerned parties. It was suggested that the consent requirement should be general and not refer to individual draft articles. It was indicated that paragraph 3 dealt with instances whereby the consent of the party would be implied, for example, when the transferee of the electronic transferable record obtained control of that record.

58. After discussion, it was agreed that paragraphs 1 and 3 should be retained in their current form. It was further agreed that paragraph 2 should remain in square brackets yet without making any reference to individual articles in the draft provisions.

Draft article 16. Issuance of an electronic transferable record*Paragraph 1*

59. It was generally agreed that paragraph 1 was acceptable. It was further suggested that paragraph 1 would not be necessary if paragraph 2 of draft article 15 were to be retained in the draft provisions (see paras. 57-58 above).

60. It was noted that while the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008) (“Rotterdam Rules”) required the consent of the carrier and of the shipper for the issuance and subsequent use of an electronic transport record, it allowed issuance of an electronic transport record not only to the shipper, but also to the documentary shipper or the consignee. It was therefore asked whether, under paragraph 1 of draft article 16, the first holder whose consent was required would be the shipper, or rather the person to which the electronic transferable record was in fact issued. In response, it was explained that under paragraph 1, the first holder could be the shipper, documentary shipper or consignee, as the case would be.

61. It was further explained that in certain cases, a paper-based transferable document or instrument satisfied multiple functions, some of which did not rely on transferability of the document or instrument. For instance, a bill of lading entitled the holder to delivery of goods and also evidenced the contract for carriage of goods by sea between the shipper and the carrier. In such cases, it was suggested that different requirements would apply to achieve equivalence with the various functions of a paper-based transferable document or instrument.

Paragraph 2

62. It was suggested that certain information required for the issuance of a paper-based transferable document or instrument might not necessarily be relevant for an electronic transferable record. It was therefore suggested that the paragraph should be deleted or revised accordingly.

63. It was noted that the information required in an electronic transferable record should correspond to the information required in the paper-based transferable

document or instrument whose functions that electronic transferable record aimed at satisfying.

64. It was stressed that one aim of the paragraph was to avoid requesting more information for the issuance of an electronic transferable record than for its paper-based equivalent, which could lead to discrimination against the use of electronic means.

65. The Secretariat was requested to revise paragraph 2 in light of the above-mentioned suggestions.

Paragraph 3

66. It was indicated that, throughout its life cycle, an electronic transferable record might contain information in addition to that contained in a paper-based transferable document or instrument that performed the same functions. It was agreed that a separate draft article should be prepared in light of that consideration.

Paragraph 4

67. It was agreed that paragraph 4 should be revised to clarify that the paragraph intended to enable the issuance of an electronic transferable record to bearer in circumstances where the same would be allowed for a paper-based transferable document or instrument.

Paragraph 5

68. It was widely agreed that paragraph 5 should be deleted as the substantive law would determine the time of issuance of an electronic transferable record. However, noting that the time of issuance had significant implications in business practice, it was suggested that paragraph 5 could be retained and refined to clarify the interaction between requirements of substantive law, on the one hand, and general rules of electronic transactions law relevant for identifying the time of issuance, on the other hand.

69. After discussion, it was agreed that paragraph 5 in its current form should be deleted, yet with the possibility of introducing a similar paragraph which would not touch upon substantive law.

Paragraph 6

70. After noting that paragraph 6 was a general statement that an electronic transferable record should be subject to control from the time it was issued till when it ceased to have any effect or validity (for example, in accordance with draft article 26), the Working Group agreed to retain paragraph 6 in its current form.

Paragraph 7

71. It was indicated that, while business practices existed where multiple originals of paper-based transferable documents or instruments were issued, no case could be identified where the law required it. It was suggested that the word “permits” should replace “requires”.

72. It was explained that the law generally aimed at mitigating the negative consequences of the use of multiple originals. It was also explained that the functions achieved through multiple originals in the paper-based environment could find adequate treatment in an electronic environment with the use of different methods. Accordingly, it was suggested that paragraph 7 should be deleted.

73. However, it was also said that a provision along the lines of paragraph 7 could be particularly useful in case a paper-based transferable document or instrument issued in multiple originals would be replaced with an electronic transferable record. In that respect, it was suggested that paragraph 7 could be recast to state that all holders of a paper-based transferable document or instrument issued in multiple originals should establish control over the resulting electronic transferable record.

74. While recognizing the business practice of issuing multiple originals, it was agreed that paragraph 7 in its current form should be deleted. The Secretariat was requested to provide examples of circumstances where such practices existed and were permitted under substantive law and the functions performed by multiple originals, and possibly identify where a similar provision might be required in other articles of the draft provisions.

Draft article 17. Control

75. In line with its decision (see para. 52), the Working Group considered the draft articles 13 and 17 jointly.

76. With respect to draft article 13, the following suggestions were made: (a) the draft article should remain separate from draft article 17; (b) the phrases in square brackets in paragraph 1 should be deleted; (c) the words “in accordance with the procedure set out in draft article 17” in paragraph 2 should be replaced with the words “whereby the authoritative copy is readily identifiable as such”; (d) the draft article should be recast similar to other provisions on functional equivalence by starting with the words “where the law requires uniqueness”. With respect to the last suggestion, it was questioned whether there were instances in which the law would require uniqueness.

77. It was widely felt that the notion of control should establish the functional equivalence of possession with respect to the use of an electronic transferable record (see para. 45 above) and aim at reliably identifying the holder. In that context, the following suggestions were made with respect to draft article 17: (a) the person in control should be the person with de facto power over the electronic transferable record; (b) de facto power would include among others, the power to deal with or dispose of the electronic transferable record; (c) the person with de facto power may not necessarily be the rightful holder; (d) substantive law would determine whether the person with de facto power was a rightful holder and the rights arising from such status; (e) de facto power could be defined as “fair, lawful and independent” power; and (f) de facto power should not be understood as the technical ability of a registry operator or a third-party service provider to control data stored in an electronic transferable record.

78. It was further explained that the person in control might be able to transfer or dispose of the electronic transferable record though it might not be the rightful holder. It was illustrated that the notion of control over an electronic transferable record could mean the control over the information regarding the electronic

transferable record (logical control) or a physical object which would contain such information (physical control).

79. It was suggested that draft article 17 should not include a reference to a person to which the electronic transferable record was “issued or transferred” as the validity of the issuance or transfer of the electronic transferable record would be determined by the substantive law. In response, it was noted that such formulation as seen in paragraph 1 did not pose any practical difficulties.

80. In addition, the following suggestions were made: (a) references should not be made to “an authoritative copy”; (b) the respective definitions of the terms “holder”, “issuance”, “transfer” and “control” needed to be considered carefully as they were likely to introduce circularity; (c) reference should be made to “exclusive control” instead of “control”; and (d) a discussion of illustrative examples of how “control” might be achieved in practice could shed light on the best way to prepare draft provisions regarding control.

81. After discussion, it was suggested that draft article 17 could read as follows: “A person has control of an electronic transferable record if a method used for evidencing transfer of interests in the electronic transferable record reliably establishes that person as the person which, directly or indirectly, has the de facto power over the record, whereby the uniqueness and integrity of this record are preserved in accordance with draft articles 13 and 14.”

82. With respect to paragraph 2, it was suggested that the paragraph should be either deleted or redrafted so as to illustrate methods to reliably identify the person with de facto power over the record. In response, it was indicated that at least some guidance, in a manner fully mindful of technology neutrality, should be provided on when and how a method would meet the reliable standard, and that a drafting technique similar to that employed in the UNCITRAL Model Law on Electronic Commerce and the Electronic Communications Convention could be used to that end. In that context, the authoritative copy approach and the registry approach were mentioned as methods of achieving reliability. It was noted that the level of reliability would vary depending on the system or types of records and that it was for the parties to choose the level of reliability adequate for their transactions.

83. It was noted that the concepts of “right of control” and “controlling party” used in the Rotterdam Rules should be distinguished from the current discussion on control, as those terms related to the substantive rights of the holder of an electronic transport record (see A/CN.9/WG.IV/WP.122, para. 30).

84. As a drafting point, it was suggested that draft article 17 should be recast similarly to other provisions achieving functional equivalence or merged with draft article 10 to begin with the words “where the law requires the possession,” without making any reference to the possession of the paper-based transferable document or instrument. In response, it was noted that even in such case, a link would need to be provided between the “law” and the electronic transferable record, as it would not be a general requirement under law, but rather under the law governing the paper-based transferable document or instrument, the functions of which the electronic transferable record aimed to achieve.

85. After discussion, it was agreed that: (a) the functional equivalence of possession would be met through control; (b) draft article 17 should not touch upon

substantive rights conferred to the person with control over an electronic transferable record; (c) the notion of uniqueness and control deserved separate draft articles while reference might be made to each other; (d) the method used for establishing control should be one that identified the de facto holder of an electronic transferable record, while the issue of whether the holder was a rightful holder would be left to substantive law; and (e) consideration should be given to combining draft articles 10 and 17.

Draft article 18. Holder

86. It was noted that paragraph 1 merely repeated the definition of “holder” contained in draft article 3, and it was suggested that that definition would suffice. It was also noted that further work to complete the provision contained in paragraph 2 could lead to interference with substantive law. It was therefore agreed that article 18 should be deleted.

Draft article 19. Transfer of control of an electronic transferable record

87. It was suggested that paragraph 1 should be revised to take into account additional transfer requirements that might exist in substantive law, namely endorsement or agreement. In response, it was indicated that paragraph 1 aimed only at conveying that transferring control of the record was necessary in order to transfer the electronic transferable record. It was suggested that a positive formulation of the draft paragraph should be adopted for the sake of clarity. It was added that substantive law would indicate additional requirements that might need to be satisfied for the transfer of an electronic transferable record.

88. It was clarified that paragraph 2 aimed at making it possible to convert the manner of transmission of an electronic transferable record from “to bearer” to “to a named person” and vice versa.

89. It was noted that the effectiveness of the transfer of an electronic transferable record was a matter governed by substantive law. Accordingly, it was suggested that paragraph 3 should be deleted. In that context, it was also suggested that the draft provisions should not deal with requirements for an effective transfer and consequences of the lack thereof.

90. It was said that paragraph 4 was redundant since draft article 15, paragraph 3, already contained a general rule on the inferral of consent.

91. It was indicated that paragraph 5 might frustrate the function of circulating an electronic transferable record to bearer by introducing a requirement to insert a statement that did not exist in substantive law. It was added that requiring the insertion of that statement could violate technology neutrality if it presupposed the use of a registry model. In response, it was said that consideration should be given on how to record the chain of endorsements in electronic transferable records issued to a named person so as to enable the action of recourse. It was suggested that where the law required an endorsement, this could be achieved in the electronic environment through electronic equivalents of writing and signature in accordance with draft articles 8 and 9 and a separate draft article could be included to indicate this.

92. It was agreed that paragraph 1 should be redrafted taking into account the above considerations and that paragraph 3 should be deleted. It was also agreed that paragraphs 2, 4 and 5 should be revised with a view to accommodating the functional equivalence of both delivery and endorsement in an electronic environment.

Draft article 20. Amendment of an electronic transferable record

93. It was suggested that functional equivalence with respect to amendment of an electronic transferable record could be achieved by introducing a rule indicating that, where the law permitted the amendment of an electronic transferable record, that requirement was met if the amended information was reflected in the electronic transferable record, and if the amended information was readily identifiable as such.

94. It was indicated that two elements had to be present for an amendment to be legitimate, i.e. substantive law authorized the amendment, and the amendment was authorized by the holder of the electronic transferable record.

95. It was noted that paragraph 2 contained a duty of notification to third parties that was a matter of substantive law. It was added that the draft provisions should enable notifications in all cases where such notifications were required by substantive law.

96. Different views were presented on what could constitute an amendment. One view was that an amendment could refer to any change or addition of information contained in an electronic transferable record. Another view was that it referred only to instances where the content of the obligation would change. It was emphasized that for the sake of clarity and to avoid unintended consequences, the meaning of the term “amendment” should be clarified and a clear distinction should be made between a change to the performance obligation and an addition to the electronic transferable record, such as an endorsement.

97. After discussion, it was decided that draft article 20 should be revised taking into account the views expressed above with focus on achieving functional equivalence.

Draft article 21. Error in information contained in an electronic transferable record

98. In response to a query, it was clarified that the notion of input error referred to a typing error made by a physical person when interacting with an automated system. It was noted that the provision on input error contained in article 14 of the Electronic Communications Convention was meant to operate in an environment very different from that in which electronic transferable records were used, and that therefore this provision might not be appropriate.

99. It was decided that draft article 21 should be deleted.

Draft article 22. Division of an electronic transferable record

Draft article 23. Consolidation of electronic transferable records

100. With respect to draft articles 22 and 23, it was indicated that whether an electronic transferable record could be divided or consolidated was a matter of

substantive law, which would also set out the relevant requirements. Accordingly, it was said that those articles should operate only when it was permitted under the substantive law. It was added that consideration should be given to the fact that the electronic environment would make it easier for division and consolidation to take place.

Draft article 24. Replacement

101. With respect to draft article 24, the following suggestions were made: (a) a replacement would require the consent of any party with the obligation to perform, which would be determined by substantive law; (b) the obligor would, in any case, be in a position to require a replacement upon presentation for performance; (c) the requirement in subparagraph 2 (b) that all information should be included should also be mentioned in subparagraph 1 (b); (d) the possibility of prior consent to replacement (for example, upon issuance) should be taken into consideration; and (f) paragraph 3 should be recast as a general rule in a separate draft article.

Draft article 25. [Surrender] [Presentation for performance]

102. With respect to draft article 25, the following suggestions were made: (a) the draft article could be construed to achieve the functional equivalence of the general term “presentation”; (b) there might be additional requirements under the substantive law for presentation for performance, for example, to demonstrate that it was the rightful holder as well as to show the chain of endorsements; (c) the draft article could be deleted as draft article 11 on delivery was sufficient; (d) as long as there was a procedure for the holder to demonstrate that it was the holder, the draft article would not be necessary; and (e) there was merit in retaining the draft article as the notions of “surrender” or “presentation for performance” were different from the notions of “presentation” or “delivery.”

Draft article 26. Performance of obligation

103. It was agreed that draft article 26 should be deleted as it dealt with matters of substantive law.

Draft article 27. Termination of an electronic transferable record

104. It was noted that when an electronic transferable record ceased to have effect or validity was a matter of substantive law and that draft article 27 should merely enable the operation of substantive law in an electronic environment. However, it was also explained that the draft article merely aimed at achieving the functional equivalence of “destruction” of a paper-based transferable document or instrument, without touching upon issues of validity of the electronic transferable record. It was suggested that the draft article should be revised to convey that idea more appropriately.

Draft article 28. Security right in an electronic transferable record

105. With respect to draft article 28, the following suggestions were made: (a) as the creation of a security right in certain types of paper-based document or instrument was governed by the law applicable to such document or instrument, reference should also be made to the applicable law; and (b) the draft article should

not be limited to “creation” of a security right and thus could be revised to state along the following lines: “A reliable procedure to allow the use of an electronic transferable record for security right purposes shall be provided.”

Draft article 29. Archiving information in an electronic transferable record

106. With respect to draft article 29, the following suggestions were made: (a) reference should be made to “retention” rather than “archiving”; (b) subparagraph 1 (b) should focus on the integrity of the record rather than the format; and (c) the possibility of dealing with the electronic retention of paper-based transferable documents or instruments could be further explored.

Draft articles 30 to 33: Third-party service providers

107. With respect to the draft articles dealing with third-party service providers, it was generally felt that those provisions were too detailed and might not fully respect the principle of technology neutrality. It was added that those draft provisions had a regulatory nature and their effect could hinder competition. It was explained that such matters were usually addressed contractually for exchanges taking place in closed systems, while guidance might be needed for those exchanges taking place in open systems. It was indicated that, if need to provide guidance in that field was felt, due attention should be given to the recent relevant texts, such as article 19 of the Proposal for a Regulation of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market, dealing with requirements for qualified trust service providers.

108. It was suggested that draft article 31, subparagraph (1)(c)(ii) should be deleted. It was also noted that the term “valid” contained in draft article 31 was unclear.

109. It was widely felt that draft article 33 dealt with matters of substantive law outside the scope of the current work and thus should be deleted.

110. After discussion, it was agreed that the draft provisions dealing with third-party service providers should be revised in light of the considerations expressed above, mindful of technology neutrality.

Draft article 34. Recognition of foreign electronic transferable records

111. It was widely felt that the draft provisions should not displace existing private international law rules applicable to paper-based transferable documents or instruments. However, it was added, the legal treatment of certain issues specific to the use of electronic transferable records, such as the possibility to discriminate a foreign electronic transferable record by virtue of its origin only, might deserve additional consideration. It was agreed that draft article 34 should be revised with a view to narrowing its scope to matters purely related to the use of electronic means, and without displacing general rules on conflict of laws.

C. Future work

112. It was noted that, while it was premature to start a discussion on the final form of work, the draft provisions were largely compatible with different outcomes that

could be achieved. However, it was also said that caution should be exercised in providing texts that had practical relevance and therefore supported existing business practices, rather than regulated potential future ones.

113. The view was expressed that the Working Group should deal in depth with certain cross-cutting issues relevant also for the treatment of electronic transferable records, such as time-stamping and archiving.

114. The Working Group was informed that Germany had recently enacted amendments to its commercial code allowing for the use of negotiable electronic transport records.

V. Technical assistance and coordination

115. The Working Group heard an oral report on the technical assistance and coordination activities undertaken by the Secretariat, including the promotion of UNCITRAL texts on electronic commerce. In particular, ongoing coordination with UN/CEFACT was mentioned. Particular reference was made to promotional and coordination efforts in the Asia and Pacific region, including the contribution of UNCITRAL to the preparation of a draft arrangement/agreement on paperless trade facilitation promoted by United Nations Economic and Social Commission for Asia and the Pacific (UN/ESCAP) in the framework of the implementation of UN/ESCAP resolution 68/3.

VI. Other business

116. The Working Group was informed that the forty-eighth session was scheduled to take place in Vienna from 9 to 13 December 2013, subject to the decision by the Commission at its forty-sixth session (8-26 July 2013) and confirmation by the conference management services of the United Nations Secretariat.

F. Note by the Secretariat on draft provisions on electronic transferable records, submitted to the Working Group on Electronic Commerce at its forty-seventh session (A/CN.9/WG.IV/WP.122)

[Original: English]

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I. Introduction

1. At its forty-fourth session, in 2011, the Commission mandated the Working Group to undertake work in the field of electronic transferable records.¹

2. At its forty-fifth session (Vienna, 10-14 October 2011), the Working Group began its work on electronic transferable records (A/CN.9/737, paras. 14-88). At its forty-sixth session (Vienna, 29 October-2 November 2012), the Working Group continued considering legal issues that arise during the life cycle of electronic transferable records (A/CN.9/761, paras. 24-89) and broad support was expressed for the preparation of draft provisions on electronic transferable records (A/CN.9/761, paras. 90-93).

3. In accordance with that decision, part II of this note contains draft provisions on electronic transferable records presented in the form of a model law without prejudice to the decision on the form of its work to be made by the Working Group (A/CN.9/761, paras. 92-93).

II. Draft provisions on electronic transferable records

A. General provisions

“Draft article 1. Scope of application

“1. This Law applies to any kind of electronic transferable record.

“2. Nothing in this Law affects the application of any rule of law governing a paper-based transferable document or instrument to an electronic transferable record other than as provided for in this Law.”

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), para. 238.*

Remarks

4. Paragraph 1 of draft article 1 reflects the Working Group's understanding that generic rules based on a functional approach should be developed encompassing various types of electronic transferable records (A/CN.9/761, para. 18). Paragraph 2 of draft article 1 continues to state that the draft provisions should not deal with matters governed by the substantive law on paper-based transferable documents or instruments (A/CN.9/761, paras. 20, 28, 49, 62, 68, 71, 79 and 85).

5. Reference may be made to the Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (Geneva, 7 June 1930) and the Convention Providing a Uniform Law for Cheques (Geneva, 19 March 1931). These Conventions were prepared in a paper-based context and only assume the use of paper-based instruments (for example, reference is made to the "face" and "back" of the instrument and "crossing" of cheques). Although the Conventions do not explicitly preclude the use of electronic equivalents, careful consideration should be given to whether States parties to these Conventions could introduce electronic equivalents of a bill of exchange, a promissory note or a cheque.

"Draft article 2. Exclusion"

"1. This Law does not override any rule of law applicable to consumer protection.

"2. This Law does not apply to the following: (a) electronic equivalent of securities; (b) electronic payment methods; and (c) ...".

Remarks

6. Paragraph 1 of draft article 2 mirrors article 1 of the UNCITRAL Model Law on Electronic Signatures (2001) and recognizes that consumer protection law may take precedence over the draft provisions. The Working Group may wish to consider whether to retain this paragraph.

7. Paragraph 2 of draft article 2 reflects the discussion by the Working Group on its scope of work (A/CN.9/761, para. 22). The Working Group may wish to further discuss its scope of work, possibly specifying instruments (for example, electronic money) or transactions (for example, foreign exchange transactions) that should be excluded from the scope of the draft provisions.

"Draft article 3. Definitions"

"For the purposes of this Law:

"amendment" means the modification of information contained in the electronic transferable record.

"electronic transferable record" means the electronic equivalent of any paper-based transferable document or instrument [that entitles the holder to claim the performance of obligation specified in the electronic transferable record].

"holder" of an electronic transferable record is a person in control of the electronic transferable record in accordance with the procedure set out in draft article 17.

“issuance” of an electronic transferable record means the issuance of the record in accordance with the procedure set out in draft articles 16 and 17.

“issuer” means a person that issues [or requests the issuance of] an electronic transferable record.

“performance of obligation” means the delivery of goods or the payment of a sum of money as specified in a paper-based transferable document or instrument or an electronic transferable record.

“paper-based transferable document or instrument” means any transferable document or instrument issued on paper that entitles the bearer or beneficiary to claim the performance of obligation specified in the paper-based transferable document or instrument.

“release” means the physical or technical step of placing an electronic transferable record under the control of its first holder.

“replacement” means the change in the medium, either from a paper-based transferable document or instrument to an electronic transferable record or vice versa.

“surrender” of an electronic transferable record means the presentation of the electronic transferable record for the performance of obligation in accordance with article 25.

“third-party service provider” means a third party providing services for the use of electronic transferable records.

“transfer” of an electronic transferable record means the transfer of control over an electronic transferable record.”

Remarks

8. The definitions in draft article 3 have been prepared as a reference and should be examined in the context of the relevant draft articles. Among others, the Working Group may wish to consider whether:

(a) To include a definition of “authoritative copy” following its discussion on draft article 17;

(b) To include a definition of “control” by referring to the procedure set out in draft article 17;

(c) The definition of “electronic transferable records” correctly reflects the understanding of the Working Group that it should focus on enabling the use of electronic transferable records as equivalents of existing paper-based transferable documents or instruments (A/CN.9/761, paras. 22 and 29). In that context, the Working Group may wish to further discuss the treatment of instruments that exist only in the electronic environment, in particular whether to exclude them from the scope of its work (A/CN.9/761, para. 29);

(d) The phrase in square brackets in the definition of “electronic transferable records” should be retained (see paras. 29-31 below);

(e) To alternatively define “holder” as being a person who has been issued an electronic transferable record or a transferee of an electronic transferable record without any reference to control;

(f) To include a definition of “beneficiary”, “obligee”, “controlling party” (see United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (New York, 2008), the “Rotterdam Rules”) or some other term, as separate from the “holder”, referring to the person entitled to claim the performance of obligation;

(g) The use of the term “person” or “party” in the draft provisions is appropriate;

(h) To include a definition of “obligor” or some other term, as separate from the “issuer”, referring to the person specified in a paper-based transferable document or instrument or an electronic transferable record with the obligation to perform;

(i) To use the term “performance of obligation” to refer generally to the delivery of goods or the payment of a sum of money as mentioned in article 2, paragraph 2, of the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (the “Electronic Communications Convention”) (A/CN.9/761, para. 22);

(j) To use a shorter term “paper-based transferable record” instead of “paper-based transferable document or instrument” and to provide examples (bills of exchange, promissory notes, consignment notes, bills of lading, warehouse receipts);

(k) To retain the definition of “release” as distinct from issuance (A/CN.9/761, para. 31);

(l) The term “replacement” used in article 10 of the Rotterdam Rules would be appropriate to refer to the change in medium or whether to use other terms (for example, conversion or substitution) (see para. 44 below);

(m) To use the term “surrender” only in the context of presentation for performance (see draft article 25 and para. 49 below);

(n) To provide a non-exhaustive list of services to be provided by a third-party service provider (for example, the issuance, transfer, replacement and archiving of electronic transferable records) and to provide examples of such service providers (for example, a registry operator or a repository); and

(o) To retain the definition of “transfer” of an electronic transferable record.

“Draft article 4. Interpretation

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

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

Remarks

9. Draft article 4 is intended to draw the attention of courts and other authorities to the fact that the draft provisions, while enacted as part of domestic law, should be interpreted with reference to their international origin in order to facilitate uniform interpretation in various countries. Inspired by article 7 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980), most UNCITRAL texts, including the UNCITRAL Model Law on Electronic Commerce (article 3) as well as the Electronic Communications Convention (article 5), contain such a provision. The Working Group may wish to consider whether to retain draft article 4 and, if retained, possibly discuss the general principles the draft provisions should be based on. For example, the Guide to Enactment of the UNCITRAL Model Law on Electronic Commerce provides a non-exhaustive list of general principles, such as to facilitate electronic commerce among and within nations, to promote and encourage the implementation of new information technologies and to support commercial practice.

“Draft article 5. Party autonomy

“The provisions of this Law may be derogated from or their effect may be varied by agreement.”

Remarks

10. While provisions similar to draft article 5 appear in UNCITRAL texts on electronic commerce (article 4 of the UNCITRAL Model Law on Electronic Commerce and article 3 of the Electronic Communications Convention), the Working Group may wish to consider whether draft article 5 is appropriate for draft provisions on the use of electronic transferable records, which would generally entail the involvement of third parties. The Working Group may also wish to discuss the issues related to the protection of third parties in this context.

“Draft article 6. Information requirements

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

Remarks

11. Draft article 6 mirrors article 7 of the Electronic Communications Convention which reminds parties of the need to comply with possible disclosure obligations that might exist under other domestic law (Explanatory note on the Electronic Communications Convention, paras. 122-128).

B. Use of electronic transferable records***“Draft article 7. Legal recognition of an electronic transferable record***

“An electronic transferable record shall not be denied legal effect, validity or enforceability on the sole ground that it is in an electronic medium.”

“Draft article 8. Writing

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

“Draft article 9. Signature

“Where the law requires that [a paper-based document or instrument] [a communication] should be signed by a person or provides consequences for the absence of a signature, that requirement is met with respect to the use of an electronic transferable record if:

- (a) A method is used to identify that person and to indicate that person’s intention in respect of the information contained in [the electronic transferable record] [the communication]; and
- (b) The method used is either:
 - (i) As reliable as appropriate for the purpose for which [the electronic transferable record] [the communication] was generated, in the light of all the relevant circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph (a) above, by itself or together with further evidence.”

Remarks

12. Based on articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce and article 9 of the Electronic Communications Convention (paragraphs 2 and 3), draft articles 8 and 9 establish minimum standards on form requirements that may exist under “the law”, meaning any rule of law governing a paper-based transferable document or instrument. The Working Group may wish to consider whether these draft articles should apply generally to such requirements in the law.

13. As mentioned (see para. 5 above), there may be other form requirements which exist only in the paper-based context. The Working Group may wish to consider whether draft article 8 would sufficiently address such instances or additional provisions would need to be prepared.

“Draft article 10. Possession

“Where the law requires the possession of a paper-based transferable document or instrument or provides consequences for the absence of possession, that requirement is met through the control of an electronic transferable record in accordance with the procedure set out in draft article 17.”

“Draft article 11. Delivery [and endorsement]

“Where the law requires the delivery [and endorsement] of a paper-based transferable document or instrument or provides consequences for the absence of delivery [and endorsement], that requirement is met through the transfer of

control of an electronic transferable record in accordance with draft article 19.”

Remarks

14. Draft article 10 reflects the understanding of the Working Group that the functional equivalence of possession is achieved through control (A/CN.9/761, paras. 24-25). Draft article 11 states that delivery and endorsement requirements that exist under law governing paper-based documents or instruments are met through the transfer of control (A/CN.9/761, para. 50). The Working Group may wish to consider whether the reference to endorsement should be retained in draft article 11, as endorsement may not always be required (for example, instruments issued to bearer). Moreover, an endorsement would generally be in writing with a signature and the requirements for both could be met through draft articles 8 and 9.

“Draft article 12. Original

“1. Where the law requires that a paper-based transferable document or instrument should be made available or retained in its original form, or provides consequences for the absence of an original, that requirement is met with respect to the use of an electronic transferable record if:

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

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

“2. For the purposes of paragraph 1 (a):

(a) The criteria for assessing integrity shall be whether the information has remained complete and unaltered, apart from the addition of any change that arises throughout the life cycle of the electronic transferable record; and

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

Remarks

15. Draft article 12 establishes a minimum standard on form requirement to be met by an electronic transferable record for it to be regarded as the functional equivalent of an original. It mirrors article 8 of the UNCITRAL Model Law on Electronic Commerce and article 9, paragraph 4, of the Electronic Communications Convention. The Working Group may wish to consider whether to retain such a provision.

16. The Working Group may wish to note that the concept of “original” as typically used in an electronic transferable record context may be different. Therefore, it may be necessary to distinguish the requirement that an electronic transferable record be made available or retained in its original form from the requirement that it be unique. As such, the Working Group may wish to discuss draft article 12 in connection with following draft articles on uniqueness and integrity.

17. Article 12 of the Act to Establish a Legal Framework for Information Technology (RSQ, c C-1.1) of Quebec may also shed light.² It states that “A technology-based document may fulfil the functions of an original. To that end, the integrity of the document must be ensured and, where the desired function is to establish: (1) that the document is the source document from which copies are made, the components of the source document must be retained so that they may subsequently be used as a reference; (2) that the document is unique, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, in particular through the inclusion of an exclusive or distinctive component or the exclusion of any form of reproduction; (3) that the document is the first form of a document linked to a person, its components or its medium must be structured by a process that makes it possible to verify that the document is unique, to identify the person with whom the document is linked and to maintain the link throughout the life cycle of the document.”

“Draft article 13. Uniqueness of an electronic transferable record

“1. A reliable method shall be used to render an electronic transferable record unique [preventing the circulation of multiples records relating to the same performance obligation] [entitling only a single holder to the performance of obligation].

“2. A method satisfies paragraph 1, if it:

(a) Ensures that an electronic transferable record cannot be reproduced; or

(b) Designates an authoritative copy of an electronic transferable record in accordance with the procedure set out in draft article 17.”

Remarks

18. Draft article 13 reflects the discussion of the Working Group, whereby it was agreed that uniqueness should aim at entitling only one holder of the electronic transferable record to the performance of obligation (A/CN.9/761, paras. 33-37 and A/CN.9/WG.IV/WP.118, paras. 39-50). The Working Group may wish to consider whether to include in paragraph 1 the phrase in square brackets.

“Draft article 14. Integrity of an electronic transferable record

“1. A reliable method shall be used to provide assurance that an electronic transferable record retains its integrity from the time when it was first issued.

“2. For the purposes of paragraph 1:

(a) The criteria for assessing integrity shall be whether the information contained in the electronic transferable record has remained complete and unaltered, apart from [the addition of any change] that arises throughout the life cycle of the electronic transferable record; and

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

² The full text of the Act is available at www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C1_1/C1_1_A.html.

Remarks

19. Subject to its discussion on draft article 12, the Working Group may wish to consider whether to retain draft article 14.

“Draft article 15. Consent to use an electronic transferable record

“1. Nothing in this Law requires a person to use an electronic transferable record.

“[2. The use of an electronic transferable record requires the consent of the parties as provided in draft articles 16, 19, 22, 23 and 24.]

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

Remarks

20. Draft article 15 is based on article 8, paragraph 2 of the Electronic Communications Convention. The Working Group may wish to consider whether paragraph 2, which states a general requirement for consent of the parties should be retained in the draft provisions.

“Draft article 16. Issuance of an electronic transferable record

“1. The issuance of an electronic transferable record shall require the consent of the issuer and the first holder to use an electronic medium.

“2. The information required for the issuance of a paper-based transferable document or instrument shall be required for the issuance of an electronic transferable record.

“3. Upon issuance, an electronic transferable record may contain additional information, including the consent as provided in paragraph 1 as well as information to uniquely identify the electronic transferable record.

“4. [Subject to any rule of law governing the issuance of a paper-based transferable document or instrument,] an electronic transferable record may be issued to bearer.

“5. An electronic transferable record is deemed to have been issued when the first holder [establishes] [is able to exercise] control of the electronic transferable record in accordance with the procedure set out in draft article 17.

“6. Upon issuance, an electronic transferable record shall be subject to control until it ceases to have any effect or validity.

“7. Where the law requires the issuance of more than one original of a paper-based transferable document or instrument, that requirement is met if [a single authoritative copy of the electronic transferable record exists] [the first holder establishes control] in accordance with the procedure set out in draft article 17.”

Remarks

21. Paragraph 1 of draft article 16 states that parties involved in the issuance of an electronic transferable record would need to agree to use an electronic medium

(A/CN.9/761, para. 32). The Working Group may wish to consider how this paragraph will operate when the electronic transferable record is issued to bearer as mentioned in paragraph 4.

22. Paragraph 2 is a reminder that the law governing paper-based transferable document or instrument applies to electronic transferable records (see also draft article 2). The Working Group may wish to consider whether such provisions should be kept. An example of information to uniquely identify the electronic transferable record in paragraph 3 could be an identification number assigned to the record (A/CN.9/761, para. 32).

23. Paragraph 4 reflects the discussion of the Working Group that the draft provisions should enable the use of electronic transferable records issued to bearer (A/CN.9/761, para. 26). The Working Group may wish to consider whether this possibility should be expressly set out in the draft provisions.

24. The Working Group may wish to consider whether to retain paragraph 5 which addresses the time of issuance. The Working Group may also wish to consider whether a similar provision on the place of issuance would be useful (for example, “an electronic transferable record is deemed to have been issued where the issuer has its place of business”).

25. With respect to paragraph 7, the Working Group may wish to consider whether it is better placed with draft article 12 (A/CN.9/761, para. 36).

“Draft article 17. Control

“1. A person has control of an electronic transferable record if a method used for evidencing transfer of interests in the electronic transferable record reliably establishes that person as the person to which the electronic transferable record was issued or transferred.

“2. A method satisfies paragraph 1, and a person is deemed to have control of an electronic transferable record, if the electronic transferable record is issued and transferred in such a manner that:

(a) A single authoritative copy of the electronic transferable record exists which is unique, identifiable and unalterable, except as otherwise provided in draft article 20;

(b) The authoritative copy identifies the person asserting control as:
(i) the person to which the document was issued; or (ii) the person to which the electronic transferable record was most recently transferred;

(c) The authoritative copy is communicated to and maintained by the person asserting control;

(d) The uniqueness and integrity of the authoritative copy is preserved;
and

(e) [Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy] [the authoritative copy is readily identifiable as such].”

Remarks

26. Draft article 17 was prepared based on section 7-106 (Control of Electronic Document of Title) of the Uniform Commercial Code (UCC) of the United States of America with minor changes. The Working Group may wish to consider whether such an approach would be suitable for its work.

27. Subparagraphs (a) and (d) of paragraph 2 should be discussed in connection with articles 13 and 14 on uniqueness and integrity of an electronic transferable record. Subparagraph (b) should be understood to mean that the authoritative copy shall identify a person asserting control but not necessarily disclose the identity (name) of that person. Therefore, it would still be possible to identify the holder of an electronic transferable record issued to bearer.

28. The Working Group may wish to consider whether the time when a person establishes or is able to exercise control (for example, in draft article 16, para. 5) is when the authoritative copy is communicated to the person asserting control.

“Draft article 18. Holder

“1. A person having control of an electronic transferable record in accordance with article 17 is the holder of the electronic transferable record.

“2. A holder is entitled to: ... ”

Remarks

29. The Working Group may wish to consider whether there is merit in retaining draft article 18 or it is sufficient to have a definition of holder as provided in draft article 3. A holder of an electronic transferable record would only have de facto control of the electronic transferable record. Whether the holder is the rightful holder and the substantive rights of the holder would be matters for the substantive law. The Working Group may wish to consider whether paragraph 2 should set out a non-exhaustive list of a holder’s rights, if any, arising from de facto control of the electronic transferable record.

30. In that context, the Working Group may also wish to refer to Chapter 10 of the Rotterdam Rules on the rights of the controlling party.³ The Rotterdam Rules use

³ The following are excerpts from the Rotterdam Rules:

“Article 1. Definitions

[...]

“13. “Controlling party” means the person that pursuant to article 51 is entitled to exercise the right of control.”

“Article 50. Exercise and extent of right of control

“1. The right of control may be exercised only by the controlling party and is limited to

(a) The right to give or modify instructions in respect of the goods that do not constitute a variation of the contract of carriage;

(b) The right to obtain delivery of the goods ...

(c) The right to replace the consignee by any other person including the controlling party.

“2. The right of control exists during the entire period of responsibility of the carrier, as provided in article 12, and ceases when that period expires.”

“Article 51. Identity of the controlling party and the transfer of right of control

the terms “right of control” and “controlling party” which both relate to substantive rights of the holder of a negotiable electronic transport record. It should be noted that “controlling party” in the Rotterdam Rules refer to the party with the right of control. Article 51, paragraph 4 of the Rotterdam Rules therefore stipulates that the de facto holder of the negotiable electronic transport record is the controlling party, who may exercise the right of control provided in article 50.

31. Therefore, the Working Group may wish to confirm that the holder of an electronic transferable record in the draft provisions shall be understood as the person in de facto control of the electronic transferable record. Whether the holder is entitled to performance would be a matter of substantive law, and the draft provisions would not endow the holder with such rights (see para. 8 (d) above).

“Draft article 19. Transfer of control of an electronic transferable record

“1. A holder of an electronic transferable record may transfer the electronic transferable record by transferring the control of the record to the transferee.

“2. [Subject to any rule of law governing the transfer of a paper-based transferable document or instrument,] an electronic transferable record issued to bearer may be transferred to a named person and vice versa.

“3. [The transfer of an electronic transferable record is effective] [An electronic transferable record is deemed to have been transferred] when the transferee obtains [establishes] [is able to exercise] control of the electronic transferable record in accordance with the procedure set out in article 17.

“4. The transferee of an electronic transferable record is deemed to have consented to the use of the electronic medium.

“5. Upon transfer, a statement indicating the transfer shall be included in the electronic transferable record.”

Remarks

32. The Working Group agreed that rules on the transfer of control should be prepared (A/CN.9/761, paras. 50-58). While it was noted that transfer of control would be achieved through the amendment of the electronic transferable record (A/CN.9/761, para. 49), the Working Group may wish to consider whether draft article 19 should not deal with the procedure for transfer of control as distinct from an amendment.

33. Paragraph 2 was drafted to reflect the Working Group’s discussion that transfer of control should allow for change in the manner of transmission to the bearer, if the record had been issued to a named person and to a named person, if the record had been issued to bearer (A/CN.9/761, para. 55). Paragraph 3 addresses the time when

“[...]

“4. When a negotiable electronic transport record is issued:

(a) The holder is the controlling party.

(b) The holder may transfer the right of control to another person by transferring the electronic transport record in accordance with the procedures referred to in article 9, paragraph 1.

(c) In order to exercise the right of control, the holder shall demonstrate, in accordance with the procedures referred to in article 9, paragraph 1, that it is the holder.”

the transfer of control takes place (A/CN.9/761, para. 56). The Working Group may wish to consider whether a more specific rule should be prepared along the lines of article 10 of the Electronic Communications Convention.

34. As to paragraph 4, the Working Group may wish to consider whether the consent of the transferee to use the electronic medium should be expressly required or could be inferred (draft article 15, para. 3).

35. The Working Group may wish to further discuss the need to include provisions on the circumstances of an ineffective transfer and the transfer of partial rights in the electronic transferable record.

“Draft article 20. Amendment of an electronic transferable record

“1. A reliable procedure for amendment of an electronic transferable record shall be provided, which shall also address unauthorized amendments.

“2. When the law requires that parties affected by the amendment should be notified with respect to the amendment of a paper-based document or instrument, the same requirement shall apply to the amendment of an electronic transferable record.

“3. Amendment of an electronic transferable record [for a purpose other than transferring control] is effective when the amended information is reflected in the authoritative copy.

“4. Upon amendment, a statement to the effect that an amendment has taken place shall be included in the electronic transferable record.

“5. An amendment of an electronic transferable record shall be readily identifiable as authorized.”

Remarks

36. The Working Group agreed that the draft provisions should acknowledge the need to address amendments and their effectiveness, while issues of establishing which party could make such amendments and under what circumstances should be left to substantive law (A/CN.9/761, para. 49). As mentioned, the Working Group may wish to consider whether transfer of an electronic transferable record should be achieved through the amendment of that record (see para. 32 above).

37. Draft article 20 does not include a paragraph on who has the authority to make amendments, leaving the matter to the substantive law. However, the Working Group may wish to consider whether there shall be circumstances where the holder of the electronic transferable record may amend the record unilaterally.

38. Paragraph 2 confirms that the same notice requirements for paper-based documents or instruments shall apply to electronic transferable records (A/CN.9/761, para. 47) and paragraph 3 addresses the time when an amendment is effective.

39. With respect to paragraph 4, the Working Group may wish to consider whether such a statement should be included in the electronic transferable record and, if so, what other information should be included (for example, the identity of the person requesting amendment or time of request). As the present draft provisions provide for inclusion of other types of statements (for example, draft articles 22, 23, 24 and

26), whether such statements should be treated as amendments would also need to be discussed.

“Draft article 21. Error in information contained in an electronic transferable record

“A reliable procedure to address input errors with respect to the use of an electronic transferable record shall be provided.”

Remarks

40. Draft article 21 reflects the Working Group’s discussion on input errors in the electronic environment (A/CN.9/761, paras. 59-62). While the possibility of introducing a rule similar to article 14 of the Electronic Communications Convention may be sought, it would be difficult to derive a rule that could be applicable to various systems and technology. The Working Group may wish to consider whether draft article 21 is sufficient.

“Draft article 22. Division of an electronic transferable record

“If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to divide the electronic transferable record into two or more electronic transferable records:

(a) The holder shall [surrender] [present for division] the electronic transferable record to the [issuer/obligor];

(b) The newly divided electronic transferable records shall be issued in accordance with draft article 16 and include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the original electronic transferable record and other newly divided electronic transferable record(s); and

(c) Upon division, the original electronic transferable record ceases thereafter to have any effect or validity and shall include: (i) a statement to the effect that division has taken place; (ii) date of division; and (iii) information to identify the newly divided electronic transferable records.”

“Draft article 23. Consolidation of electronic transferable records

“If the holder of two or more electronic transferable records, the [issuer/obligor] of which is the same, agree with the [issuer/obligor] to consolidate the electronic transferable records into a single electronic transferable record:

(a) The holder shall [surrender] [present for consolidation] the electronic transferable records to the [issuer/obligor];

(b) The newly consolidated electronic transferable record shall be issued in accordance with draft article 16 and include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and (iii) information to identify the original electronic transferable records;

(c) Upon consolidation, the original electronic transferable records cease thereafter to have any effect or validity and shall include: (i) a statement to the effect that consolidation has taken place; (ii) date of consolidation; and

(iii) information to identify the newly consolidated electronic transferable record.”

Remarks

41. Draft articles 22 and 23 were prepared based on the basis of article 10 of the Rotterdam Rules on replacement, following the discussion by the Working Group on splitting and consolidation of electronic transferable records (A/CN.9/761, paras. 66-67). The Working Group may wish to consider whether the procedure set out in these draft articles are a matter of substantive law and, if so, whether the draft provisions should merely state the need for a procedure to address division and consolidation of electronic transferable records.

42. The Working Group may also wish to consider whether the draft articles would need to take into consideration the possibility of a paper-based document or instrument being involved in the division or consolidation process or the present draft articles in conjunction with draft article 24 on replacement would be sufficient to address such circumstances.

43. The Working Group may also wish to note that the phrase “original” electronic transferable record is used in draft articles 22 and 23 to refer to the electronic transferable record that ceases to have any effect or validity due to division or consolidation. To avoid confusion, the Working Group may wish to consider using some other term (for example, substituted, initial or pre-existing).

“Draft article 24. Replacement

“1. If a paper-based transferable document or instrument has been issued and the holder and the [issuer/obligor] agree to replace that document or instrument by an electronic transferable record:

(a) The holder shall [surrender] [present for replacement] the paper-based transferable document or instrument, or all of them if more than one has been issued, to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the paper-based transferable document or instrument, an electronic transferable record in accordance with draft article 16 which shall include a statement to the effect that it replaced the paper-based transferable document or instrument; and

(c) The paper-based transferable document or instrument ceases thereafter to have any effect or validity.

“2. If an electronic transferable record has been issued and the holder and the [issuer/obligor] agree to replace that electronic transferable record by a paper-based document or instrument:

(a) The holder shall [surrender] [present for replacement] the electronic transferable record to the [issuer/obligor];

(b) The [issuer/obligor] shall issue to the holder, in place of the electronic transferable record, a paper-based document or instrument that includes all information contained in the electronic transferable record and a statement to the effect that it replaced the electronic transferable record; and

(c) The electronic transferable record ceases thereafter to have any effect or validity.

“3. The replacement of a paper-based transferable document or instrument or an electronic transferable record shall be subject to procedures that provide for its reissuance in the original [form] [medium].”

Remarks

44. Draft articles 24 mirrors article 10 of the Rotterdam Rules on replacement, following the discussion by the Working Group (A/CN.9/761, paras. 72-77). The Working Group may wish to first make a decisions on whether to use the term “conversion/convert” or “replacement/replace”, which would refer to the change in the medium with the legal effect and information contained in the document, instrument or record, unchanged.

45. The Working Group would further need to discuss which parties should consent to or otherwise be involved in the replacement (A/CN.9/761, para. 76) or whether this was a matter for the substantive law.

46. Paragraph 3 of draft article 24 was prepared to address circumstances where the replaced document or record would need to be restored such as when the new substitute document or record had not been effectively issued or had been lost (A/CN.9/761, para. 76). The Working Group may wish to consider whether such a restoration clause would also be needed for procedures dealing with division and consolidation.

“Draft article 25. [Surrender] [Presentation for performance]

“Where the law requires the [surrender] [presentation for performance] of a paper-based transferable document or instrument or provides for the consequences for the absence of [surrender] [presentation for performance], that requirement is met upon demonstration by the holder that it is the holder of the electronic transferable record in accordance with the procedure set out in draft article 17.”

Remarks

47. It was pointed out that presentation for performance in the electronic environment introduced significant practical challenges due to remoteness and possible lack of familiarity between the parties. The Working Group agreed that a rule should be prepared aimed at achieving the functional equivalence of physical delivery of paper-based documents (A/CN.9/761, paras. 70-71).

48. In certain cases, the law governing paper-based documents or instruments might have a requirement to surrender the document or instrument for its performance. Draft article 25 aims at achieving the functional equivalence of surrender by mirroring article 47, paragraph 1, subparagraph (a)(ii), of the Rotterdam Rules. The Working Group may wish to consider whether such a provision should be retained or the matter could be addressed with draft article 11 on delivery.

49. The Working Group may wish to further consider whether the term surrender could be understood to encompass presentation for division, consolidation, replacement as well as for performance (draft articles 22-25).

“Draft article 26. Performance of obligation

“1. A reliable method shall be used to provide confirmation that performance of obligation has been effected. Upon such confirmation, the electronic transferable record shall cease to have any effect or validity.

“2. The issuer/obligor may refuse the performance of obligation if:

(a) The person asserting control of an electronic transferable record does not demonstrate that it is the holder in accordance with the procedures set out in draft article 17;

(b) There is more than one person demonstrating that it is the holder; or

(c) ...

“3. When the [issuer/obligor] refuses the performance of obligation in accordance with paragraph 2, the holder shall retain control of the electronic transferable record and a statement to the effect that the [issuer/obligor] refused the performance of obligation shall be included in the electronic transferable record.

“4. When there is partial performance of obligation, the electronic record shall be amended in accordance with draft article 20 and [include a statement to the effect that there was partial performance].”

Remarks

50. The Working Group may wish to consider whether the paragraphs of draft article 26 deal with matters of substantive law and should not be included in the draft provisions.

51. Paragraph 3 addresses refusal by the issuer/obligor to perform the obligation and paragraph 4 addresses the issue of partial performance through the amendment of the electronic transferable record (A/CN.9/761, para. 70). The Working Group may wish to consider whether the draft article should also address the holder's refusal to receive or accept the performance of obligation.

“Draft article 27. Termination of an electronic transferable record

“1. When an electronic transferable record ceases to have effect or validity in accordance with articles 22, 23, 24 and 26, the electronic transferable record shall be terminated and a method shall be provided to prevent further circulation of that electronic transferable record.

“2. Where the law requires that a statement to indicate the termination of a paper-based transferable document or instrument should be included in the document or instrument, that requirement is met by including a statement in the electronic transferable record to the effect that it has been terminated.”

Remarks

52. Draft article 27 deals with the termination of an electronic transferable record and it does not deal with the termination of the underlying obligation, which is a matter of substantive law (A/CN.9/761, para. 78). The Working Group may wish to consider whether there is a need to distinguish the termination of an electronic transferable record upon its replacement (draft article 24) from the termination upon the performance of obligation (draft article 26) (A/CN.9/761, para. 75).

53. Paragraph 2 replicates the requirement to include annotations indicating termination in paper-based documents or instruments.

54. The Working Group may wish to consider inserting a paragraph requiring the notification of termination to relevant parties in draft article 27.

“Draft article 28. Security right in an electronic transferable record

“A security right may be created in an electronic transferable record in accordance with the applicable secured transactions law.”

Remarks

55. The Working Group may wish to consider whether the following text may be more appropriate to reflect its discussion (A/CN.9/761, paras. 63-65): “A reliable procedure to allow [the creation of a security right in an electronic transferable record] [the use of electronic transferable records for security right purposes] shall be provided.”

56. The Working Group may wish to note that the UNCITRAL Legislative Guide on Secured Transactions (2007) defines a security right as a property right in a movable asset that is created by agreement and secures payment of other performance of an obligation, regardless of whether the parties have denominated it as a security right.

“Draft article 29. Archiving information in an electronic transferable record

“1. Where the law requires that a paper-based transferable document or instrument be archived, that requirement is met by archiving an electronic transferable record provided that the following conditions are satisfied:

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

(b) The electronic transferable record is archived in the format in which it was issued or in a format which can be demonstrated to represent accurately the information contained therein; and

(c) Such information, if any, is archived as enables the identification of the issuer and holder(s) of the electronic transferable record and the date and time when it was issued and transferred as well as when it ceases to have any effect or validity.

“2. The requirements referred to in paragraph 2 may be satisfied by using the services of a third-party service provider, provided that the conditions set forth in that paragraph are met.”

Remarks

57. Draft article 29 deals with the storage of information in electronic transferable records and was prepared mirroring article 10 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/761, para. 81). The Working Group may wish to consider whether the same requirement shall also apply to electronic transferable records that have been divided or consolidated in accordance with draft articles 22 and 23 and to a paper-based transferable document or instrument or an electronic transferable record that have been replaced in accordance with draft article 24.

C. Third-party service providers

“Draft article 30. Functions of a third-party service provider

“A third-party service provider shall provide the following functions with respect to the use of electronic transferable records:

(a) ...”

“Draft article 31. Conduct of a third-party service provider

“1. Where a third-party service provider supports the use of an electronic transferable record, that third-party service provider shall:

(a) Act in accordance with representations made by it with respect to its policies and practices;

(b) Exercise reasonable care to ensure the accuracy and completeness of all material representations made by it that are relevant to the life cycle of an electronic transferable record;

(c) Provide reasonably accessible means that enable a relying party to ascertain from an electronic transferable record:

(i) The identity of the third-party service provider;

(ii) That the holder that is identified in an electronic transferable record had control of the electronic transferable record when the electronic transferable record was issued;

(iii) That information contained in the electronic transferable record was valid at or before the time when the electronic transferable record was issued;

(d) Provide reasonably accessible means that enable a relying party to ascertain, where relevant, from an electronic transferable record:

(i) The method used to identify the issuer/obligor and the holder;

(ii) Any limitation on the purpose or value for which the electronic transferable record may be used;

(iii) That the information contained in an electronic transferable record is valid and has not been compromised;

(iv) Any limitation on the scope or extent of liability stipulated by the third-party service provider;

(e) Utilize trustworthy systems, procedures and human resources in performing its services.

“2. A third-party service provider shall bear the legal consequences of its failure to satisfy the requirements of paragraph 1.”

“Draft article 32. Trustworthiness [Licensing requirements]”

“For the purposes of article 31, paragraph 1 (e) of this Law in determining whether, or to what extent, any systems, procedures and human resources utilized by a third-party service provider are trustworthy, regard may be had to the following factors:

- (a) Financial and human resources, including existence of assets;
- (b) Quality of hardware and software systems;
- (c) Procedures for processing of electronic transferable record;
- (d) Availability of information to related parties;
- (e) Regularity and extent of audit by an independent body;
- (f) The existence of a declaration by the State, an accreditation body or the third-party service provider regarding compliance with or existence of the foregoing; or
- (g) Any other relevant factor.”

“Draft article 33. Liability of the third-party service provider”

“1. A third-party service provider shall be liable for any damages caused by its negligence or mistake with respect to the use of electronic transferable records.

“2. A third-party service providers shall not be liable for damages:

- (a) Arising from a failure to perform any of its obligations if the failure was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences;
- (b) Related to the performance of obligation; or
- (c) Arising from the service user’s negligence or violation of its obligation.”

Remarks

58. At its last session, the Working Group had a preliminary discussion on issues related to third-party service providers (A/CN.9/761, paras. 83-86). Draft articles 30 to 33 were prepared based on articles 9 and 10 of the UNCITRAL Model Law on Electronic Signatures on certification service providers as a possible approach.

59. The Working Group may wish to consider whether to include provisions on third-party service providers and to what extent. If included, such rules should aim at encompassing all third-party service providers without reference to any specific technology or system (A/CN.9/761, para. 27).

D. Cross-border recognition of electronic transferable records

“Draft article 34. Recognition of foreign electronic transferable records

“1. In determining whether, or to what extent, an electronic transferable record is legally effective, no regard shall be had to the location where the electronic transferable record is issued or used.

“2. An electronic transferable record issued outside [the enacting State] shall have the same legal effect in [the enacting State] as an electronic transferable record issued in [the enacting State] if it offers a substantially equivalent level of reliability.

“3. In determining whether an electronic transferable record offers a substantially equivalent level of reliability for the purposes of paragraph 2, regard shall be had to recognized international standards and to any other relevant factors.”

Remarks

60. At the forty-fifth session of the Commission, in 2012, the need for an international regime to facilitate the cross-border use of electronic transferable records was emphasized.⁴ The Working Group also reiterated the importance of cross-border aspects of legal recognition of electronic transferable records (A/CN.9/761, paras. 87-89).

61. Article 34 was drafted to mirror article 12 of the UNCITRAL Model Law on Electronic Signatures. However, it should be noted that the draft provisions do not include any reference to the “location where electronic transferable record is issued or used.”

62. The Working Group may wish to consider whether the approach in draft article 34 would be appropriate to address cross-border aspects. An alternative approach could be to adopt conflict-of-laws provisions similar to those provided in the Convention for the Settlement of Certain Conflicts of Laws in connection with Bills of Exchange and Promissory Notes (Geneva, 7 June 1930).

⁴ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 83.

III. ONLINE DISPUTE RESOLUTION

A. Report of the Working Group on Online Dispute Resolution on the work of its twenty-sixth session (Vienna, 5-9 November 2012)

(A/CN.9/762)

[Original: English]

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I. Introduction

1. At its forty-third session, (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.¹ It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.² The Commission decided that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer (C2C) transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para.218.

consider specifically the impact of its deliberations on consumer protection and that it should report to the Commission at its forty-fifth session.³

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.⁴ It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.⁵

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.116, paragraphs 5-14.

II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-sixth session in Vienna, from 5 to 9 November 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Bolivia (Plurinational State of), Brazil, Canada, China, Colombia, Czech Republic, El Salvador, France, Germany, Honduras, Israel, Japan, Kenya, Mexico, Pakistan, Philippines, Republic of Korea, Russian Federation, Senegal, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Belarus, Belgium, Cyprus, Dominican Republic, Ecuador, Finland, Hungary, Indonesia, Netherlands, Panama, Poland, Portugal.

7. The session was also attended by observers from Palestine and the European Union.

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

(a) *Intergovernmental organizations*: League of Arab States;

(b) *International non-governmental organizations*: Center for International Legal Education (CILE), Construction Industry Arbitration Council (CIAC), Institute of Law and Technology (Masaryk University), Instituto Latinoamericano de Comercio Electrónico (ILCE), Madrid Court of Arbitration, National Center for Technology and Dispute Resolution (NCTDR), New York State Bar Association (NYSBA).

³ Ibid., para. 218.

⁴ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

⁵ Ibid., para. 79.

9. The Working Group elected the following officers:
Chairman: Mr. Agustín MADRID PARRA (Spain)
Rapporteur: Ms. Olga KOSTYSHYNA (Ukraine)
10. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.III/WP.116);
 - (b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.117 and Add.1);
 - (c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113);
 - (d) A proposal by the Government of Canada on principles applicable to Online Dispute Resolution providers and neutrals (A/CN.9/WG.III/WP.114); and
 - (e) Note submitted by the Center for International Legal Education (CILE) on Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules (A/CN.9/WG.III/WP.115).
11. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.117 and its addendum; A/CN.9/WG.III/WP.113; A/CN.9/WG.III/WP.114; and A/CN.9/WG.III/WP.115). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV.

IV. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

13. At the beginning of the Working Group's twenty-sixth session, a proposal was made that the Working Group break for informal consultations in an attempt to reach understanding on certain key issues on which opinion was said to be currently divided within the Working Group. There was broad agreement that such informal consultations could be productive in moving forward the general consideration of the Rules.

14. On the afternoon of the first day of the session, a brief report of the progress of the informal consultations was given by one delegation on behalf of those who participated. It was said that there were broadly two perspectives expressed, namely: (i) on the one hand, from those countries whose laws rendered pre-dispute agreements to arbitrate not binding upon consumers, and (ii) on the other, from those countries where no such laws were in place. It was said that the presence of an arbitration phase in the Rules could be problematic in those countries where such agreements were not regarded as binding.

15. A suggestion to overcome this difficulty was to have a "two track" system of ODR, one track of which would include negotiation, facilitated settlement and arbitration phases, and one which would not include an arbitration phase. It was said this might be accomplished by the preparation of alternative clauses or provisions under which parties to a transaction could agree to the use of the ODR Rules, with different clauses providing for the application of a different "track". There was said to be consensus on the need for flexibility in the Rules, allowing (inter alia) for such a two-track approach.

16. In this respect, a link with draft article 8(1) bis was made, which article dealt with the movement to an arbitration phase where the parties had been unable to reach a settlement of their dispute. That issue concerned the requirement in some countries for a post-dispute agreement on the part of a consumer in order to proceed to an arbitration phase, and the related question of when in the proceedings such an agreement (sometimes referred to as a "second click") would be required. It was indicated that progress on this issue would benefit from further informal consultations, which were then undertaken with the agreement of the Working Group.

17. Several delegations expressed the need for an arbitration stage in ODR leading to a legally binding outcome, particularly in developing countries where it was said to give consumers — as well as small businesses — in transactions a degree of protection they currently lacked. Views were expressed by a number of other delegations to the effect that all countries have an interest in an efficient, rapid and cost-effective global dispute resolution system, and it had to be decided what kind of solutions would result from such a system. It was clarified that the informal consultations consisted of brainstorming intended to reach a common understanding and were not to be regarded as having resulted in conclusions which were binding upon the participants.

18. It was decided that the informal consultations, though they did not result in formal agreement, were helpful in leading to greater common understanding of certain issues, in particular that the Rules could accommodate both an approach to ODR embodying an arbitration stage and one without such a stage. Several delegations stated that any arbitration stage would need to address the concerns regarding consumer protection expressed by delegations whose jurisdictions provided that pre-dispute agreements to arbitrate are not binding on consumers.

19. There was broad understanding that the ODR Rules should permit pre-dispute arbitration agreements among jurisdictions where they are permitted by law to be binding on all parties. It was also agreed that there was a shared concern for consumer protection, which may be reflected differently in different country contexts and systems. It was further agreed that the Working Group would resume its consideration of the draft Rules, beginning with draft article 9, on the basis that that article would not apply to the “non-arbitration” track of any compromise arrangement that might be reached.

20. A suggestion was made that the two-track system discussed by the Working Group might not have adequately accounted for the possibility of a third track, specifically, a decision by a neutral which would not amount to a formal arbitral decision, but rather which would be subject to private enforcement mechanisms. It was said that such a third option would not preclude the possibility for formal arbitration. It was also stated that the Commission had explicitly mandated the Working Group to consider a private enforcement option in its 2012 Report (A/67/17), and specifically in paragraph 79(c) thereof. This suggestion received support by the Working Group.

Proposal

21. A document was introduced in order to clarify the two tracks that had been discussed throughout the week informally by delegations and to provide proposed language for relevant articles in the Rules; that document, which was not formally adopted by the Working Group, and the language of which was not discussed at this session, is appended to this Report as an annex. Many delegations commended the cooperation that had taken place in the preparation of that document, and expressed optimism that a two-track approach, which could accommodate two distinct perspectives within the group regarding the application of the Rules, could provide a basis for further consideration of the Rules. It was said however that the document should not be seen as precluding other tracks, and in particular a track providing a possible alternative compliance mechanism to arbitration, and a structure to the Rules enabling such a mechanism to exist.

22. It was also said in relation to the first view set out in that document, by way of clarification, that it also encompassed the position that the ODR Rules should be designed so as not to provide for an automatic progression to an arbitration stage, particularly in relation to consumers whose jurisdictions provided that pre-dispute agreements to arbitrate are not binding on them, and who had not agreed post-dispute to arbitrate their online dispute.

23. It was said that while progress had been made in compiling that document, there was a risk that the marketplace was a dynamic one, and that as it moved on it could render the work of the Working Group irrelevant. It was pointed out that the

group most in need of effective ODR processes is consumers, and that keeping the Rules simple and accessible should be a paramount goal.

24. Other delegations encouraged the Working Group to provide concrete proposals for language, linked to specific articles, which would reflect the legal positions of the delegations, for the next session so as to improve the progression of the Rules and to improve the efficiency of its work. It was also said that the document could provide a basis for a new iteration of the Rules to be considered at the twenty-seventh session of the Working Group.

B. Notes on draft procedural rules

6. Decision by the neutral

Draft article 9 ([Issuing of] [Communication of] [decision] [award])

25. The Working Group considered draft article 9 as contained in paragraph 44 of document A/CN.9/WG.III/WP.117/Add.1.

Paragraph (1)

“Award” versus “decision”

26. Several delegations expressed a preference for the use of the word “award” rather than the word “decision”, on the basis that “award” resonated with existing language in national legal systems regarding the outcome of a substantive dispute, as well as in the existing UNCITRAL Arbitration Rules. It was said that that language would not be controversial vis-à-vis the presumptive “first track”, as set out in paragraph 15 above.

27. It was also said in support of the “award” language that it would support harmonized legal terminology, and that that word had always been used in a traditional arbitration context. It was moreover stated that it was important to move forward with the Rules and that removing the brackets, while not amounting to a final view on the topic, would progress the Working Group’s consideration of the Rules.

28. Several delegations supported leaving the words “decision” and “award” in paragraph (1) in square brackets until the Working Group had better defined the incorporation of the presumptive “two tracks” in the Rules and to reflect that differing views still remained in relation to the two words. It was also said that other means of enforcement, such as private enforcement mechanisms, might require non-arbitration based solutions, and that therefore it would be preferable not to limit the terminology of paragraph (1) at this time.

29. In response to a question regarding whether there existed a difference between “decisions” and “awards”, it was said (i) that a procedural difference existed, with the latter being handed down in relation to substance, and the former in relation to matters of procedure and interim measures; and (ii) that in the context of facilitated settlement, the outcome would not result in either an award or a decision, but that in the context of arbitration, the outcome would always be an “award”.

30. A suggestion was made to include in the commentary the clarification that (i) an “award” would be applicable only to arbitration; (ii) that the Rules would need to resolve issues relating to the prohibition on binding, pre-dispute agreements to arbitrate in a number of jurisdictions; and (iii) that the Rules would recognize that, in addition to arbitration, another path would exist, including mediation-only, or adjudication.

Time limits

31. Paragraph (1) as set out in paragraph 44 of document A/CN.9/WG.III/WP.117/Add.1 required the neutral to render its decision or award within seven calendar days, with a possible extension of seven additional calendar days.

32. Some delegations expressed the view that seven calendar days (plus the seven-day extension, currently square-bracketed) provided sufficient time for the neutral to render a decision, based on the low-value, high-volume nature of the disputes, and that such timing would facilitate the quick and cost-efficient resolution of disputes. Other delegations expressed the view that seven days would not be sufficient, but did not propose another option to be inserted into the text.

33. Another suggestion was made to commence the timeline for the rendering of a decision or award from the day the neutral received the final submissions, rather than from when the parties submitted the same.

34. It was stated that two clear positions had emerged in relation to paragraph (1): (i) some delegations expressed the view that the square brackets in paragraph (1) should be retained; and (ii) other delegations favoured deleting the square brackets, retaining the word “award” and deleting the word “decision” throughout.

35. Despite the support for the retention of the square brackets in relation to paragraph (1), the prevailing view in relation to that paragraph was that the brackets should be removed, the word “award” retained, and the word “decision” deleted.

36. Some delegations requested that their objection to that conclusion, as being recorded prematurely and potentially prejudicing future consideration of the paragraph, be recorded. It was also clarified that paragraph (1) only referred to a potential arbitration track, and that in any event paragraph (1) could be revisited at a future reading of the Rules by the Working Group.

37. It was further agreed to remove all other square brackets in paragraph (1), including around the words “with possible extension of additional seven (7) calendar days”, and around the words “without delay”, such that that phrase would be retained, and in addition to delete the word “promptly”.

Paragraph (2)

Brief grounds

38. There was broad consensus that wording requiring brief grounds for the neutral’s decision should be retained in paragraph (2), including to maintain consistency with article 34(3) of the UNCITRAL Arbitration Rules 2010 (the “UNCITRAL Arbitration Rules”). It was consequently agreed to remove the square brackets in paragraph (2).

39. A further suggestion was made that a requirement for the neutral to provide brief grounds should also be included in supplementary documents to be prepared at a future session, such as the Guidelines for ODR Providers and Neutrals.

Place of arbitration and identity of parties

40. Various delegations expressed support for including in paragraph (2) a requirement that, in addition to the date, the award made under that paragraph also include (a) the place where the award was made, and (b) the identity of the parties to the dispute.

41. In relation to (a), a distinction was made between determining the place of arbitration, and recording the place of arbitration in the award. It was agreed that paragraph (2) was the appropriate place in which to express the requirement for the latter, but not the former, which should be addressed elsewhere in the Rules.

42. In relation to (b), the suggestion that the provision require that the award include the identity of the parties did not receive support, on the bases that: (i) it was self-evident that the parties' identities would be contained in an award and that explicit wording to that effect was not required; and (ii) such inclusion would be unusual and inconsistent with existing UNCITRAL texts.

43. It was consequently agreed that in addition to requiring an award to contain the date on which it was made, paragraph (2) should also include language requiring the award to contain the place of arbitration, but that no explicit requirement to identify the parties would be added to that paragraph.

"Made in writing and signed by the neutral"

44. It was said that the word "writing" in the context of an electronic proceeding was clear, further to the existence of a draft definition for the word writing in draft article 2(9) of the Rules, but that no such definition existed for the word "signature" in the Rules. The Working Group requested the Secretariat to include in the subsequent draft of the Rules a definition for the word "signature" based on existing UNCITRAL standards in the electronic commerce sphere.

Publication

45. A suggestion was made that the Rules attempt to require the publication of awards, subject to redaction of sensitive information including the parties' identities. Some delegations supported this proposal on the grounds: (i) that it would introduce transparency into the ODR system, and provide a means of oversight given the probable lack of judicial review; (ii) that the provision of this type of information to the public (including consumers) could be educational; and (iii) that current trends in arbitration were to promote transparency, such as in UNCITRAL's Working Group II and in cases of arbitration relating to sports. It was suggested that one way to include this proposal in the Rules would be to include a provision mandating publication "unless the parties otherwise agreed".

46. Other delegations opposed this proposal on the grounds that: (i) the default premise of arbitration is that it is by nature confidential, and that issues of transparency in investor-State arbitration and in anti-doping sports tribunals were not relevant or appropriate analogies to low-value, online disputes; (ii) permitting

publication would require a host of complicated supplementary rules, such as protection of confidential information; (iii) the volume of online disputes envisaged under the Rules would render publication impracticable; and (iv) the oversight mechanism referred to by those in support could be fulfilled by the aggregation of statistics and data from ODR providers.

47. It was agreed to consider the matter further at a future session of the Working Group, and to facilitate that discussion to include in square brackets in the next iteration of the Rules a provision reflecting the content of article 34(5) of the UNCITRAL Arbitration Rules.

Paragraph (3)

48. The following suggestions were made with regard to paragraph (3): (i) to remove the square brackets around the paragraph; and (ii) to retain the term “award” rather than “decision” in order to be consistent with the terminology in draft article 9(1). It was also suggested to retain the phrase “without delay” rather than “promptly” in the second line, in order to be consistent with similar usage in the UNCITRAL Arbitration Rules. A suggestion to use the term “promptly” rather than “without delay” did not attract support.

49. A further suggestion was made that paragraph (2) should provide for the neutral to set a deadline for the parties to carry out the award.

50. A proposal was made to include in the Rules language to the effect that an award would not be binding in a case involving a consumer whose participation in ODR originated in a pre-dispute agreement to arbitrate which purported to deprive the consumer of his or her right of access to a court for resolution of the dispute, and where the law of the consumer’s jurisdiction guaranteed such right. That proposal was supported by several delegations.

51. The proposal, and/or its inclusion in paragraph (3), was questioned on the grounds that it would be unenforceable, that it concerned the arbitration agreement and not the award, and that it would compromise the intended simplicity of the Rules. It was also said that, as a two-track approach was in contemplation by the Working Group, it remained to be seen whether and where such a provision might be located in the Rules.

52. Following discussion it was decided: (i) that the square brackets around paragraph (3) would be removed and that the paragraph would read as follows: “The award shall be final and binding on the parties. The parties shall carry out the award without delay.”; (ii) with regard to the proposal for additional wording set out in paragraph 50 above, in light of support for the view that it raised an issue of some importance, that the proposed wording would be placed in square brackets to be discussed at a future meeting, including consideration as to where in the Rules it might be most appropriately placed in light of the potential two-track approach to the Rules.

Paragraph (4)

53. A suggestion was made to retain the term “award”, delete the term “decision” and to remove all remaining square brackets from the paragraph.

54. Following discussion it was agreed to amend the paragraph accordingly.

55. Some delegations also expressed the view that (i) the neutral should be permitted on his or her own initiative to correct the award; and (ii) a provision regarding interpretation of the award, parallel to the provision at article 37 of the UNCITRAL Arbitration Rules, be included.

56. The Working Group requested that the Secretariat include such additional provisions in the next iteration of the Rules, and that to avoid overcomplicating paragraph (4), that those provisions be included in a new article 9(bis), to be square-bracketed and considered at a subsequent reading of the Rules.

57. The Working Group further considered the time limits set out in paragraph (4), and specifically, whether that paragraph should prescribe deadlines and the length of the time period, and/or whether it would be preferable to have a general provision in the Rules to permit the neutral to extend any deadline with the agreement of the parties. In this regard, the Working Group requested the Secretariat to provide at its next session a list of the different time limits contained throughout the Rules, and suggested that such a list be considered, alongside a general provision regarding modification or extension of deadlines with consent of the parties, at a future session of the Working Group.

Paragraph (5)

58. It was stated by some delegations that paragraph (5) ostensibly dealt with applicable law, but that it failed adequately or completely to address that substantive topic. A suggestion was made to move the paragraph from draft article 9 to the section of the Rules that would deal with applicable law, for example, a document annexed to the Rules regarding substantive legal principles for resolving disputes, as referred to in paragraph 2(c) of the preamble (“substantive legal principles annex”). It was said that paragraph (5) could explicitly incorporate such an annex, for example by way of a reference in paragraph (5) or elsewhere in the main text of the Rules stating that the neutral would decide disputes in accordance with the principles set out in such an annex.

59. Another view was expressed that the draft Rules should be consistent to the extent possible with the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration, both of which included a reference to the determination of disputes based on the terms of the contract and the applicable trade usage, and that although the latter may or may not apply in consumer disputes, the rendering of the award would have to take account of the terms of the contract. It was further stated that the Rules should clearly contain the essential elements required in the determination of the award. In support of that view, it was suggested that paragraph (5) should remain, as drafted, in its current location.

60. It was said in response that (i) there may be some difficulty in being selective about using provisions of existing UNCITRAL texts, given that those texts are typically designed as a package; and (ii) a reference to trade usage was not appropriate in the context of low-value consumer disputes.

61. In light of the diverging views within the Working Group, it was agreed that no definitive decision would be taken in relation to paragraph (5) and that it would be revisited at a subsequent reading of the Rules.

*Paragraph (6)**Location*

62. There was support for the view that paragraph (6) be moved from draft article 9 of the Rules. There was support for moving the paragraph to draft article 4A, as well as suggestions that it could be moved to the substantive legal principles annex referred to in paragraph 58 above.

Content

63. In terms of the content of paragraph (6), one view was expressed that a provision on burden of proof should track as closely as possible that set out in article 27 of the UNCITRAL Arbitration Rules.

64. It was also suggested that the commentary reflect that the proof required in the Rules be of a simple nature, for example proffering a receipt to prove purchase of goods. Some delegations pointed out that providing proof could be problematic, particularly for consumers in an online environment. Examples were given of the difficulty of proving online the non-delivery or defective condition of an item. Thus, it was said that provisions relating to proof could not simply be transposed from arbitration rules that were devised to deal only with B2B cases, but had to take account of both the online nature of ODR proceedings, and the fact that in many instances parties seeking to prove their case would be relatively unsophisticated consumers, usually acting without the benefit of legal advice.

65. A suggestion which attracted some support was to set out requirements for proof that were specific to each category or type of claim, in each instance focusing on how a party could in practical terms provide the necessary proof.

66. A proposal was made that there should be provision in the Rules for reversing the burden of proof in situations where the party required to prove a fact was not in possession of the evidence needed to do so or could not readily or easily obtain it. This was said to be an exception that could be invoked when the facts of the case required. There was some support for this proposal, with one suggestion that it be dealt with in the commentary to the Rules or in a document setting out guidelines and minimum requirements for neutrals ("guidelines for neutrals"; see preamble, paragraph 2(b), as set out in para. 7 of document A/CN.9/WG.III/WP.117).

Conclusion

67. Following discussion it was decided that the paragraph dealt with an important matter but was inappropriately located in draft article 9 and, while remaining in square brackets, should be moved provisionally to draft article 4A. It was further agreed that the proposal set out in paragraph 66 above, relating to reversal of the burden of proof, should also be included for further consideration, itself in square brackets.

7. Other provisions**Draft article 10 (Language of proceedings)**

68. The Working Group considered draft article 10 as contained in paragraph 53 of document A/CN.9/WG.III/WP.117/Add.1.

69. A number of delegations expressed support for the Rules containing a provision on language, on the grounds inter alia that simply because a consumer could transact in one language did not mean that consumer would be able to engage in ODR proceedings in that language, and that therefore protection should be built into the Rules in this respect.

70. It was said on the one hand that the UNCITRAL Arbitration Rules and Model Law provided a good basis on which to determine language of proceedings, namely, that subject to agreement by the parties, the neutral shall decide. Other delegations said on the other hand that considerations involved in commercial arbitration under those UNCITRAL instruments, such as the fact that arbitrators are selected by the parties, the arbitration clause is individually negotiated, and the parties may have access to resources including translation, rendered those standards inapplicable to consumer-based online disputes.

71. In order to ensure sensitivity to language problems faced by consumers in cross-border transactions, other delegations variously supported the following suggestions: (i) the inclusion of text set out in paragraph 59 of document A/CN.9/WG.III/WP.117/Add.1 be included in article 10 or in the guidelines for neutrals, with one delegation suggesting less robust language should be used (i.e. “may” instead of “shall”); (ii) that the commentary and/or guidelines mention that it would be preferable for each party to use its own language; and (iii) that pre-dispute agreement between the parties in relation to language might be less persuasive than post-dispute agreement, as consumers may not pay careful attention pre-dispute to a language option in a dispute clause in an online agreement.

“Unless a neutral decides otherwise”

72. Several delegations expressed support for a residual power of the neutral to determine the language of proceedings, where the parties had failed to do so.

73. Other delegations stated that it may be problematic that a neutral could override the agreement of the parties, both for reasons of contract sanctity as well as because the neutral may not share the language of the parties.

74. It was said that the general power under draft article 7(1) bis for a neutral to conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute, might be sufficient to accommodate concerns regarding over-prescribing language in the Rules themselves, particularly when read in conjunction with a future document to be drafted regarding guidelines and minimum requirements for neutrals.

Proposal for new draft article 10

75. A proposal was put forward to replace draft article 10 with the following language:

“Article 10

Paragraph (1)

The ODR proceedings shall be conducted in the language or languages agreed upon by the parties at the commencement of the ODR proceedings.

Paragraph (2)

In the event the parties do not agree on the language or languages of proceedings, the language or languages of proceedings shall be determined by the neutral taking into account the parties' due process right under article [x].

Paragraph (3)

The determination of a language or languages referred to in paragraph (2) shall apply to all communications in the course of the ODR proceedings.

Paragraph (4)

An ODR provider dealing with parties using different languages shall ensure that its systems, rules and neutrals are sensitive to these differences and shall put in place mechanisms to address the needs of parties in this regard."

76. Broad support was expressed for that proposal. Suggestions were made to modify that proposal to refer, in paragraph (2), of the proposal, not to an as yet to be determined article, but rather to the power of the neutral presently set out in article 7(1) bis, to provide a fair and efficient process for resolving disputes. It was also said in relation to paragraph (2) that language could be added to protect consumers in the event the language they had contracted to apply was not in fact a language they understood.

77. In relation to paragraph (4) of that proposal, it was also said that that requirement appeared to impose responsibilities on ODR providers which would be better placed in the guidelines document to be prepared as an annex to the Rules.

78. In addition, it was said that in relation to the third paragraph of that proposal, wording should be included to the effect that evidence could be provided in the original language, accompanied by a translation.

79. Further to that suggestion, a proposal for a further two paragraphs was made as a proposed addition to the proposal set out in paragraph 75 above, as follows:

"Paragraph (5)

Any documents attached to the communications and any supplementary documents or exhibits may be submitted in the course of the ODR proceedings in their original language, provided that their content is undisputed."

Paragraph (6)

When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of it, into a language which the other party understands."

80. Support was expressed in relation to the proposed new paragraph (5) of that proposal. In relation to the proposed new paragraph (6), several delegations expressed concerns that that paragraph might create a disproportionate cost to and burden on consumers. It was agreed to consider further paragraph (6) during a subsequent reading of the Rules.

81. There was consensus that the current draft text of article 10, as contained in paragraph 53 of document A/CN.9/WG.III/WP.117/Add.1, should be replaced with the proposed paragraphs (1) to (6), set out in paragraphs 71 and 75 above, with any

minor modifications the Secretariat may deem necessary, in square brackets for further consideration.

V. Future work

82. The Working Group noted that its twenty-seventh session was scheduled to take place in New York from 20-24 May 2013.

Annex

Note by the Secretariat

During the course of the twenty-sixth session of Working Group III (Online Dispute Resolution), a number of delegations submitted to the Secretariat the following text discussed in the content of informal consultations which had taken place alongside the Working Group's twenty-sixth session.

The text is reproduced in the form in which it was received by the Secretariat.

Overview of rules enabling multiple pathways for ODR

Following informal consultations which drew out the differing positions of various delegations on the processes to be applied to ODR, the delegation of the Czech republic would like to present the following as a basis for further discussion.

As a basis for further discussion it is recognized that there is an issue regarding the effect of pre-dispute arbitration agreements on the design of the ODR Rules with respect to buyers, the following are two views how to reflect this concern:

View 1

It is suggested that, at the appropriate point in the text of the Generic Rules, a provision will need to be added to provide a procedure that accommodates binding pre-dispute arbitration agreements, while ensuring that the ODR process does not — without the buyers consent — move on to arbitration if the buyer is resident in the country according to the laws of which relevant agreements are not binding on him.

View 2

It is suggested that, at the appropriate point in the text of the Generic Rules, a procedure will need to be added that accommodates binding pre-dispute arbitration agreements without imposing awards arising out of such agreements on buyers who would not be permitted to enter into such agreements under applicable law from which the parties cannot derogate.

ODR Proceedings

Draft article A (Negotiation and settlement)

1. Upon receipt of the response and, if applicable, counter-claim referred to in Article [XX, paragraph[s] ()-()], at the ODR platform and notification thereof to the claimant, the parties shall attempt to settle their dispute through direct negotiation including, where appropriate, through the communication methods available on the ODR platform.
2. If the respondent does not submit a response to the ODR provider within seven (7) calendar days of [...], it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the form of neutral resolution selected in the ODR agreement, at which point the ODR provider shall promptly

proceed with the appointment of the neutral in accordance with Article XX (Appointment of Neutral).

3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of [...], the ODR proceedings shall automatically move to the neutral resolution stage(s) selected in the ODR agreement.

4. Extension provision.

5. If settlement is reached during the negotiation stage, the terms of such settlement shall be recorded on the ODR platform, at which point, the ODR proceedings will automatically terminate.

Draft article B (Neutral Resolution)

1. The dispute resolution process(es) used for neutral resolution shall be determined by the ODR clause agreed to by the claimant and the respondent and may consist of: (a) facilitated settlement; (b) arbitration; (c) facilitated settlement which, if unsuccessful, is followed by arbitration; or (d) facilitated settlement which if unsuccessful is followed by adjudication or recommendation.

2. Facilitated Settlement: Where the ODR clause specifies facilitated settlement, the neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement.

(a) Where the ODR clause specifies arbitration or adjudication/recommendation, the neutral may offer the parties the opportunity to agree to engage in facilitated settlement prior to that stage of the ODR proceedings.

3. If the parties reach a settlement, such settlement shall be recorded on the ODR platform, at which point, subject to article 7, paragraph (5), the ODR proceedings will automatically terminate.

4. If the parties do not reach a settlement within ten (10) calendar days, and the ODR clause provides for arbitration or adjudication(recommendation, the parties shall proceed to the arbitration or adjudication/recommendation stage of the ODR proceedings. Where the ODR clause does not provide for arbitration or adjudication/recommendation, the ODR proceedings will automatically terminate unless both parties agree in a writing submitted to the ODR platform that they wish to proceed to arbitration or adjudication/recommendation.

(a) In the event of arbitration, the neutral shall render an award pursuant to [Article 9].

(b) In the event of adjudication/recommendation, the neutral shall render a decision in accordance with the terms of the ODR clause.

5. [Neutral inability to remain impartial or independent.]

B. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-sixth session

(A/CN.9/WG.III/WP.117 and Add.1)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions. It was also agreed that the form of the legal standard to be prepared should be decided after further discussion of the topic.¹ At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions. The Commission decided that, while the Working Group should be free to interpret that mandate as covering C2C transactions and to elaborate possible rules governing C2C relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection and report to the Commission at its next session.²

2. At its twenty-second session (Vienna, 13-17 December 2010),³ the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 218.

³ The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

rules for ODR, including taking into account that the types of claims with which ODR would deal should be B2B and B2C, cross-border, low-value, high-volume transactions (A/CN.9/716, para. 115). At that session, the Working Group also requested the Secretariat to list available information regarding ODR known to the Secretariat with references to websites or other sources where they may be found (A/CN.9/716, para. 115). The Working Group may wish to note that that list is available on the UNCITRAL website.⁴

3. At its twenty-third session (New York, 23-27 May 2011),⁵ twenty-fourth session (Vienna, 14-18 November 2011)⁶ and twenty-fifth session (New York, 21-25 May 2012),⁷ the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, A/CN.9/WG.III/WP.109, and A/CN.9/WG.III/WP.112 and its addendum, respectively. At the twenty-fourth session, the Working Group requested that the Secretariat, subject to availability of resources, prepare a revised version of the draft generic procedural rules as well as documentation addressing issues of guidelines for neutrals, minimum standards for ODR providers, substantive legal principles for resolving disputes and a cross-border enforcement mechanism (A/CN.9/721, para. 140 and A/CN.9/739, para. 151). At its twenty-fifth session, the Working Group engaged in discussions on the draft procedural rules (A/CN.9/744).

4. This note contains an annotated draft of generic procedural rules for online dispute resolution in cross-border electronic transactions (the “Rules”), taking into account the deliberations of the Working Group at its twenty-second, twenty-third, twenty-fourth and twenty-fifth sessions.

II. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

5. These Rules have been prepared in accordance with the decision of the Working Group to draft generic procedural rules for ODR, taking into account that the types of claims with which ODR would deal should be B2B and B2C low-value, high-volume cross-border electronic transactions. Rules prepared in this format — and which, pursuant to draft article 1 thereof, require the agreement of the parties — are of a contractual nature, and subject to mandatory law.

6. Several issues relating to the design of an overall ODR framework arise when considering the Rules. Documents A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115 address a number of these issues, including guidelines and minimum standards for ODR providers and neutrals, and proposed substantive principles for ODR claims and relief.

⁴ www.uncitral.org/uncitral/en/publications/online_resources_ODR.html.

⁵ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

⁶ The report on the work of the Working Group at its twenty-fourth session is contained in document A/CN.9/739.

⁷ The report on the work of the Working Group at its twenty-fifth session is contained in document A/CN.9/744.

B. Notes on draft procedural rules

1. Introductory rules

7. Draft preamble

“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of cross-border low-value, high-volume transactions conducted by means of electronic communication.

“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which [are attached to the Rules as an Appendix and] form part of the Rules:

[(a) Guidelines and minimum requirements for online dispute resolution providers;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[...];

“[3. Any separate and supplemental [rules] [documents] must conform to the Rules.]”

Remarks

Paragraph (1)

8. The Working Group may wish to note that at a previous session of the Working Group, a proposal was made to indicate in the draft preamble that the Rules were intended to apply also to disputes relating to the “sale of goods and performance of services” (A/CN.9/739, para. 19).

Paragraph (2)

9. The Working Group at its twenty-fourth session noted that the list of documents in paragraph (2) is not exhaustive (A/CN.9/739, para. 21). The Working Group may wish to consider which of these documents and any additional documents the Working Group should be preparing in the fulfilment of its mandate. The Working Group may wish to note that A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115 address issues related to the documents identified in paragraph (2) (see para. 6, above).

Paragraph (3)

10. An ODR provider may choose to adopt supplemental rules to deal with issues that are not included in the Rules and that may require different treatment for each ODR provider — e.g. costs, definition of calendar days, responses to challenge of neutrals.

11. Draft article 1 (Scope of application)

“1. The Rules shall apply where the parties to a transaction conducted by use of electronic communications have[, [at the time of transaction] [either at the time of the transaction or after a dispute has arisen],] explicitly agreed that disputes relating to that transaction and falling within the scope of the ODR Rules shall be submitted to ODR under the Rules.

[“1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction and notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the ODR Rules will be exclusively resolved through ODR proceedings under the ODR Rules.”]

[“2.

Option 1: [“The Rules shall not apply where the law of the buyer’s state of residence provides that agreements to submit a dispute within the scope of the ODR Rules are binding on the buyer only if they were made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement which it had given at the time of the transaction.”]

Option 2: [“These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision of the law applicable to the ODR proceedings from which the parties cannot derogate, that provision shall prevail.”]

Option 3: [“Nothing in these Rules overrides a rule of law intended for the protection of consumers.”]

“3. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information.”

Remarks

Paragraphs (1) and (1) bis.

12. The current proposed wording of paragraphs (1) and (1) bis. require an agreement to submit disputes to ODR, which agreement is separate from the transaction. It was suggested that a separate agreement would better ensure that a consumer was providing “informed consent” when agreeing to submit disputes to ODR (A/CN.9/744, paras. 23-24). The consent of the parties might be so expressed in the form of a separate “OK box” (click-wrap agreement) accessible from or linked to the underlying transaction.

13. The Working Group may wish to consider whether paragraph (1) should clearly specify that the agreement to submit disputes to ODR under the Rules must take place at the same time as the substantive transaction, notwithstanding that a further confirmatory “click” may be required by some consumers at a later stage, where mandatory law requires a consumer’s post-dispute agreement to enter into an arbitration phase of dispute resolution.

14. Specifically, there was a suggestion at the Working Group's twenty-fifth session that a "second click" by a consumer at a post-dispute stage to confirm its agreement to submit its dispute to ODR under the Rules might alleviate concerns expressed that in some jurisdictions consumers were barred from entering into an agreement to arbitrate pre-dispute (A/CN.9/744, para. 33). The Working Group may wish to consider:

(i) at which stage of the ODR process such a confirmatory second click would be appropriate, and in particular whether a reconfirmation at the stage of arbitration (that is, following a failure at both the negotiation and negotiated settlement stages) would entitle all consumers to benefit from the first two stages of ODR by virtue of having accepted the ODR Rules at the time of transaction;

(ii) whether all consumers or only consumers in certain jurisdictions would be obliged to provide a post-dispute confirmatory click, bearing in mind the difficulties with defining or ascertaining a consumer's "habitual residence". This may be an issue to be addressed by regional ODR providers, should they have the capacity to know and track the consumer law requirements in their region;

and alternatively,

(iii) whether an action, such as making a claim, might amount to the requisite confirmation by the consumer post-dispute to submit its dispute to ODR (see A/CN.9/744, para. 20).

Paragraph (2)

15. Although options 1 and 2 were not originally proposed as alternatives, the Working Group may wish to consider whether one option alone would be sufficient to clarify in the Rules that ODR proceedings are subject to relevant national consumer protection law, particularly with regard to jurisdictions where pre-dispute agreements to arbitrate involving consumers are not binding upon consumers. A third option the Working Group may wish to consider by way of further alternative has been included in square brackets and is derived from language in a note to Article 1 of the UNCITRAL Model Law on Electronic Commerce.

Paragraph (3)

16. At its twenty-fifth session the Working Group agreed to retain paragraph (3) (previously paragraph (2)), which sets out as a pre-condition for the use of the Rules the requirement that the parties provide their contact information (A/CN.9/744, para. 39). The word "electronic" has been added for the sake of clarity.

17. Because this paragraph is expressed as a pre-condition to the operation of the Rules, the Working Group may wish to consider including a time frame by which this condition must be satisfied. Bracketed language has been inserted to mirror the timing options currently set out in draft article 3, and the Working Group may wish to consider whether this draft paragraph would itself be better placed in draft article 3 (see A/CN.9/744, para. 42, and paras. 68-71).

18. The Working Group may wish to recall its discussion regarding the need for the parties to provide a current, functioning electronic address, and the fact that, as

currently drafted, no sanctions exist under the Rules for a deliberate (or negligent) failure to do so (see A/CN.9/744, para. 43).

19. Draft article 2 (Definitions)

“For purposes of these Rules:

ODR

“1. ‘ODR’ means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

“2. ‘ODR platform’ means one or more than one online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR.

“3. ‘ODR provider’ means an online dispute resolution provider which is an entity that administers ODR proceedings for the parties to resolve their disputes in accordance with the Rules, whether or not it maintains an ODR platform.

Parties

“4. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

“5. ‘respondent’ means any party to whom the notice is directed.

“6. ‘neutral’ means an individual that assists the parties in settling the dispute and/or [renders an award or other decision regarding the dispute] [resolves the dispute] in accordance with the Rules.

Communication

“7. ‘communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

“8. ‘electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into a digital format so as to be directly processed by a computer or other electronic devices.

[“9. ‘writing’ means a data message containing information that is accessible so as to be useable for subsequent reference.”]

Remarks

General

20. The Working Group may wish to review the order of the definitions, which have been reorganized by theme (rather than strictly alphabetically) in order to

establish a consistent order among different language versions of the Rules, as requested by the Working Group in its twenty-fifth session (A/CN.9/744, para. 47).

Paragraph (6) “neutral”

21. The first bracketed option in paragraph (6), the definition of “neutral”, (previously paragraph (4)) has been modified slightly in order to reflect the language in Article 33(1) of the UNCITRAL Arbitration Rules, pursuant to the suggestion of the Working Group at its twenty-fifth session (A/CN.9/744, para. 53). The second bracketed option removes any reference to the words “award” or “decision”. The Working Group may wish to recall its discussion (A/CN.9/744, para. 54) to the effect that the purpose of this provision is to define the role of the neutral and not any determination he or she may make.

Paragraph (9) “writing”

22. At the twenty-fifth session of the Working Group, it was proposed that a definition for the word “writing” be added to the list of definitions, and reflect the language in Article 6 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/744, para. 59).

23. The word “writing” currently appears twice in the draft Rules, in draft article 9, paragraphs (2) and (4), as a requirement pertaining to the decision or award rendered by the neutral. The Working Group may also wish to consider whether, in light of the addition of this definition, the word “writing” should be inserted in relation to the agreement, in article 1, paragraph (1) bis. of the Rules.

24. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be submitted by electronic means via the ODR platform designated by the ODR provider.

“2. The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be [that][those]

Option 1: [set out in the notice of ODR (“the notice”), unless the claimant notifies the ODR provider otherwise].

Option 2: [notified by the claimant to the ODR provider when accepting the Rules [under article 1(3) above] and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable)].

“3. The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be

Option 1: [[that] [those] notified by the respondent to the ODR provider when accepting the Rules [under article 1(3) above] and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.]

Option 2: [the address[es] for the respondent which [has] [have] been provided by the claimant. Thereafter, the designated electronic address[es] of the respondent for the purpose of all communications arising under the Rules

[shall be [that] [those] which the respondent notified to the ODR provider when accepting the Rules [or any changes notified during the ODR proceedings and as updated to the ODR provider at any time thereafter during the ODR proceedings]].

“[4.

Option 1: The time of the receipt of an electronic communication under the Rules is the time when it becomes capable of being retrieved by the addressee of the communication [at the ODR platform] [[provided that the addressee has been notified thereof] [pursuant to paragraph (6) below]]. [An electronic communication is presumed to be capable of being retrieved when the addressee has been notified thereof in accordance with paragraph 6 below]. [The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.]

Option 2: A communication shall be deemed to have been received when, following submission to the ODR platform in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). [The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.]

“5. The ODR provider shall [promptly] [without delay] communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.

“6. The ODR provider shall [promptly] [without delay] notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”

Remarks

Paragraph (1)

25. The Working Group agreed at its twenty-fifth session that paragraph (1) would reflect the principle that all communications in the ODR process take place through the ODR platform (A/CN.9/744, paras. 62-63). Consequently, language throughout the Rules has been inserted in brackets to clarify that while the parties *communicate* [e.g., a notice] to the ODR provider, the process requires *submitting a communication to the ODR platform* (see by way of example draft article 4A, paragraph (1), below).

Paragraphs (2) and (3)

26. At its twenty-fifth session, the Working Group requested the Secretariat to prepare draft language to reflect different options with regard to draft article 3, paragraphs (2) and (3), for further consideration (A/CN.9/744, para. 71). Several considerations were suggested to be relevant in this respect: (i) the desire to avoid the potentially confusing use of the term “notice” before that term was formally defined in the Rules; (ii) the support for the proposition that the designated contact address for the parties should be the contact address provided at the time the parties

accepted the Rules; and (iii) the potential difficulty a claimant may face in the event a respondent's electronic address has changed in the period between the agreement to submit a dispute to ODR under the Rules, and the time of a dispute arising in practice, and where such change has not been communicated to the ODR provider.

27. Further to these considerations and the Working Group's request, the Secretariat has inserted square bracketed language in paragraph (2), as option 2, and paragraph (3), as option 1. These options are intended to address concerns that (a) any notice is directed in the first instance to an electronic address (or addresses) provided by the respondent at the time of acceptance of the Rules (assuming that acceptance of the Rules takes place at the time of transaction, and thus precedes the notice); and (b) the given electronic address or addresses remains consistent and up-to-date throughout the proceedings.

28. The Working Group may recall that both parties are required to provide their respective electronic addresses as a pre-condition for using the Rules (draft article 1(3)); an option in paragraph (3) permitting the claimant to provide an electronic address for the respondent in the notice (option 2) may be inconsistent with that provision, in circumstances where agreement to use the Rules has taken place at the time of the transaction.

29. In this regard, both paragraph (2) and paragraph (3) are closely linked with draft article 1, paragraphs (1) and (1) bis., in relation to the timing and nature of acceptance of the Rules, and to draft article 1, paragraph (3), which specifies that each party must provide its contact information as a condition to using the Rules.

Paragraph 4

Option 1

30. The Working Group remarked at its last session that paragraph (4), which as originally drafted reflected Article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (the "Electronic Communications Convention", or the "ECC"), should be re-drafted, bearing in mind the close relationship of this paragraph with paragraph (6), and moreover taking into account Article 2(5) of the UNCITRAL Arbitration Rules (A/CN.9/744, para. 73).

31. The Working Group may wish to recall that the ECC creates an explicit presumption that an electronic communication is capable of being retrieved when it reaches the addressee's electronic address (Article 10(2) ECC: *see also* A/CN.9/WG.III/WP.112, para. 26). As this presumption cannot be directly transposed to an ODR context, in which communications are submitted to the ODR platform rather than directly to an electronic address, pursuant to draft article 3, paragraph (1), the term "capable of being retrieved" may require some qualification or explanation; two options have been inserted in square brackets for the consideration of the Working Group in this respect, based on the relationship of this paragraph with paragraph (6).

32. The Working Group however may wish to consider that paragraph (4) is intended to govern the timing of receipt; in this respect, the Working Group may wish to consider whether timing should be based on an objective point of entry into an information system (i.e. at the moment it is submitted to the ODR platform), or

whether receipt should be deemed at the moment when a communication is “capable of being retrieved” by the recipient.

If the latter:

(i) and such capability is to be presumed when the ODR provider has notified the relevant parties of the availability of the communication on the platform, does receipt in fact take place at the time of notification by the ODR provider? (*See also option 2, set out in paragraphs 34-35 below*)

(ii) when is the presumption overturned? In situations where, for example, a (consumer) party is on holiday and does not check his or her e-mails for two weeks; or if a (consumer) party fails to update his e-mail address, and an old or inactive account is used as his contact address, is a communication sent to that address “capable of being retrieved”? Does the presumption hold notwithstanding these practical, possible scenarios? If there is ambiguity in relation to capability of receipt, then there is ambiguity regarding timing of receipt, in which case the ODR proceedings may experience disruption;

(iii) if ODR proceedings have not yet reached a stage where a neutral has been appointed, who determines whether the presumption that a communication is capable of receipt, has been overturned?

33. In response to a concern raised at its twenty-fifth session, the Working Group may wish to consider whether the final, bracketed sentence, in concert with the language in (currently bracketed) draft article 7, paragraph (5) (power of the neutral to make inquiries) is sufficient to address situations where a party — particularly a consumer respondent — has not been capable, for any number of reasons, of retrieving a communication from the platform.

Option 2

34. A suggestion was made at the last session to redraft paragraph (4) to reflect Article 2, paragraph (5) of the UNCITRAL Arbitration Rules.⁸ Consequently, option 2 has been inserted, which provides for “deemed receipt”, thus avoiding any notion of when a communication is “capable of being retrieved” including any presumption thereof. The proposed language deems receipt at the time the ODR provider notifies the parties that the relevant communication is available on the platform. Whilst a deemed receipt provision may transfer slightly more risk of non-receipt of communication to the parties, as compared to a presumptive receipt provision (because the presumption can be rebutted), it also may provide for more certainty of timing. However, the outcomes of option 1 and option 2 are not necessarily different: see paragraph 32(i) above.

35. Option 2 also currently provides, in brackets, for the discretionary power of the neutral to extend deadlines should the addressee show good cause for failure to retrieve that communication from the platform.

⁸ Article 2(5) of the UNCITRAL Arbitration Rules states: “A notice shall be deemed to have been received on the day it is delivered in accordance with paragraphs 2, 3 or 4, or attempted to be delivered in accordance with paragraph 4. A notice transmitted by electronic means is deemed to have been received on the day it is sent, except that a notice of arbitration so transmitted is only deemed to have been received on the day when it reaches the addressee’s electronic address.”

2. Commencement

36. Draft article 4A (Notice)

“1. The claimant shall [communicate to the ODR provider][submit to the ODR platform] a notice in accordance with the form contained in paragraph (4). The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

“2. [The notice shall then be communicated by the ODR provider to the respondent [promptly] [without delay].][The ODR provider shall [promptly][without delay] notify the respondent that the notice is available at the ODR platform.]

“3. ODR proceedings shall be deemed to commence on the date of [receipt by the ODR provider at] [submission to] the ODR platform of the notice referred to in paragraph (1).

“4. The notice shall include:

“(a) the name and designated electronic address of the claimant and of the claimant’s representative (if any) authorized to act for the claimant in the ODR proceedings;

“(b) the name and electronic addresses of the respondent and of the respondent’s representative (if any) known to the claimant;

“(c) the grounds on which the claim is made;

“(d) any solutions proposed to resolve the dispute;

“(e) a statement that the claimant agrees to participate in ODR proceedings [or, if applicable, a statement that the parties have an agreement to resort to ODR proceedings in case of any dispute arising between them].”

“(f) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;

“(g) the location of the claimant;

“[(h) the preferred language of proceedings;]

“(i) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods;

“[...]”

Remarks

General

37. The Working Group may wish to consider whether draft articles 4A and 4B, in relation to Commencement, should be moved to precede the current draft article 3, in relation to Communications, in order to promote a chronology in the Rules which more closely follows the presumed chronology of proceedings.

38. At its twenty-fifth session the Working Group agreed that draft article 4 should be split into separate articles, on notice and response respectively. In addition the

Working Group agreed to incorporate the contents of existing annexes by reflecting them as paragraphs in the respective articles (A/CN.9/744, para. 76). Thus the former Annex A is now included as draft article 4A, paragraph (4), and the former Annex B as draft article 4B, paragraph (3).

39. The Working Group may wish to recall its discussion and the suggestion of an approach using equitable principles, codes of conduct, uniform generic rules or sets of substantive provisions as the basis for deciding cases (A/CN.9/716, para. 101). The Working Group may wish to consider, further to A/CN.9/WG.III/WP.113, paragraphs 10-14, and A/CN.9/WG.III/WP.115, Section IV(B), the proposal that the Working Group adopt an approach of enumerating, in draft articles 4A, paragraph (4), and draft article 4B, paragraph (3), a list of possible claims, and responses thereto, to be included in the notice and response respectively.

40. Square-bracketed language has been inserted in the first paragraph of draft articles 4A and 4B respectively, should the Working Group wish to reflect the language of draft article 3, paragraph (1), which sets out that the notice and response are submitted in the first instance to the ODR platform (see e.g. para. 25, above).

Paragraph (2)

41. The Working Group may wish to consider whether the ODR provider will directly communicate the notice to the respondent, or whether the ODR provider will notify the respondent of the existence of the notice at the ODR platform. As the latter option may be more consistent with the form of communication set out in draft article 3, a second sentence has been inserted in brackets to provide for this option.

Paragraph (3)

42. The Working Group may wish to consider simplifying this paragraph in order that the timing is based on the time of receipt of the communication at the ODR platform, rather than the time of receipt by the ODR provider, which may be less transparent.

43. It was suggested to consider adding options for including separate definitions of commencement for each specific phase of the ODR proceedings — negotiation, facilitated settlement and arbitration (see A/CN.9/WG.III/WP.112, paras. 32-33).

Paragraph (4) (Formerly Annex A)

Paragraphs (4)(c) and (4)(d)

44. The Working Group may wish to consider whether draft paragraph (4) should enumerate the grounds on which claims can be made and the available remedies (A/CN.9/WG.III/WP.112, paragraph 36; see also A/CN.9/WG.III/WP.115, Section IV(B)). In a global cross-border environment for resolving low-value high-volume cases, it may be necessary to limit the types of cases to simple fact-based claims and basic remedies, to avoid the risk of overloading the system with complex cases, making it inefficient and expensive.

Paragraph (4)(f)

45. The Working Group may wish to note that, at its twenty-third session, it was suggested that paragraph (4)(f), together with a companion provision in draft article 4B, paragraph (3), could assist in preventing a multiplicity of proceedings relating to the same dispute (see A/CN.9/721, para. 122).

Paragraph (4)(h)

46. In the interest of promoting efficiency of proceedings, the Working Group may wish to consider requiring the parties to select a preferred language of the proceedings, in the event they wish to use a language different from that used in connection with the transaction in dispute (see A/CN.9/WG.III/WP.112/Add.1, paras. 20-25).

Paragraph (4)(i)

47. The Working Group may wish to recall its discussion that complex identification and authentication methods may not be necessary for the purposes of ODR, and that current UNCITRAL texts on electronic commerce already address methods of electronic signature that are reliable and appropriate for the purposes for which they were used (Article 7(2)(b) of UNCITRAL Model Law on Electronic Commerce; see A/CN.9/716, para. 49). The issue of identification and authentication of parties in ODR might be more appropriately dealt with in a document separate from the Rules such as guidelines and minimum standards for ODR providers. It should also be noted that the term “electronic signature” differs from “digital signature”. Electronic signature⁹ refers to any type of signature that functions to identify and authenticate the user including identity management.¹⁰

48. Draft article 4B (Response)

“1. The respondent shall [communicate to the ODR provider][submit to the ODR platform] a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

“[2.

[Option 1: The respondent may, in response to the notice [communicated by the claimant], [communicate][submit] a claim which arises out of the same

⁹ Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”. Digital signature generally uses cryptography technologies such as public key infrastructure (PKI), which require specific technology and means of implementation to be effective.

¹⁰ Identity management could be defined as a system of procedures, policies and technologies to manage the life cycle and entitlements of users and their electronic credentials. It was illustrated that verifying the identity of person or entity that sought remote access to a system, that authored an electronic communication, or that signed an electronic document was the domain of what had come to be called “identity management”. The functions of identity management are achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

transaction [or same factual circumstances] identified by the claimant in the notice [with the same ODR provider][to the ODR platform] ('counter-claim').] The counter-claim shall be [submitted][initiated] no later than [seven (7)] calendar days [after the notice of the first claim is [submitted to the ODR platform] [communicated to] [received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceedings together with the [first claim] [notice by the claimant].]"

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].]"

[Option 2: "The respondent may, in response to the notice, submit a counter-claim to the ODR platform. 'Counter-claim' means a[n independent] claim by the respondent against the claimant which arises out of the same transaction or same factual circumstances identified by the claimant in the notice [with the same ODR provider]]".] The counter-claim shall be [submitted][initiated] no later than [seven (7)] calendar days [after the notice of the first claim is [submitted to the ODR platform] [communicated to] [received by] the respondent]. [The counter-claim shall be dealt with in the ODR proceedings together with the [first claim] [notice by the claimant].

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].]"

"3. The response shall include:

"(a) the name and designated electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

"(b) a response to the statement and allegations contained in the notice;

"(c) any solutions proposed to resolve the dispute;

"[(d) a statement that the respondent agrees to participate in ODR proceedings];

"(e) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;

"(f) the location of the respondent;

"[(g) the preferred language of proceedings];

"(h) the signature of the respondent and/or the respondent's representative in electronic form including any other identification and authentication methods;

"[...]"

Remarks

General

49. As noted in paragraphs 25 and 40 above, the Working Group may wish to consider modifying slightly the language of this article in order that language of

submission of communications to the ODR platform is consistent throughout the Rules.

Paragraph (1)

50. At its twenty-fourth session, the Working Group agreed to retain the term “calendar” throughout the Rules (A/CN.9/739, para. 64). The Working Group may wish to note that UNCITRAL texts do not contain a definition of calendar days.¹¹

51. The Working Group may wish to recall its decision to provide in an additional document the recommendation that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own rules with regard to time so long as they are not inconsistent with the Rules (A/CN.9/721, para. 99). The Working Group may wish to consider whether these matters should be addressed in the Rules together with the relevant questions of how the period of time under the Rules should be calculated and whether the calculation should be left to the ODR provider and addressed in guidelines and minimum requirements for ODR providers.

Paragraph (2)

52. Draft article 4B, paragraph (2) (formerly draft article 4, paragraph (5)), reflects the Working Group’s decision to include a provision on counter-claims in the Rules (A/CN.9/739, para. 93).

53. At its twenty-fourth session, the Working Group requested that the Secretariat prepare a definition of counter-claim as an alternative to that proposed in option 1, and moreover to suggest where such a definition might be included in the Rules (A/CN.9/739, para. 93). Consequently, option 2 was inserted in brackets. The Working Group may wish to retain the stand-alone definition proposed in option 2 in this paragraph, or separately, in draft article 2 (Definitions).

54. The Working Group may wish to note that several questions arise in relation to counter-claims:

(a) Should the respondent file a new claim or include the counter-claim in the response? Can the response to the notice be presumed to encompass any counter-claim? Should this be made apparent to the claimant, for instance by way of the respondent indicating same by clicking a separate check-box? Will the neutral have the discretion to decide that a response encompasses or constitutes a counter-claim, in the absence of an express statement to that effect by the respondent? Should the counter-claim be in the form of an original claim as set out in article 4A, paragraph (4)?

(b) Will there be an option for the claimant to file a response to the counter-claim, or might the neutral have the discretion to request that the claimant do so?

¹¹ However, article 2(6) of the UNCITRAL Arbitration Rules, deals with extensions of time when the last day of a period of time is an official holiday or non-business day and provides that official holidays or non-business days occurring during the running of the period of time are included in calculating the time period.

(c) How will it be determined whether the counter-claim falls within the ambit of the initial claim in the notice by the claimant? (A/CN.9/739, para. 92). The Working Group may wish to consider the extent to which this question is addressed by draft article 7 and in particular paragraph (4) thereof (power of the neutral to rule on his own jurisdiction, including the existence or validity of the agreement to submit the dispute to ODR).

(d) Should the Rules or additional documents regulate the grounds for deciding whether a counter-claim falls within the ambit of the initial claim?

(e) Does the filing of a counter-claim prevent the respondent from filing a new claim on the same transaction and with a different ODR provider?

Paragraph (3)

55. Paragraph (3) addresses the content of the response to the notice and mirrors the provisions of draft article 4A, paragraph (4).

Paragraph (3)(a)

56. As with draft article 4A, paragraph (4), the issue of data protection or privacy and online security in the context of communicating information relating to the parties in the course of ODR proceedings should be taken into consideration (A/CN.9/721, para. 108).

Paragraphs (3)(b) and (3)(c)

57. Paragraphs (3)(b) and (c) mirror draft article 4A, paragraphs (4)(c) and (d). As with the counterpart provisions in draft article 4A, the Working Group may wish to consider whether draft article 4B, paragraph (3) should enumerate the responses to the statements, allegations and proposed solutions contained in the notice.

Paragraph (3)(d)

58. The Working Group may wish to consider whether this provision is necessary in light of the agreement required by both parties at the time of transaction (see above, paras. 12-14).

Paragraphs (3)(e)-(h)

59. Paragraphs (3)(e) to (h) mirror discussion in respect of draft article 4A, paragraphs 4(f) to (i), respectively.

(A/CN.9/WG.III/WP.117/Add.1) (Original: English)

Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-sixth session

ADDENDUM

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3. Negotiation**1. Draft article 5 (Negotiation and settlement)***[Negotiation]*

“1. *[Upon [submission][receipt] of the response [and, if applicable, counter-claim] [[to][on] the ODR platform][and notification thereof to the claimant] referred to in article [4B, paragraph[s] (1) and [(2)]]], the parties shall attempt to settle their dispute through direct negotiation including, where appropriate, through the communication methods available on the ODR platform.]*

“2. *If the respondent does not [communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3)] [respond to the notice] within seven (7) calendar days, it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the [next] [facilitated settlement [and arbitration]] stage[s], at which point the ODR provider shall [promptly] [without delay] proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).*

“3. *If the parties have not settled their dispute by negotiation within ten (10) calendar days of receipt of the response [by the ODR provider] [and notification thereof to the claimant], then the ODR proceedings shall automatically move to the [next] [facilitated settlement [and arbitration]] stage[s].*

“4. *The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days.*

[Settlement]

“5. If settlement is reached [during the negotiation stage][and/or at any other stage of the ODR proceedings], [the terms of such settlement shall be recorded on the ODR platform], [at which point,] [subject to article 5, paragraph (6),] the ODR proceedings will automatically terminate.

“[6. Where a party has failed to implement any settlement reached under paragraph (5) within [ten (10)] days of such settlement being agreed [and recorded on the ODR platform][the “long-stop date”], either party may [re-commence] [re-open] ODR proceedings [with the same ODR provider] [within fifteen (15) days of the long-stop date] to seek a [decision] [award] reflecting the terms of the settlement which [decision] [award] a neutral shall have the power to grant.]”

*Remarks**General*

2. The Secretariat has reordered draft article 5, taking into account the proposals of the Working Group and with a view to reflecting more clearly the probable chronology of negotiation and settlement. The Working Group may wish to consider including the provisional subheadings provided in this article in order to better distinguish between the negotiation and settlement phases, particularly if the Working Group is inclined to consider settlement as a process that could take place at any time during the proceedings, including at or during the facilitated settlement and/or arbitration stages (although see A/CN.9/744, para. 85).

3. The Working Group may wish to note that the negotiation stage can involve assisted negotiation, automated negotiation or both. In assisted negotiation, the parties endeavour to reach a settlement communicating by electronic means offered by the ODR provider. In automated negotiation, each party offers a solution, usually in monetary terms, for settlement of the dispute, which is not communicated to the other party. The software then compares the offers and aims to reach a settlement for the parties if the offers fall within a given range. The Rules may need to take into consideration the use of automated negotiation where it is the technology (software) that “negotiates” the settlement on the basis of proposals submitted by the parties. The Working Group may wish to consider whether the provisions on negotiation should include assisted negotiation and automated negotiation.

Paragraph (1)

4. At its twenty-fifth session, the Working Group requested the Secretariat to modify the drafting of paragraph (1) to take into account suggestions that the negotiation stage should be more clearly defined and furthermore that the Rules support implementation of negotiated settlements (A/CN.9/744, paras. 79-81). Consequently, paragraph (1) now addresses the timing and content of the negotiation stage. This paragraph formerly addressed the consequences of settlement (namely, termination of proceedings), which now appears as draft paragraph (5).

Paragraph (2)

5. The following suggested wording “[*communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3)*]” has been inserted as an alternative to “[*respond to the notice*]” in the interest of maintaining consistency with the requirements for the notice set out in article 4B, paragraph (4), and also in order to avoid ambiguity in relation to the timing of receipt.

6. The Working Group may wish to recall its decision that, following a failure to negotiate, the proceedings will move to the next stage automatically (A/CN.9/739, para. 97). In defining that next stage (the second set of square-bracketed language), the Working Group may wish to consider whether the three envisaged and specific phases of ODR proceedings — negotiation, facilitated settlement and arbitration — may require separate and distinct definitions of commencement (see A/CN.9/WG.III/WP.112, para. 33).

Paragraph (3)

7. Bracketed language has been included with the aim clarifying the timing of receipt of the response, and to maintain consistency with the other provisions in this article.

Paragraph (4)

8. It was suggested at the Working Group’s twenty-fifth session that limiting the time period during which an extension could be agreed would be preferable to facilitate efficient proceedings; ten days was agreed to be sufficient in this respect (A/CN.9/744, paras. 84, 86).

9. The Working Group may wish to consider whether the intent of this paragraph is to extend the deadline for filing a response (under draft article 4, paragraph (3)), or for reaching a settlement (under draft article 5, paragraph (5)). Although these options are not mutually exclusive, the Working Group may wish to recall its consensus that only one of these options should be included (A/CN.9/744, para. 85). There was some discussion regarding whether the paragraph should govern only the commencement of proceedings, and hence be applicable only to a response, or whether it should instead place some limitation on the capacity of the parties to negotiate through the ODR system by limiting the time in which they can reach settlement through such negotiation (without prejudice to their ability to negotiate outside the ODR system in any event).

Paragraph (5)

10. The Working Group may wish to recall the preference expressed for settlements to be clearly recorded on the ODR platform (A/CN.9/744, para. 90). The Working Group may wish to consider whether a settlement may be reached at any stage of ODR proceedings and the desirability of recording any such settlement on the ODR platform. Should the Working Group decide to adopt an approach whereby settlement may be reached at different points in the ODR proceedings, it may wish to consider whether settlement should be included in a separate draft article to distinguish it as distinct from the negotiation process.

11. The Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether these would require a separate provision providing for disputes arising out of the settlement.

Paragraph (6)

12. The Working Group may wish to recall its agreement that the purpose of this paragraph was to permit a party to re-commence proceedings for the sole purpose of obtaining an award or decision with which it could seek enforcement (A/CN.9/744, para. 90).

13. In particular the Working Group may wish to recall the following matters, raised at the twenty-fifth session, as being applicable to a provision on non-implementation (A/CN.9/744, para. 90): (i) the relationship between this paragraph and (the current) paragraph (5) in relation to settlement; (ii) that short time periods for implementation of settlement and/or re-commencement could encourage compliance on the part of a defaulting party; (iii) that the phrase “re-open” better captures the intent of the paragraph than “re-commence”, as the intention was not to begin ODR proceedings afresh from the claim/notice stage; (iv) the possibility for forum shopping between ODR providers if it was not made clear in the paragraph that the same ODR provider must be used; and (v) the need to have settlements clearly recorded on the ODR platform.

14. The Working Group may also wish to consider the practicalities of re-opening proceedings and whether the Rules ought to clarify issues such as (i) whether a new neutral would be appointed to replace any neutral that had previously been acting, or whether the previous neutral would be expected to re-commence his or her duties; and (ii) whether reference should be made to draft article 9 in order to clarify the timelines of the rendering of any award or decision.

15. Bracketed language has been inserted in the event the Working Group wishes to consider whether a deadline should be imposed on the party seeking to re-open proceedings following an alleged non-implementation of a settlement agreement.

4. Neutral

16. Draft article 6 (Appointment of neutral)

“1. The ODR provider through the ODR platform shall appoint the neutral by selection from a list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions]. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment.

[“2. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceedings to be conducted and completed expeditiously in accordance with the Rules.]

“3. The neutral shall declare his or her independence and shall disclose to the ODR provider any circumstances [arising at any time during the ODR proceedings] likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.

“4. Either party may object to the neutral’s appointment within [two (2)] calendar days of [(i)]the notice of appointment [without giving reasons therefor] [; or (ii) a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, [so long as that party sets out the fact or matter giving rise to such doubts,] at any time during the ODR proceedings].

“4 bis. Where a party objects to the appointment of a neutral, that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment [under [(i)/[(i) or (ii)]] above, following which the appointment of a neutral by the ODR provider will be final[, subject to article 4(ii) above]. [Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment becomes final, subject to (ii) above.]

“5. Either party may object, within three (3) calendar days from the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage [except in the situation to which article 5(6) applies]. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.

“6. If the neutral has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform will appoint a neutral to replace him or her and will inform the parties [promptly][without delay]. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

“7. The number of neutrals shall be one unless the parties otherwise agree.”

Remarks

Paragraph (1)

17. It was suggested that the bracketed language at the end of the first sentence be included in order to accommodate access to a wider range of neutrals, including neutrals from arbitral institutions (A/CN.9/744, para. 103).

18. The Working Group may wish to note that the second sentence has been moved from the original paragraph (4) (now paragraph (5)) in order to clarify the chronology of communication of a neutral’s appointment to the parties.

Paragraph (2)

19. Draft article 6, paragraph (2) has been moved from draft article 7, paragraph (1), following the determination of the Working Group that this paragraph was more closely related to the appointment of the neutral (A/CN.9/744, para. 104).

Paragraph (3)

20. The Working Group may wish to recall the suggestion that the neutral’s duty of independence and impartiality be drafted as an ongoing one (A/CN.9/744, para. 92). This duty is also reflected in the current draft article 7, paragraph (1) bis.

Paragraphs (4) and (4) bis.

21. At its twenty-fifth session, the Working Group requested the Secretariat to draft a separate provision in draft article 6 permitting a party to object to the appointment of a neutral at any stage of proceedings where there was a justification for such objection (A/CN.9/744, para. 94). Consequently, the former paragraph (3) has been split into two paragraphs, (4) and (4) bis., to differentiate between the right of a party to object to the appointment of a neutral at any time, and the consequences of such objection.

22. The Working Group may wish to note that the current bracketed language in paragraph (4) permits a party to object to an appointed neutral two days after a fact or matter comes to its attention providing it with a justification for such an objection, albeit at any time during the ODR proceedings. The Working Group may wish to consider (i) whether the objecting party would need to furnish an objective justification for such a fact or matter (see A/CN.9/744, para. 94, as well as the ongoing duty to self-report required by the neutral in draft article 6, paragraph (3)); and (ii) whether the existing neutral would be competent to rule on his own competence in respect of such a challenge (bearing in mind the current competence-competence provision in article 7(4)).

23. The Working Group may wish to consider whether the maximum number of challenges (currently expressed as three) should apply to both the original appointment of a neutral (in respect of whom the parties need show no good cause for their objection), as well as to a replacement neutral appointed further to a party showing an objective justification for such objection. The current bracketed drafting provides the option for the maximum number of challenges to apply in relation to the former situation only, or in both cases.

Paragraph (5)

24. Paragraph (5) (previously paragraph (4)) has been amended to reflect the principle that within a three-day period the parties may object to the provision of information to the neutral, but that after the expiration of that period the full set of information would be conveyed to the neutral (A/CN.9/744, para. 97).

Paragraph (7)

25. At its twenty-fifth session, the Working Group agreed to retain this paragraph as drafted, given that it provided clarity while also permitting a certain degree of flexibility (A/CN.9/744, paras. 101-102).

26. The Working Group may wish to consider whether moving this paragraph to follow paragraph (1) might create a more logical chronology.

27. Draft article 7 (Power of the neutral)

["1. Subject to the Rules [and the Guidelines and Minimum Requirements for ODR Neutrals], the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.

"1 bis. The neutral, in exercising his or her [discretion] [functions under the Rules], shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the

dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.]

“2. Subject to any objections under article 6, paragraph (5), the neutral shall conduct the ODR proceedings on the basis of documents filed by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.

“3. At any time during the proceedings the neutral may [require][request] or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.

“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, a dispute settlement clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A [decision] [award] by the neutral that the contract is null shall not automatically entail the invalidity of the dispute settlement clause.

“[5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules;

(i) [as to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself with regard to such receipt, and in doing may where necessary extend any time period provided for in the Rules.]]”

Remarks

Paragraphs (1) and (1) bis.

28. This paragraph (formerly paragraph (2)) has been split into paragraphs (1) and (1) bis. and slightly reorganized in order more clearly to characterize (i) the functions of the neutral; and (ii) the neutral's broad discretion to conduct the ODR proceedings as he or she sees appropriate, subject to certain constraints (see A/CN.9/744, para. 105).

29. The Working Group may wish to consider whether a document to be prepared in relation to guidelines and minimum requirements for neutrals (see A/CN.9/WG.III/WP.114) should be explicitly incorporated into paragraph (1) as a standard to which the neutral is subject in his or her conduct of proceedings.

30. Whilst the wording of paragraph (1) bis. mirrors the wording of Article 17 of the UNCITRAL Arbitration Rules, the Working Group may also wish to consider

whether the word “function” would be more consistent with the wording previously used in article 6(6) of the Rules.

Paragraph (2)

31. The Working Group may wish to recall its agreement that this paragraph should be subject to the ability of a party to object to the provision by the ODR provider to the neutral of information generated during the negotiation stage of ODR proceedings (A/CN.9/744, para. 108).

Paragraph (3)

32. This paragraph has been modified slightly to reflect the Working Group’s concerns that the “burden of proof” concept should be retained in the Rules but, as a substantive legal principle with legal consequences and obligations, should be relocated (A/CN.9/744, paras. 110-112). Consequently the provision on burden of proof has been relocated to draft article 9, paragraph (6) below.

33. Furthermore the Working Group may wish to recall that it considered modifying slightly the powers of the neutral in order to allow the neutral to request, but not to require, the parties to provide additional information (A/CN.9/744, para. 109).

Paragraph (5)

34. The Working Group may wish to recall its request to the Secretariat to redraft this paragraph (previously paragraph (6)) in order (i) to oblige the neutral to conduct enquiries where any doubt existed regarding receipt of the notice, and (ii) to give the neutral the discretion to do so regarding all other communications (A/CN.9/744, paras. 115-117). Square bracketed language has been inserted to reflect this request.

5. [Facilitated settlement and arbitration]

35. Draft article 8 (Facilitated settlement)

“1. The neutral shall evaluate the dispute based on the information submitted and shall communicate with the parties to attempt to reach an agreement. If the parties reach [an agreement][a settlement], then [such settlement shall be recorded on the ODR platform], [at which point,][subject to article 5, paragraph (6),] the ODR proceedings will automatically terminate.

“1 bis. If the parties do not reach [an agreement][a settlement] within ten (10) calendar days, [the parties shall have the option to move to the next [stage[s]] of the ODR proceedings] [the neutral shall render a [decision] [award] pursuant to article 9].

“[2. If, as a consequence of his or her involvement in the facilitation of settlement, any neutral develops doubts as to his or her ability to remain impartial or independent in the future course of the ODR proceedings under article 9, that neutral shall resign and inform the parties and the ODR provider accordingly.]”

*Remarks**General*

36. The word “settlement” has been included in square brackets as an alternative to “agreement” as it may be considered more consistent with the language in draft article 5.

Paragraph (1)

37. Paragraph (1) has been split into two paragraphs to more clearly express the chronology of facilitated settlement, and of failure to reach a facilitated settlement.

38. Square-bracketed language has been inserted in paragraph (1) to reflect the settlement language in draft article 5, paragraph (5). The Working Group may wish to consider whether another option might be to simply note that, if settlement is achieved, the provisions on settlement in draft article 5, paragraphs (5) and (6) will apply.

39. In particular, the Working Group may also wish to consider whether a provision in respect of a failure to implement a settlement, parallel to that in article 5, paragraph (6) should apply to any settlement arising out of a facilitated settlement stage.

Paragraph (1) bis.

40. Paragraph (1) bis. is closely linked to draft article 1, regarding the staged nature of ODR proceedings, as well as to the mechanism in draft article 5, paragraphs (2) and (3), regarding the transition from negotiation to the next stage of arbitration proceedings.

41. The Working Group may wish to recall that this paragraph is intended to determine whether, after the failure of facilitated settlement, the parties should have the option to determine whether proceedings move to the final stage, or whether this progression to an award or decision would be automatic (A/CN.9/744, para. 121).

42. The Working Group may wish to recall that there was some support for the need for an agreement or additional requirement to move to the next stage of proceedings, on the basis that the timing of such agreement would amount to a post-dispute agreement to arbitrate (A/CN.9/744, para. 123; see also paragraph 14 of WP.117 regarding the desirability of requiring a confirmation at this stage). Moreover, the Working Group may wish to consider whether the automatic rendering of an award or decision at this stage may blur the line between the facilitated settlement stage and the arbitration stage, with consequential difficulties for providing a “confirmatory” agreement to enter into an arbitration stage of proceedings.

Paragraph (2)

43. The Working Group may wish to consider whether paragraph (2) is suitable to be included in draft article 8, or whether would be better suited in draft article 6, and in particular paragraph (3).

6. Decision by the neutral

44. Draft article 9 ([Issuing of] [Communication of] [decision] [award])

“1. The neutral shall render a [decision] [award] [promptly][without delay] and in any event within seven (7) calendar days [with possible extension of additional seven (7) calendar days] after the parties make their final submissions to the neutral. The ODR provider shall communicate the [decision] [award] to the parties. Failure to adhere to this time limit shall not constitute a basis for challenging the [decision] [award].

“2. The [decision] [award] shall be made in writing and signed by the neutral, and shall contain the date on which it was made [and brief grounds for the [decision] [award]].

“[3. The [decision] [award] shall be final and binding on the parties. The parties shall [promptly] carry out the [decision] [award] without delay.]

“4. Within [five (5)] calendar days after the receipt of the [decision] [award], a party, with notice to the other party, may request the neutral to correct in the [decision] [award] any error in computation, any clerical or typographical error, [or any error or omission of a similar nature]. If the neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefore] within [two (2)] calendar days of receipt of the request. Such corrections [shall be in writing and] shall form part of the [decision] [award].

“5. In all cases, the neutral shall decide in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction].”

[“6. Each party shall have the burden of proving the facts relied on to support its claim or defence.]

Remarks

Paragraph (1)

45. The Working Group may wish to consider whether the Rules provide sufficiently for a link between facilitated settlement and the decision stage, and furthermore whether there is sufficient guidance in the Rules in relation to the timeframe in which parties must make submissions (including “final submissions”) to the neutral.

46. The Working Group may wish to deliberate on what happens in the event that a neutral fails to render a decision within the time provided in the paragraph (A/CN.9/739, para. 133) as well as to consider the suggestion to impose reputation-based penalties on ODR parties defaulting on their obligations (A/CN.9/739, para. 136).

Paragraph (2)

47. The Working Group may wish to address the question whether a neutral needs to provide grounds for his or her decision (A/CN.9/739, para. 137).

48. The requirement for the decision or award to be in writing and signed by the neutral reflects the language in Article 31(1) of the Model Law on Arbitration.

Paragraph (4)

49. The Working Group may wish to address the question whether a neutral needs to provide grounds for his or her correction to the decision (A/CN.9/739, para. 139).

Paragraph (5)

50. The Working Group may wish to note that, as paragraph (5) relates to substantive legal principles for resolving disputes, it was suggested to delete it from draft article 9 and to include it elsewhere (A/CN.9/739, para. 141). The Working Group may also wish to note that this issue is discussed in A/CN.9/WG.III/WP.113. The Working Group may wish to consider relocating this paragraph, as well as the subsequent paragraph regarding burden of proof, into a separate annex or document in relation to substantive legal principles/guidelines for neutral's resolution of ODR disputes.

Paragraph (6)

51. The Working Group may wish to note that, as paragraph (6) (formerly draft article 7, paragraph (4)) relates to substantive legal principles for resolving disputes, it was suggested that this paragraph be moved from draft article 7 and included elsewhere in the Rules (A/CN.9/744, para. 112).

52. The Working Group may wish to consider whether such a provision is required in the Rules. The Working Group may also wish to recall the concern expressed that the current formulation of this paragraph did not reflect the varying concepts of burden of proof in consumer cases in different jurisdictions (A/CN.9/744, para. 111).

7. Other provisions

53. Draft article 10 (Language of proceedings)

“[The ODR proceedings shall be conducted in the language used in connection with the transaction in dispute, [unless another language is agreed upon by the parties] [unless the neutral decides otherwise]. [In the event the parties do not agree on the language of proceedings, the language of proceedings shall be determined by the neutral.]]”

Remarks

54. The Working Group may wish to note that in some situations, the language used in connection with a transaction may be different for the seller and buyer, depending on their respective locations. For instance, a seller may access a selling website in one language while the website automatically changes to another language depending on the buyer's Internet protocol (IP) address, which reflects his location and the language commonly used there. In such a case, identifying the “language used in connection with the transaction” could be problematic.

55. In addition, a common argument against choosing the language of the transaction as the language of proceedings is that the level of understanding of a

language needed to conclude a transaction may differ from that needed when making a claim. Technology may assist parties in overcoming such language issues, making it possible for users to submit a claim while having little understanding of the language of the ODR platform. However, it should be borne in mind that a given ODR platform may not have the capacity to provide such technology-based services, and may not be able to accommodate the full range of languages.

56. In order to facilitate agreement on the language of proceedings, the Working Group may wish to provide for selection of language by the parties in annexes A and B of draft article 4 (see A/CN.9/WG.III/WP.112, para. 38).

57. Draft article 10 reflects the suggestion made by the Working Group that, where the parties have failed to reach an agreement on the language of proceedings, this matter could be left to the discretion of the neutral (A/CN.9/716, para. 105). In that case, the Working Group may wish to consider how the language of proceedings is to be determined prior to the involvement of the neutral and on what grounds the neutral will decide on the language of proceedings.

58. The Working Group may also wish to note that in cases where the neutral needs to review supporting documentation submitted by the parties, the ODR provider may need to appoint a neutral who has understanding of the relevant language(s).

59. A proposal was made to include a separate paragraph along the following lines (A/CN.9/739, para. 143): “*An ODR provider dealing with parties using different languages shall ensure that its system, Rules and neutrals are sensitive to these differences and shall put in place mechanisms to address the needs of parties in this regard*”. The Working Group may wish to consider whether such a reference is more appropriately placed in guidelines and minimum requirements for ODR providers.

60. Draft article 11 (Representation)

“A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider.”

61. Draft article 12 (Exclusion of liability)

“[Save for intentional wrongdoing or gross negligence, neither the neutral nor the ODR provider shall be liable to the parties for any act or omission in connection with any ODR proceedings under the Rules.]”

Remarks

62. Draft article 12 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It mirrors article 16 of the UNCITRAL Arbitration Rules, with necessary adjustments.

63. Draft article 13 (Costs)

“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”

Remarks

64. The term “costs” refers to an order by a neutral for the payment of money from one party (usually the losing party) to another (usually the successful party) in compensation for the successful party’s expenses in bringing its case.

65. The Working Group may wish to consider, in the event the claimant is successful in ODR proceedings where the neutral is involved, whether his or her filing fee should be paid by the unsuccessful party.

C. Report of the Working Group on Online Dispute Resolution on the work of its twenty-seventh session (New York, 20-24 May 2013)

(A/CN.9/769)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution relating to cross-border electronic commerce transactions.

2. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission reaffirmed the mandate of Working Group III relating to cross-border electronic transactions, including B2B and B2C transactions.¹ At that session the Commission decided *inter alia* at that, while the Working Group should be free to interpret that mandate as covering consumer-to-consumer transactions and to elaborate possible rules governing consumer-to-consumer relationships where necessary, it should be particularly mindful of the need not to displace consumer protection legislation.²

3. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission reaffirmed the mandate of the Working Group in respect of low-value, high-volume cross-border electronic transactions, and the Working Group was encouraged to

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 218.

² *Ibid.*, para. 218.

continue to explore a range of means of ensuring that online dispute resolution outcomes were effectively implemented, and to continue to conduct its work in the most efficient manner possible.³ It was further agreed that the Working Group should consider and report back at a future session of the Commission on how the draft rules would respond to the needs of developing countries and those facing post-conflict situations, in particular with regard to the need for an arbitration phase to be part of the process; and that the Working Group should continue to include in its deliberations the effects of online dispute resolution on consumer protection in developing and developed countries and countries in post-conflict situations.⁴

4. The most recent compilation of historical references regarding the consideration by the Commission of the work of the Working Group can be found in document A/CN.9/WG.III/WP.118, paragraphs 5-14.

II. Organization of the session

5. Working Group III (Online Dispute Resolution), which was composed of all States members of the Commission, held its twenty-seventh session in New York, from 20 to 24 May 2013. The session was attended by representatives of the following States members of the Working Group: Algeria, Bolivia (Plurinational State of), Brazil, Bulgaria, Canada, Chile, China, Colombia, Croatia, Czech Republic, Egypt, El Salvador, France, Germany, Greece, Honduras, India, Israel, Italy, Japan, Malta, Mexico, Nigeria, Philippines, Republic of Korea, Russian Federation, Singapore, Spain, Thailand, Turkey, Ukraine, United States of America, Venezuela (Bolivarian Republic of).

6. The session was also attended by observers from the following States: Belarus, Democratic Republic of Congo, Hungary, Indonesia, Ireland, Netherlands, Oman, Panama, Qatar, Somalia, Tunisia.

7. The session was also attended by observers from the European Union.

8. The session was also attended by observers from the following international non-governmental organizations: American Bar Association (ABA), American National Standards Institute (ANSI), Asia Pacific Regional Arbitration Group (APRAG), Center for International Legal Education (CILE), Centre de Recherche en Droit Public (CRPD), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration C.I.C. (FICACIC), Institute of Commercial Law (Penn State Dickinson School of Law), Institute of International Commercial Law (IICL), Instituto Latinoamericano de Comercio Electrónico (ILCE), Internet Bar Organization (IBO), Maritime Organisation of West and Central Africa (MOWCA), Moot Alumni Association (MAA), New York State Bar Association (NYSBA), Regional Centre for International Commercial Arbitration — Lagos (RCICA), National Center for Technology and Dispute Resolution (NCTDR), Union Internationale des Avocats (UIA).

³ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 79.

⁴ Ibid., para. 79.

9. The Working Group elected the following officers:
Chairman: Mr. Soo-geun OH (Republic of Korea)
Rapporteur: Ms. Rosario Elena A. LABORTE-CUEVAS (Philippines)
10. The Working Group had before it the following documents:
 - (a) Annotated provisional agenda (A/CN.9/WG.III/WP.118);
 - (b) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules (A/CN.9/WG.III/WP.119 and Add.1);
 - (c) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: timelines (A/CN.9/WG.III/WP.120);
 - (d) A note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: further issues for consideration in the conception of a global ODR framework (A/CN.9/WG.III/WP.113);
 - (e) A proposal by the Government of Canada on principles applicable to Online Dispute Resolution providers and neutrals (A/CN.9/WG.III/WP.114); and
 - (f) Note submitted by the Center for International Legal Education (CILE) on Analysis and Proposal for Incorporation of Substantive Principles for ODR Claims and Relief into Article 4 of the Draft Procedural Rules (A/CN.9/WG.III/WP.115).
11. The Working Group adopted the following agenda:
 1. Opening of the session.
 2. Election of officers.
 3. Adoption of the agenda.
 4. Consideration of online dispute resolution for cross-border electronic transactions: draft procedural rules.
 5. Other business.
 6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group resumed its work on agenda item 4 on the basis of notes prepared by the Secretariat (A/CN.9/WG.III/WP.119 and its addendum, and A/CN.9/WG.III/WP.120). The deliberations and decisions of the Working Group with respect to this item are reflected in chapter IV. The deliberations of the Working Group on other business are reflected in chapter V.
13. At the closing of its deliberations, the Working Group requested the Secretariat to prepare (i) a revised draft of procedural rules for online dispute resolution for cross-border electronic transactions; and (ii) a paper setting out an overview of existing private enforcement mechanisms.

IV. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. Proposals to resolve outstanding substantive issues on the draft procedural rules for online dispute resolution for cross-border electronic transactions

14. It was recalled that at the beginning of its twenty-sixth session, the Working Group engaged in extensive informal consultations in an attempt to reach understanding on certain key issues, namely, to address how the draft procedural rules for online dispute resolution for cross-border electronic transactions (“the Rules”) could accommodate an approach to online dispute resolution (“ODR”) embodying an arbitration stage as well as an approach without such a stage.⁵

15. It was furthermore recalled that those informal consultations had resulted in a proposal, appended as an Annex to document A/CN.9/762, for the development of a “two-track system”, one track of which ended in arbitration, and one that did not.

16. At its twenty-seventh session, a number of delegations reiterated that the Working Group needed to devise a global system for online dispute resolution accommodating both jurisdictions that provided for pre-dispute arbitration agreements to be binding on consumers, and jurisdictions that did not.

B2B-only proposal

17. Some delegations stated that one possible way forward would be first to consider a set of Rules that would be applicable to business-to-business (“B2B”) disputes only, with a view to moving to deliberations of the issues raised by business-to-consumer (“B2C”) disputes at a later time. It was recalled that the mandate of the Working Group was in relation to both B2B and B2C low-value, high-volume disputes, but that the Commission had given a mandate to the Working Group to consider different approaches than a single set of procedural rules.

18. A B2B-only proposal was said to have the advantages of permitting the Working Group to avoid the complex consumer protection issues that it was said had divided the Working Group and to facilitate a more expeditious consideration of the Rules.

19. In relation to the suggestion that proceeding on a B2B-only basis would help the Working Group reach consensus, it was said that whilst this might be a viable preliminary means of moving forward, the Working Group should not lose sight of its mandate in relation to low-value, high-volume disputes.

20. It was also said that the Working Group should be mindful that most disputes falling into a low-value, high-volume category would involve consumers and that limiting the Rules to B2B transactions only at this stage would thus not address the majority of the transactions intended to be addressed by the Rules. It was also said that the work of the Working Group to date, as well as the knowledge on consumer protection issues accrued, might be lost should B2C transactions be excluded from discussions.

⁵ See A/CN.9/762, paras. 13 and 18.

Two-track implementation proposal

21. Other delegations proposed a two-track system whereby merchants, at the time of the transaction, would generate two different online dispute resolution clauses, depending on the jurisdiction and status (business or consumer) of the purchaser. Under that proposal, consumers from jurisdictions (so-called “Group I” States) in which pre-dispute agreements to arbitrate were not binding on them, would, at the transaction stage, be presented with a dispute resolution agreement providing for ODR with a non-binding result. Consumers from jurisdictions in which pre-dispute agreements to arbitrate were binding on them, and business purchasers, would be presented with a dispute resolution agreement providing for ODR ending in an arbitration stage, in the event that an online merchant intended to offer Track II of the Rules.

22. It was said that such a process would require the seller to gather two pieces of information: (a) the shipping or billing address of the buyer, to identify that purchaser’s jurisdiction; and (b) whether the purchase was for private or professional purposes, to identify whether the purchaser was a consumer. Using this data, the seller’s website would automatically direct the purchaser to the correct ODR track.

23. That proposal would furthermore require an Annex to the Rules to identify “Group I” and non-Group I jurisdictions, to provide information to the seller to appropriately direct consumers from the relevant jurisdiction down the relevant track. It was said that for this system to work, a definition of “consumer” would need to be added to the Rules. It was suggested that consumers from Group I countries could agree to arbitrate post-dispute. It was said that such a proposal was technically simple to implement and provided interoperability with regional systems.

24. In response to that proposal it was said, first, that such a proposal would require the Working Group to revisit one of the fundamental areas on which the Working Group had achieved consensus, namely the inadvisability of defining “consumer” in an international text; and second, the issue (set out in paragraph 23 above) of devising an Annex purporting to decide for States which rules would apply to that State’s consumers was not for the Working Group to decide, and nor was it for States to provide that kind of submission or update it. It was said that should States fail to provide such information, for example, then those States would simply not be able to be included in such an Annex and it would create serious implementation problems in relation to the Rules.

25. It was furthermore said that although the Working Group may be able to devise a definition of consumer, the application of the definition, when it applies, to whom it applies and who applies that definition would remain unresolved. In relation to listing States in an Annex by reference to their consumer protection laws, it was said that such a list would be problematic given the wide variety and non-uniformity of provisions even in “Group I” jurisdictions in relation to pre-dispute arbitration agreements. For these reasons it was said that resolving basic rules in a B2B context as a preliminary step was desirable, and that complex questions relating to consumers could be addressed at a later stage.

26. It was furthermore stated that for common law jurisdictions, where case law and public policy can evolve rapidly, such an Annex would be of little utility and might be misleading.

27. It was also suggested by other delegations that the application of the two-track system should not be determined by reference to the jurisdiction and status (i.e., business or consumer) of the purchasers at the time of transaction. Otherwise, in practice, the development of online transactions would be hindered.

28. Delegations supporting the proposal set out in paragraphs 21-23 above stated in response that the definition of consumer appears in other international instruments, such as the Hague Convention on Choice of Court Agreements, and the Working Group could take cognisance of those definitions, bearing in mind that such a definition would not necessarily be congruent with the definition of consumer in all States. It was also said that countries could proactively opt-in to inclusion on a “Group I” list.

29. The view was also expressed that the proposal would be inconsistent with the structure and proper interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, therefore undermining existing international arbitration practice.

Decision

30. After discussion, it was determined that there had not been a preponderance of views to discard the two-track system in favour of a B2B-only set of Rules as a preliminary stage.

Two-track implementation proposal

31. A proposal was submitted for further consideration in relation to specific language to be included in Track I, draft article 1, and Track 1, draft article 2 in order to implement the proposal set out in paragraphs 21-23 above. It was said that that language was provided to facilitate discussions in relation to ensuring that consumers from certain jurisdictions would not be subject to an arbitration track of the Rules, but rather only to the presumptive “Track II” resulting in a non-arbitral stage of proceedings.

32. That proposal would insert:

(a) In article 1 of Track I of the Rules, a paragraph 1(a) that would read as follows: “*1a. These Rules shall not apply where one party to the transaction is a consumer from a State listed in Annex X, unless the Rules are agreed after the dispute has arisen.*”

(b) In article 2 of Track I of the Rules, a paragraph 5(a) as follows: “*5a. ‘consumer’ means a natural person who is acting primarily for personal, family or household purposes.*”

33. The reason for the proposal was said to be to ensure that a purchaser, where he or she was a consumer, was directed to the correct track of the Rules at the time of transaction. It was said that that would be accomplished by a party identifying, first, whether he or she was from a State which did not regard pre-dispute agreements to arbitrate as binding on consumers and, second, whether he or she was a consumer.

34. A further aspect of the proposal would be to include an Annex comprising a list of jurisdictions, which would opt in to inclusion on that list in order to exclude the application of Track I of the Rules to consumers in those jurisdictions (pursuant to draft article 1a of that proposal, set out in para. 26 above).

35. It was suggested that such an approach would be easy to implement in that it relied on purchasers to provide two simple pieces of information, namely their shipping or billing address and whether they were a consumer, and that that data, coupled with reference to the list of countries in the proposed Annex, would enable a vendor's website to automatically offer the appropriate dispute resolution clause to the prospective purchaser.

36. Several delegations indicated that the proposal was helpful as a way forward, and expressed the view that while the approach proposed was not a perfect one it could effectively direct purchasers to the appropriate ODR track in a significant percentage of cases at the time of transaction. It was also stated that, though there may be a risk that certain purchasers could be directed to the wrong track, the proposal addressed a perceived greater risk, namely that consumers could find themselves in a track involving arbitration which they did not intend to take and which was inappropriate in view of their jurisdictions' consumer protections laws.

37. In relation to issues requiring further consideration, it was said that party autonomy could be compromised by such an approach, and in particular it was questioned whether UNCITRAL should as a matter of policy, or could legally, adopt Rules that self-proclaim they are inapplicable to certain States or parties as such, as proposed article 1(a) would purport to do.

38. It was also said that the definition of the term "consumer" in that proposal required additional review. On the one hand, it was said that the proposed definition encapsulated the essence of the definition of consumer in many jurisdictions, and provided an accurate filter for a large percentage of consumers. On the other hand, delegations expressed concern that such a definition risked miscategorizing too many consumers and/or was inconsistent with many national definitions.

39. Concerns were also expressed in relation to the requirement inherent in that proposal for consumers to self-identify as consumers at the time of transaction. It was said that such self-categorization might provide too much scope for consumers, whether intentionally or mistakenly, to characterize their status incorrectly. In response to that concern, it was said that whilst such mischaracterizations were possible and even likely, self-categorization was not difficult, and existed already in relation to certain online and offline transactions.

40. In relation to the proposed Annex, questions were raised regarding who would maintain the list of jurisdictions, and what the consequence would be where a jurisdiction was added to the list after a consumer from that jurisdiction had already entered into an agreement specifying Track I.

41. It was also stated that such a proposal, which required the provision of data from consumers, such as self-characterization as well as their billing or shipping address, would be very difficult to implement in practice, particularly for merchants where huge volumes of Internet transactions took place on a daily basis and where flash sales, for example, were very popular and necessarily took little time for the purchaser to undertake.

42. Various delegations also stated that while the proposal provided a positive compromise solution on its face, further consultation was needed and it was necessary to obtain further instructions. An objection was also made by one delegation that the proposal contravened its public policy.

43. Further to the discussion on that proposal, it was determined that the proposal had received sufficient support to be considered as a basis for future discussion, and that although delegations had expressed reservations, the proposal was to be commended insofar as it had sought in concrete terms to implement the two-track system. It was agreed that all components of the proposal would be put in square brackets for further consideration and that the concerns raised in relation to the proposal would need to be further addressed.

44. The Working Group proceeded to discuss the draft Rules as contained in document A/CN.9/WG.III/WP.119/Add.1, commencing with draft article 8 (Facilitated settlement).

B. Consideration of outstanding substantive issues on the draft procedural rules for online dispute resolution for cross-border electronic transactions

1. Draft article 8 (Facilitated settlement)

45. The Working Group considered draft article 8 as contained in paragraph 37 of document A/CN.9/WG.III/WP.119/Add.1.

General

46. A suggestion was made to include in the relevant paragraphs of draft article 8 a notification to the parties when the ODR proceedings moved from one stage of proceedings to the next; in the draft Rules the words “automatically move” (e.g., to the next stage of proceedings) were said not to provide sufficient notice to the parties.

47. It was agreed that a provision would be added into draft article 3 to provide for such a notification and a mandate was given to the Secretariat to draft appropriate language in that respect.

48. It was said in that respect that the word “automatically” should be reconsidered specifically in relation to paragraph (2) of article 8 as it related to Track I, which dealt with the transition from a facilitated settlement stage to an arbitration stage of proceedings. In response, a proposal was made to insert, at the end of paragraph (2) (Track I), the following language: “, and the provider shall promptly notify the parties that they have moved from the consensual stage of the proceedings to the binding arbitration stage.”

49. It was clarified that the purpose of the word “automatically” was to prevent the need for any intervention by the neutral or the parties to trigger the next phase of proceedings. Several delegations expressed support for retaining the word “automatically” to preserve that meaning. A proposal to replace the word “automatically” with the phrase “without the intervention of the parties or neutral” was not supported, and was said to unnecessarily complicate the drafting. Another

suggestion was made to delete the word “automatically”, as it was not necessary to convey the meaning of the sentence, namely that no further action was needed to move to the arbitration stage of proceedings.

50. After discussion it was agreed to delete the word “automatically” from article 8(2) (Track II), and to insert the language proposed in paragraph 48 above, with any modifications the Secretariat may deem necessary to maintain consistency with other provisions.

Paragraph (1)

51. Two issues were discussed in relation to paragraph (1). First, it was queried whether the facilitated settlement stage terminated at the time of settlement, or at the time the settlement agreement was recorded on the ODR platform. It was clarified that the latter option, which was contained in the current draft, reflected the understanding that in an online environment, agreement had to be recorded; in order to be regarded as having been arrived at during the course of proceedings, such agreement should be recorded before the proceedings terminated.

52. It was agreed to remove the square brackets in paragraph (1) to reflect that agreement.

53. Second, a proposal was made in relation to the second sentence of paragraph (1), namely that a settlement agreement concluded during the facilitated settlement stage, in a Track I proceeding only, should be submitted to a neutral who would give that agreement the status of an arbitral award. Disagreement was expressed in relation to that proposal on the basis that a settlement agreement is a contractual agreement between the parties and should not be conflated with an arbitration stage of proceedings. It was agreed that language would be submitted in relation to that proposal for the consideration of the Working Group, and that following that submission the second sentence of paragraph (1) might require relocation. It was agreed to consider that sentence further at a later stage.

Paragraph (2), Tracks I and II

54. It was said that in order to maintain consistency with paragraph (1) and avoid a situation where a purchaser was not made aware of the appointment of a neutral for some time, paragraph (2) should refer to the notification to the parties of the appointment of a neutral, rather than to the appointment of the neutral itself. It was clarified that draft article 6(1) provided that the appointment of a neutral would be “promptly” notified to the parties and that a cross-reference to that article might be included for the avoidance of doubt.

Paragraph (2), Track II

55. The two options as set out in paragraph 37 of document A/CN.9/WG.III/WP.119/Add.1 were considered in relation to the final stage of Track II proceedings. Under option 1, Track II proceedings would terminate at the expiry of the facilitated settlement stage, if no settlement had been reached. Under option 2, a non-binding decision would be rendered.

56. Support was expressed for option 2, with various delegations observing that the solution encompassed by that option conformed with national systems and

legislation already in place, as well as ODR systems currently in existence. It was agreed to proceed on the basis of option 2, acknowledging that such discussions could not be entirely dissociated from discussions on draft article 8(bis).

2. Draft article 8(bis) (Decision by a neutral)

General

57. As a general matter relating to the content of draft article 8(bis), the Secretariat was requested to provide a document at a future session setting out an overview of existing private enforcement mechanisms. That request received support.

58. It was discussed whether the appropriate term for the outcome of the neutral's deliberations at the draft article 8(bis) stage of proceedings should be a "decision" or a "recommendation". After discussion, the Working Group agreed to replace the word "decision" as it appeared throughout draft article 8(bis) with the word "recommendation", which was said better to reflect the intended character of the non-binding determination to be made.

Paragraph (1)

59. The Working Group agreed to retain paragraph (1) as drafted.

Paragraph (2)

60. It was said that the neutral should make a recommendation based not only on the information submitted by the parties, as currently required by paragraph (2), but also on the basis of the terms of the contract, given the contractual underpinning for transactions and consequently for disputes.

61. There was support for that proposal, and consequently it was agreed to add the words "and on the terms of the contract" after the term "submitted by the parties".

62. In relation to the square brackets in paragraph (2), a query was raised as to the meaning of recording a recommendation on the ODR platform, and specifically, whether such a record would be available only to the parties and the neutral or to the public. It was clarified that there were no provisions in draft article 8(bis) relating to the publication of recommendations to be made by a neutral under that article. Several delegations expressed support for that understanding, and observed the impracticality of publishing recommendations in low-value high-volume disputes. After discussion it was agreed to delete the square brackets and retain the contents therein.

Paragraph (3)

63. A suggestion was made to delete paragraph (3), on the basis that in a recommendation stage of proceedings, a recommendation could be made on the basis of the documents provided pursuant to article 4, and that supplementary provisions regarding burden of proof were not necessary.

64. In response, it was said that paragraph (3) provided a useful basis in law for the making of a recommendation, and that it should be retained. After discussion, the Working Group agreed to retain paragraph (3) as drafted.

Paragraphs (2) and (3)

65. It was agreed to reverse the order of paragraphs (2) and (3) to better provide for the natural chronology of proceedings.

Paragraph (4)

66. One delegation proposed new language for paragraph (4) as follows: “The decision shall be [enforceable/implemented] through a private mechanism in accordance with the Cross-border enforcement mechanism set out in the document referred to at paragraph 2(d) of the Preamble to the Rules.” It was said that that approach would provide for more flexibility and encompass a wider range of enforcement processes, including enforcement mechanisms that would only develop during or after the conclusion of the draft Rules. That proposal did not receive support.

67. The Working Group considered the first sentence of paragraph (4), which stated: “The decision shall not be binding on the parties”. It was suggested that the intent of that sentence was that any decision rendered pursuant to draft article 8(bis) should not have *res judicata* effect, and that the provision should reflect this explicitly.

68. In response, it was said that the term *res judicata* was confusing. An example was provided that the *res judicata* considerations differ in relation to settlement agreements in civil law as opposed to common law jurisdictions. It was also said that use of the term *res judicata* might foreclose access to many enforcement mechanisms currently in existence. It was consequently agreed that the term *res judicata* should be avoided.

69. A separate proposal was made to amend the language of paragraph (4) to state that the making of a recommendation would not prevent a party from bringing its case in court. That proposal was said to be insufficiently precise, and was not supported.

70. It was proposed that a recommendation should be binding where the parties so agreed, and that language should be added to paragraph (4) accordingly. There was support for that suggestion, with reference to similar provisions in national laws. It was said that agreement between the parties would give the recommendation a contractually binding character.

71. After discussion, the Working Group agreed that paragraph (4) should reflect the proposal set out in paragraph 70 above, namely that a recommendation should be binding where the parties so agreed. The Working Group also considered whether consent by the parties to make such a recommendation binding should be given after the recommendation had been made, or could be made at any time during proceedings. After discussion, there was consensus to leave the timing of parties’ consent open in this respect. On the basis of these discussions, it was agreed to amend the first sentence of paragraph (4) such that it would read as follows: “The decision shall not be binding on the parties unless they otherwise agree.” It was agreed that the remainder of paragraph (4) would remain unchanged.

3. Draft article 9 (Arbitration)

72. The Working Group considered draft article 9 as contained in paragraph 54 of document A/CN.9/WG.III/WP.119/Add.1.

General

73. The Working Group considered whether a neutral could continue his or her appointment at the arbitration stage of proceedings, or whether a new neutral should be appointed at the time an arbitration commenced.

74. Different views were expressed in relation to whether the same neutral could act in the facilitated settlement stage, as well as in an arbitration stage of proceedings. It was widely acknowledged that the Rules should provide for a fast, efficient and low-cost means of resolving disputes in relation to low-value, high-volume disputes.

75. Bearing that in mind, three primary suggestions were made.

76. The first, from delegations supporting a presumption that a different neutral be appointed at an arbitration stage, proposed that whilst the default situation should be that of different neutrals for the two stages, parties could give express consent to retain the same neutral.

77. It was said that such a proposal was premised on the fact that in certain jurisdictions, national law provided that a mediator should not act as an arbitrator in the same proceedings. It was further said that providing for different neutrals was important to preserve the different roles of mediator and neutral, as well as the different legal implications of mediation and arbitration, including for example the provision of confidential information to a neutral during a mediation stage, which might not be appropriate to pass on to a neutral acting in an arbitration stage. It was suggested that having the same neutral for both processes could result in a challenge to the enforcement of an award.

78. A second proposal was made to retain the same neutral throughout proceedings, unless (i) parties agreed otherwise; or (ii) neither party objected. Several delegations observed that their national law permitted such a continuous appointment, and that in light of the low-value, high-volume nature of the transactions the Rules were intended to address, such a process would be much more efficient and less costly to the parties. In support of that proposal, it was also said that the Rules were intended to address a new system of online dispute resolution containing elements of mediation and of arbitration, but that the Rules did not contemplate full-fledged mediation with exchanges of confidential or ex parte information that may be considered prejudicial in certain circumstances or jurisdictions. It was also said that that proposal could promote efficiency in time and cost of proceedings, and that providing the parties the unilateral right to object to the continued appointment of the same neutral at an arbitration stage would provide a sufficient safeguard.

79. In response, it was said that whilst a presumption that the neutral would not be replaced at the arbitration stage would be helpful in streamlining proceedings, two possible obstacles to that proposal would need to be addressed. First, it was said that the exchange of any ex parte communications during a facilitated settlement stage could prejudice the outcome of an award rendered by the neutral, and that the

Rules should be explicit in prohibiting such communications during the facilitated stage in order to avoid that problem. Second, it was said that a neutral might have undue coercive influence during a facilitated settlement stage, and in that respect, the parties ought to be given the right to object to the continued appointment of that neutral at the arbitration stage.

80. Finally a third proposal was made to subsume the facilitated settlement stage into the arbitration stage of proceedings, as a subset of that stage. It was said that that would have the benefit of putting parties on notice that they were in the arbitration stage, and that the matter of a neutral's impartiality at two different stages of proceedings would therefore become moot. It was suggested that at the beginning of the arbitration phase, the neutral could request, or require, the parties to engage in a facilitated settlement; in addition, and by analogy, it was said that in international commercial arbitration, an arbitrator encouraging facilitated settlement at the outset of proceedings was emerging as a best practice. Delegations supporting that proposal suggested a two-stage process would be less costly than a three-stage process. It was also clarified that two stages only had previously been contemplated by the Working Group, and reference made to paragraph 128 of document A/CN.9/744.

81. In response to the third proposal, it was said that ODR is best resolved through non-binding processes and that the facilitated settlement stage should therefore not be subsumed into an arbitration stage; broad support was expressed for the need to retain such a stage as an integral part of a three-stage process. It was also observed that different procedural requirements, and cost implications, attached to a facilitated settlement as opposed to an arbitration stage.

82. The Working Group agreed to consider the issue further at a future session.

Paragraph (1)

83. It was observed that should the Working Group determine, in its future considerations pursuant to paragraphs 73-82 above, that a new neutral should be appointed at the arbitration stage, the language in paragraph (1) would require consequential amendment.

84. It was reiterated, further to the discussion in relation to draft article 8(2) (Track I), that a clear notification should be provided to the parties in relation to the transition from the facilitated settlement stage to the arbitration stage of proceedings.

85. It was also proposed that the time frame in which a neutral should provide for final submissions should be more clearly linked to the appointment of the neutral. In that respect, it was suggested that paragraph (1) be replaced with the following language: "The neutral shall within [x] days from the receipt by the parties of the notification referred to in Article 8(2) set a time limit of 10 calendar days for final submissions to be made". It was recalled that the Working Group had amended draft article 8(2) to provide for such a notification to the parties (see paragraphs 48 and 50 above).

86. Further to the suggestion set out in paragraph 84 above, it was agreed that the notification to the parties in relation to the transition between phases of proceedings, whether set out in draft article 8(2) (Track I), article 9(1), or both,

should be clear; and moreover, bearing in mind the suggestion in paragraph 85 above, that there should be a clear time frame for submissions to be made following that notification. The Working Group gave a mandate to the Secretariat to provide language in the next draft of the Rules accordingly.

87. The Secretariat was also requested to ensure that language throughout the document was consistent in relation to matters of notification to the parties. A separate request was made to the Secretariat to clarify in the next iteration of the Rules when notifications to the parties, or specific documents (such as arbitration agreements and awards) must be made “in writing”.

Paragraph (2)

88. After discussion it was agreed to delete the square brackets and retain the contents therein. It was agreed that in all other respects paragraph (2) would be retained in its current form.

Paragraph (3)

89. It was agreed to retain paragraph (3) in its current form.

Paragraphs (2) and (3)

90. The Working Group agreed to reverse the order of paragraphs (2) and (3) to better provide for the natural chronology of proceedings and to retain consistency with draft article 8(bis) (see paragraph 65 above).

Paragraph (4)

91. It was agreed to retain paragraph (4) in its current form.

Paragraph (4) (bis)

92. It was agreed that, save for any amendment or relocation to the definition of the word “writing” necessitated if that word were to be used in other locations throughout the Rules (see paragraph 87 above), that paragraph (4)(bis) would be retained in its current form.

Paragraph (5)

93. It was agreed to retain paragraph (5) in its current form.

Paragraph (6)

94. A question arose as to the consequence should a neutral fail to render an award in accordance with the timeline specified in paragraph (6). It was stated that in some States an award may be, or may be rendered, invalid, should the neutral fail to comply with the timeline provided for in the procedural rules or in national legislation. It was observed that promptness is a key aspect of ODR and that the Rules should encourage decisions to be reached in a timely manner.

95. A proposal was made to replace the text of draft paragraph (6) in its entirety as follows: “The award shall be rendered promptly, preferably within ten calendar days [from a specified point in proceedings]”. Strong support was received for this

proposal, which was said to reinforce the need for timeliness in the Rules, while avoiding complex legal arguments over the consequences of gross delay on the part of a neutral.

96. After discussion, it was agreed to adopt the proposal set out in paragraph 95 above. It was also agreed that a document setting out guidelines for ODR providers could address issues of timeliness including, for example, replacement of the neutral should he or she fail to undertake his or her duties in a timely way.

Paragraph (6)(bis)

97. Support was expressed for the contents of paragraph (6)(bis) on the basis that it articulated the Working Group's deliberations at its twenty-sixth session, and that furthermore it reflected existing language in Article 34(5) of the UNCITRAL Arbitration Rules.

98. It was agreed to delete the square brackets and retain the contents of paragraph (6)(bis) as drafted. It was furthermore suggested that the publication of statistics and summaries of decisions in relation to ODR proceedings was a matter to be addressed in a document setting out guidelines for ODR providers.

Paragraph (7)

99. It was agreed to retain paragraph (7) as drafted.

Paragraph (8)

100. A number of views were expressed in relation to paragraph (8), a new provision that had been inserted to provide for substantive rules on the merits in the context of the draft Rules.

101. On the one hand, it was said in support of paragraph (8) that it reflected an approach taken in other UNCITRAL texts, including the Model Law and the Arbitration Rules. It was also said that the principle of *ex aequo et bono* provided for an expedient and common sense basis for resolving low-value, high-volume disputes, and that that principle was used in some countries in relation to such disputes.

102. On the other hand, it was said that an *ex aequo et bono* provision was ambiguous and essentially amounted to a lack of substantive law, and that it gave too wide a discretion to the neutral. In that respect, a proposal was made to amend paragraph (8) such that it would provide for a decision to be made according to the terms of the contract and in addition, *ex aequo et bono*. Some support was expressed for that proposal. In response, it was said that requiring a neutral to act *ex aequo et bono* as well as in accordance with the terms of the contract could be confusing as the contract terms may prescribe an applicable domestic law.

103. Another view was expressed that recourse to traditional applicable law would not be appropriate in the context of ODR, and that a better solution might be to refer in paragraph (8) to an as yet-to-be-drafted document, but referred to in the draft preamble to the Rules, which would address substantive legal principles applicable to disputes. Some support was also expressed for that proposal.

104. It was also said that *ex aequo et bono* was a legal concept that would be difficult for consumers to understand, and that it should be expressed in plain language.

105. After discussion, it was agreed that the term “*ex aequo et bono*” would be placed in square brackets and alternative suggestions would be proposed by the Secretariat at a future session of the Working Group.

4. Draft article 6 (Appointment of neutral)

106. The Working Group considered draft article 6 as contained in paragraph 16 of document A/CN.9/WG.III/WP.117/Add.1, in relation to the appointment of the neutral.

General

107. It was clarified that the Working Group would consider draft article 6 first in relation to the set of Rules for Track I, thus allowing the Working Group to resume discussions on a potentially simplified or streamlined approach for the appointment of a neutral under the set of Rules for Track II at a future date.

Paragraph (1)

108. It was suggested that the phrase in square brackets “or belonging to other arbitral institutions” should be deleted, unless there was a way to ensure that an ODR provider could have oversight over such a list and that expanding that list to other arbitral institutions would risk dilution or loss of such oversight. It was stated that, although a document in relation to guidance for ODR providers and neutrals had not yet been drafted, it was envisaged that the ODR provider would provide a list of neutrals that would be accessible to parties. Moreover, it was said that an ODR provider would have some oversight function in relation to neutrals, including their replacement during proceedings if necessary, and that ODR providers and neutrals would be familiar with the fast track arbitration envisaged in the Rules, which it was said was different from traditional arbitration.

109. It was also suggested in that vein that the identity of the neutrals should be made known to the parties such that the parties could reasonably object to an appointment.

110. After discussion, it was agreed that the phrase “[or belonging to other arbitral institutions]” would be deleted, and that the identity of the neutral should be notified to the parties upon his or her appointment. The Secretariat was requested to include language to that effect in the next iteration of the Rules.

Paragraph (2)

111. Support was expressed for paragraph (2) on the basis that it reflected other provisions in UNCITRAL texts (including in a model statement contained in an annex to the UNCITRAL Arbitration Rules 2010).

112. It was said however that such a provision, whilst of sufficient importance to be included in the Rules, could also be considered to impose an obligation on a neutral; it was said that the Rules could not purport to do that, given their status as a contractual agreement between parties to a dispute, and that paragraph (2) should

consequently be redrafted. It was also queried whether transferring the burden to the ODR provider to ensure the neutral had sufficient capacity to undertake its role was appropriate, and whether the Rules could bind the ODR provider in that respect.

113. It was clarified that an ODR provider, analogously to an arbitral institution administering an UNCITRAL arbitration, was not a contractual party to the Rules. It was furthermore said that the wording of paragraph (2) was in line with similar instruments and provided useful guidance in relation to the duties of a neutral that were sufficiently important to be included in the Rules.

114. It was consequently agreed to remove the square brackets and retain the text of paragraph (2) as drafted.

Paragraph (3)

115. There was broad support for retaining the principle included in the square brackets, namely that the obligation for a neutral to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence was an ongoing one.

116. It was observed that with the removal of the square brackets, the provision may not be sufficiently clear with regard to the need for the neutral to disclose such circumstances existing at the time of his or her appointment. Article 11 of the UNCITRAL Arbitration Rules 2010 and Article 12 of the UNCITRAL Model Law on International Commercial Arbitration were cited as possible bases for better encapsulating that principle.

117. It was agreed that the square brackets in paragraph (3) would be deleted, to preserve the principle of an ongoing duty of disclosure, and the Secretariat was requested to make any necessary amendments to the paragraph to ensure that pre-existing circumstances at the time of appointment and requiring disclosure under paragraph (3) would also fall under the obligation in that paragraph.

Paragraph (4)

118. It was agreed that the square-bracketed language “resign and inform the parties and the ODR provider accordingly” should be deleted. It was further agreed that paragraph (4) consequently was redundant, in light of the amendments made to paragraph (3) as set out in paragraphs 116-117 above, and should be deleted.

119. It was further agreed that the Secretariat would prepare wording for a separate provision dealing in general with resignation and replacement of neutrals, including in instances where neutrals wished to resign for reasons of independence and impartiality, for consideration at a future session.

Paragraph (5)

120. The question arose whether to delete the square-bracketed text “without giving reasons therefor”. It was explained that that text originated in a desire to provide a quick and simple procedure for peremptory challenges to neutrals without the delay and complexity entailed in providing justification at the time of appointment. After discussion it was agreed to retain that language, and to delete the square brackets.

121. It was clarified that there were two routes under paragraph (5) under which a neutral could be disqualified: first, at the time of appointment, at which time it had been agreed that reasons need not be given and that disqualification would be automatic; and second, at any time during proceedings, upon reasons being given that a fact or matter had arisen leading to doubts as to the impartiality or independence of the neutral.

122. It was also agreed that the wording “[including a neutral’s declaration or disclosure pursuant to paragraphs (3) [or (4)]]” was unnecessary and could be deleted.

123. In all other respects, it was agreed to retain the language in paragraph (5) and to delete all remaining square brackets, save for the time frame, which would be considered holistically with other time frames in the Rules at a future session.

Paragraph (5)(bis)

124. After discussion, and recalling the clarification made regarding the contents of paragraph (5) and the two routes for the disqualification of a neutral, it was said that the language of paragraph (5)(bis) could be simplified or split into two or three separate paragraphs for the sake of clarity.

125. The Secretariat was given a mandate to revisit the language in that paragraph and amend the drafting accordingly.

126. In all other respects it was agreed to retain the language in paragraph (5)(bis) and remove all square brackets save for those relating to time frames.

Paragraph (6)

127. It was agreed to retain the language and delete the square brackets in paragraph (6).

Paragraph (7)

128. Broad support was expressed to retain the content of paragraph (7) as drafted. A proposal that the words “[and will inform the parties promptly of that selection]” be deleted as redundant in light of existing wording paragraph (1) also received support.

129. After discussion, it was agreed to delete all square brackets in paragraph (7), and also to accept the proposal to delete the wording “and will inform the parties promptly of that selection”. In all other respects paragraph (7) would be retained in its current form.

Paragraph (8)

130. Support was expressed for the principle that only one neutral was envisaged by the Rules as drafted to date, and as a practical matter, one neutral was more appropriate in the context of the low-value high-volume disputes the subject of the Rules. It was also acknowledged that as the Rules were contractual as between the parties, there was nothing to prevent the parties from agreeing otherwise.

131. After discussion, it was agreed to delete the text in square brackets.

V. Other business

132. The Working Group noted that subject to confirmation by the Commission, its twenty-seventh session was scheduled to take place in Vienna from 7-11 October 2013.

D. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-seventh session

(A/CN.9/WG.III/WP.119 and Add.1)

[Original: English]

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I. Introduction

1. At its forty-third session (New York, 21 June-9 July 2010), the Commission agreed that a Working Group should be established to undertake work in the field of online dispute resolution (ODR) relating to cross-border electronic commerce transactions, including business-to-business (B2B) and business-to-consumer (B2C) transactions.¹ At its forty-fourth (Vienna, 27 June-8 July 2011)² and forty-fifth (New York, 25 June-6 July 2012)³ sessions, the Commission reaffirmed the mandate of the Working Group on ODR relating to cross-border electronic transactions, including B2B and B2C transactions.

2. At its twenty-second session (Vienna, 13-17 December 2010),⁴ the Working Group commenced its consideration of the topic of ODR and requested that the Secretariat, subject to availability of resources, prepare draft generic procedural rules for online dispute resolution in cross-border electronic transactions (the “Rules”), including taking into account that the types of claims the Rules would address should be B2B and B2C, cross-border, low-value, high-volume transactions.⁵ From its twenty-third (New York, 23-27 May 2011)⁶ to

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 257.

² *Ibid.*, *Sixty-sixth Session, Supplement No. 17 (A/66/17)*.

³ *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*.

⁴ The report on the work of the Working Group at its twenty-second session is contained in document A/CN.9/716.

⁵ A/CN.9/716, para. 115.

⁶ The report on the work of the Working Group at its twenty-third session is contained in document A/CN.9/721.

twenty-sixth (Vienna, 5-9 November 2012)⁷ sessions, the Working Group considered draft generic procedural rules as contained in documents A/CN.9/WG.III/WP.107, A/CN.9/WG.III/WP.109, A/CN.9/WG.III/WP.112 and its addendum, and A/CN.9/WG.III/WP.117 and its addendum, consecutively.

3. At its twenty-sixth session, the Working Group identified that two tracks in the Rules might be required in order to accommodate jurisdictions in which agreements to arbitrate concluded prior to a dispute (“pre-dispute arbitration agreements”) are considered binding on consumers, as well as jurisdictions where pre-dispute arbitration agreements are not considered binding on consumers (A/CN.9/762, paras. 13-25, and annex).

4. This note contains an annotated draft of the Rules taking into account the deliberations of the Working Group at its previous sessions, including its request for a “two-track” set of Rules as set out in paragraph 3 above.

II. Online dispute resolution for cross-border electronic transactions: draft procedural rules

A. General remarks

Legal nature of the Rules

5. The Working Group may wish to bear in mind in its consideration of the Rules that, as set out in draft article 1, the Rules are of a contractual nature, and nothing therein serves to override mandatory law.

6. At the twenty-sixth session of the Working Group, two approaches in relation to the application of the Rules were expressed: (i) under a first approach, pre-dispute arbitration agreements should apply to all B2C and B2B transactions, and (ii) under a second approach, as pre-dispute arbitration agreements are not considered binding on consumers in certain jurisdictions, disputes involving consumers in those jurisdictions should not be settled by arbitration (A/CN.9/762, paras. 15, 17, 18, 20-22 and annex).

7. Consequently the suggestions of the Working Group in the discussion paper annexed to document A/CN.9/762 amounted to a proposal that the Rules include different sets of provisions depending on whether the consumer’s domestic law would permit a pre-dispute arbitration agreement to be binding upon that consumer.

Two-track set of the Rules

8. With that proposal in mind, the following options for creating a “two-track” set of the Rules pursuant to the Working Group’s proposal were considered:

- *At the time of transaction, requiring any of the following:*

(i) a vendor to classify whether the purchaser is a business or consumer, and the jurisdiction of any consumer, and to tailor the relevant dispute resolution clause accordingly;

⁷ The report on the work of the Working Group at its twenty-sixth session is contained in document A/CN.9/762.

(ii) purchasers to self-categorize (i.e., identify themselves as consumers or businesses) and as being subject to the laws of a certain jurisdiction;

(iii) those identifying themselves as consumers to select at the time of transaction whether they would prefer an ODR proceeding ending in arbitration, or not;

- During the proceedings or at the time of making a claim, requiring:

(iv) the neutral to make a determination regarding the consumer's jurisdiction and/or whether a party was a consumer or a business; or

(v) the ODR provider to make a determination regarding the consumer's jurisdiction and/or whether a party was a consumer or a business;

(vi) a "second click" by some or all claimants, at the time of lodging a claim, and in addition to the action of lodging a claim (itself likely a post-dispute agreement to arbitrate, see document A/CN.9/744, para. 20), to indicate the claimant's agreement at that post-dispute stage to engage in a process ending in binding arbitration (see A/CN.9/744, para. 33).

9. The difficulties perceived in relation to the above approaches were as follows. In relation to (i), requiring vendors to determine whether their counterparty is a business or consumer, and the relevant jurisdiction and law applicable to that counterparty, and to tailor their dispute resolution clause accordingly, would possibly thwart a presumptive objective of the Rules, namely to remove investigatory burden and risk from merchants to encourage them to sell cross-border. The Working Group has previously identified the difficulties inherent in categorizing consumers and businesses in the context of online transactions (see e.g. A/65/17, para. 265; A/CN.9/721, para. 35). In relation to (ii) and (iii), self-categorization by consumers and/or selection of desired outcome would be unlikely to satisfy those delegations desirous of the valid application of pre-dispute arbitration agreements to all parties, where permitted by law (A/CN.9/762, para. 18), nor would it necessarily provide for greater consumer protection. Moreover, the Rules are not solely intended to govern B2C transactions, but rather, and further to the mandate of the Commission, the Rules also apply to B2B transactions. The Working Group may wish to consider whether it is desirable for respondents which are businesses to have the option to opt out of an arbitration stage at the outset of proceedings.

10. In relation to (iv), complex determinations of residence, jurisdictional requirements and choice of law by a neutral presiding over a simple low-value dispute between parties anywhere in the world, are not envisaged by the Rules. Nor would such determinations produce an efficient dispute resolution process.

11. In relation to (v), the Working Group may wish to recall that ODR providers will be private entities, most likely selected by businesses and prescribed in contracts of adhesion, to provide an ODR service. The Working Group may wish to consider whether such entities would be willing or able to provide accurate assessments, regarding, for instance, place of residence of consumers and to implement different outcomes based on those assessments, and even in the event they were, whether consumers would be satisfied with this type of determination and where they could seek recourse if not.

12. Finally, in relation to (vi) in paragraph 8 above, or any variation thereof, the validity of the initial dispute resolution clause might be compromised if such a clause were to be superseded by a second “acknowledgement” or agreement. In any event, such a second click by consumers post-dispute could not resolve any concern relating to consumer respondents. Nor would a post-dispute agreement to arbitrate by both parties appear to be practical in either B2B transactions, or in the vast majority of B2C transactions, where the respondent is likely to be a business, thus substantially reducing the ability of claimants to achieve relief under the Rules in instances where a business respondent declines to arbitrate post-dispute.

13. In respect of most potential determinations set out above, disputes might arise in relation to a categorization, ancillary to the substantive dispute intended to be resolved by the ODR proceedings.

14. Furthermore, there are a number of benefits to a set of procedural rules being a self-contained, global system. First, procedural rules are intended to provide a clear legal process, and, particularly in a context involving simple low-value disputes, often involving consumers, ought to be clear and simple. Second, procedural rules are contractual in nature and as such are subject to mandatory law. Thus a single coherent instrument is already subject to the possibility of being overridden in some respects by national law; building additional complexity into the Rules might render them difficult to use. Finally adding an element of discretion or categorization into procedural rules, and thus conferring certain additional rights on parties in some jurisdictions or complex obligations on third parties, such as ODR providers or neutrals, may simply be unworkable in practice.

Proposed new structure of the Rules

15. The present draft Rules have consequently been drafted as two discrete sets of Rules, one ending in a binding arbitration stage (tentatively referred to as “Track I”), and another (tentatively referred to as “Track II”) with two possible final outcomes for the Working Group to consider: either an outcome terminating (i) at the close of the facilitated settlement stage, even if no settlement has been reached; or (ii) if a settlement has not been reached, with a non-binding decision by a neutral, enforceable via private mechanisms such as trustmarks. The latter approach received support as a third alternative to the “two track” system at the twenty-sixth session of the Working Group (A/CN.9/762, paras. 19-21).

16. A dispute resolution clause would therefore need to specify whether disputes arising under that transaction would be resolved under “Track I” or “Track II” of the “UNCITRAL ODR Rules”. In practice, therefore, no determination would be made by the seller in relation to the jurisdiction or status (consumer or business) of the counterparty to the contract; rather, the Track specified in the dispute resolution clause would apply irrespective of the nature of the purchaser. Each Track would comprise a stand-alone set of Rules.

17. This approach seeks to accommodate both positions expressed by the Working Group at its twenty-sixth session whilst taking account of the legal and practical difficulties of a determination before or during the dispute of the type of purchaser and of its jurisdiction(s). If a dispute resolution clause specifies that disputes arising under the transaction will be conducted under Track I of the Rules (ending in arbitration), all parties would be bound by the final award where the applicable

domestic law so permitted. Consumers in jurisdictions where pre-dispute arbitration agreements are not considered binding on them would engage in the same ODR process but would not be bound by the award under their national legislation (failing a post-dispute agreement to arbitrate). If a dispute resolution clause specifies that disputes arising under the transaction will be conducted under Track II of the Rules, proceedings would not end in arbitration for any party.

18. Ideally a business vendor's webpage or even an internal link within a dispute resolution clause should set out the implications of its dispute resolution procedures including the implications for consumers in certain jurisdictions of, for example, the non-binding nature of a pre-dispute resolution clause. However, as imposing obligations on businesses is not within the scope of the Rules, the Working Group may wish to consider whether the guidelines for ODR providers should require that the implications of Track I or Track II of the Rules (as applicable) should be stated clearly and simply for both parties when a claim is filed.

19. The content of the proposed draft Rules accommodating two Tracks is set out in paragraphs 23-69 below. Although for economy of drafting, this note does not repeat the provisions which would be common to both Tracks, the final Rules would necessarily encompass two discrete and stand-alone sets of Rules (Track I and Track II), with no commonality with or cross-reference to the other Track, so that each Track could be referred to independently by its constituent users.

20. For ease of reference, the Working Group may wish to note that the draft preamble and articles 1 to 7 and 11-15 would be identical in both Tracks I and II. Draft article 8(2) would be tailored to the relevant Track. Track II would additionally include draft article 8 (bis); Track I, draft articles 9, 9 (bis), 9 (ter) and 10.

Drafting matters

21. The Working Group may wish to note that, for the sake of consistency, the following changes have been made throughout the Rules. First, in line with other UNCITRAL instruments, the word "promptly" has been used throughout the Rules, instead of the phrase "without delay", where those were proposed as alternatives. Second, the phrase "submitted to the ODR platform" has been replaced with the term "communicated to an ODR provider", in order to achieve greater consistency with the definitions set out in draft article 2, and to improve consistency more generally throughout the Rules.

ODR provider and ODR platform

22. As a general remark, the Working Group may wish to consider whether the relationship between the ODR platform and the ODR provider is sufficiently clear in the Rules, and the delineation of the roles of those entities clearly framed within the ODR process. Although the supplementary document setting out guidelines for ODR providers may provide further structure in this regard, the Working Group may wish to consider whether the Rules ought to express the respective roles more clearly. The definitions of ODR platform and ODR provider have been slightly modified to attempt to clarify the relationship between these entities (draft articles 2(2) and (3)), as has the first paragraph of draft article 3.

B. Notes on draft procedural rules

1. Introductory rules

23. Draft preamble

“1. The UNCITRAL online dispute resolution rules (“the Rules”) are intended for use in the context of cross-border low-value, high-volume transactions conducted by means of electronic communication.

“2. The Rules are intended for use in conjunction with an online dispute resolution framework that consists of the following documents which [are attached to the Rules as an Appendix and] form part of the Rules:

[(a) Guidelines and minimum requirements for online dispute resolution providers;]

[(b) Guidelines and minimum requirements for neutrals;]

[(c) Substantive legal principles for resolving disputes;]

[(d) Cross-border enforcement mechanism;]

[...];

“[3. Any separate and supplemental [rules] [documents] must conform to the Rules.]”

Remarks

Paragraph (2)

24. At its twenty-fourth session, the Working Group noted that the list of documents in paragraph (2) is not exhaustive (A/CN.9/739, para. 21). The Working Group may wish to consider which of these documents and any additional documents the Working Group should prepare in the fulfilment of its mandate. The Working Group may wish to note that documents A/CN.9/WG.III/WP.113, A/CN.9/WG.III/WP.114 and A/CN.9/WG.III/WP.115 address issues related to the documents identified in paragraph (2).

Paragraph (3)

25. An ODR provider may choose to adopt supplemental rules to deal with issues that are not included in the Rules and that may require different treatment for each ODR provider — e.g. costs, definition of calendar days,⁸ responses to challenge of neutrals.

⁸ At its twenty-fourth session, the Working Group agreed to retain the term “calendar days” throughout the Rules (A/CN.9/739, para. 64). The Working Group may wish to recall its decision to provide in an additional document the recommendation that time should be construed liberally in the procedural rules to ensure fairness to both parties, and that ODR providers might make their own rules with regard to time so long as they are not inconsistent with the Rules (A/CN.9/721, para. 99).

26. Draft article 1 (Scope of application)

“1. The Rules shall apply where the parties to a transaction conducted by use of electronic communications have, at the time of a transaction, explicitly agreed that disputes relating to that transaction and falling within the scope of the Rules shall be resolved by ODR under the Rules.

[“1 bis. Explicit agreement referred to in paragraph (1) above requires agreement separate from that transaction[, and] notice in plain language to the buyer that disputes relating to the transaction and falling within the scope of the ODR Rules will be exclusively resolved through ODR proceedings under the ODR Rules [and whether Track I or Track II of the Rules apply to that dispute] (the “dispute resolution clause”).”

[“2. These Rules shall only apply to claims:

(a) that goods sold or leased [or services rendered] were not delivered, not timely delivered, not properly charged or debited, and/or not provided in accordance with the agreement made at the time of the transaction; or

(b) that full payment was not received for goods [or services] provided.

[“3.

Option 1: [“The Rules shall not apply where the applicable law at the buyer’s place of residence provides that agreements to submit a dispute within the scope of the ODR Rules are binding on the buyer only if they were made after the dispute has arisen and the buyer has not given such agreement after the dispute has arisen or confirmed such agreement which it had given at the time of the transaction.]

Option 2: [“These Rules shall govern the ODR proceedings except that where any of these Rules is in conflict with a provision applicable law from which the parties cannot derogate, that provision shall prevail.]

Remarks

Paragraph (1)

27. Paragraphs (1) and (1) bis require an agreement to submit disputes to ODR, which agreement is separate from the transaction. It was suggested that a separate agreement would better ensure that a consumer was providing “informed consent” when agreeing to submit disputes to ODR (A/CN.9/744, paras. 23-24). The consent of the parties might be so expressed in the form of a separate “OK box” (click-wrap agreement) accessible from or linked to the underlying transaction.

Paragraph (1) bis

28. In paragraph (1) bis, language has been included in square brackets to provide for the requisite information to be given to the buyer at the time of the transaction in relation to the relevant Track of the Rules that will govern the dispute resolution procedure.

29. A definition for “dispute resolution clause” has also been inserted for the Working Group to consider as the requirements for, and severability of, this clause

are referred to elsewhere in the Rules (see e.g. draft articles 2(3), 3(1), 7(4), 10 and 11).

30. A model dispute resolution clause for each Track ought to be included in an appendix to the Rules, and to include the relevant determination of applicable law (see paras. 68-70 of document A/CN.9/WG.III/119/Add.1).

Paragraph (2)

31. It may be desirable for the scope of the disputes to which the Rules will apply to be defined in the Rules. The language in the current draft paragraph (2) addresses the nature of the possible claims set out in document A/CN.9/WG.III/WP.115; by consequence it also excludes claims that may be inappropriate for resolution by ODR under the Rules, such as consequential damage or personal injury.

32. Alternatively, the scope of the Rules could be defined by cross-referring to article 4A (Notice), should that article be amended to set out the full list of claims that might be initiated under the Rules (see para. 55 below).

Paragraph (3)

33. Although options 1 and 2 were not originally proposed as alternatives, the Working Group may wish to consider whether one option alone would be sufficient to clarify in the Rules that ODR proceedings are subject to relevant national consumer protection law, particularly with regard to jurisdictions where pre-dispute agreements to arbitrate involving consumers are not binding upon consumers.

34. The Working Group may wish to consider that the Rules are contractual rules and therefore would, in any event, not serve to override national law.

35. Draft article 2 (Definitions)

“For purposes of these Rules:

ODR

“1. ‘ODR’ means online dispute resolution which is a mechanism for resolving disputes facilitated through the use of electronic communications and other information and communication technology.

“2. ‘ODR platform’ means an online dispute resolution platform which is a system for generating, sending, receiving, storing, exchanging or otherwise processing electronic communications used in ODR, and which is designated by the ODR provider in the ODR proceedings.

“3. ‘ODR provider’ means the online dispute resolution provider specified in the dispute resolution clause referring disputes to online dispute resolution under these Rules. An ODR provider is an entity that administers ODR proceedings [and designates an ODR platform][, whether or not it maintains an ODR platform].

Parties

“4. ‘claimant’ means any party initiating ODR proceedings under the Rules by issuing a notice.

“5. ‘respondent’ means any party to whom the notice is directed.

“6. ‘neutral’ means an individual that assists the parties in settling or resolving the dispute.

Communication

“7. ‘communication’ means any statement, declaration, demand, notice, response, submission, notification or request made by any person to whom the Rules apply in connection with ODR.

“8. ‘electronic communication’ means any communication made by any person to whom the Rules apply by means of information generated, sent, received or stored by electronic, magnetic, optical or similar means including, but not limited to, electronic data interchange (EDI), electronic mail, telecopy, short message services (SMS), web-conferences, online chats, Internet forums, or microblogging and includes any information in analogue form such as document objects, images, texts and sounds that are converted or transformed into a digital format so as to be directly processed by a computer or other electronic devices.

Remarks

General

36. The Working Group may wish to review the order of the definitions, which have been reorganized by theme (rather than strictly alphabetically) in order to establish a consistent order among different language versions of the Rules, as requested by the Working Group at its twenty-fifth session (A/CN.9/744, para. 47).

37. The Working Group may recall that, at its twenty-fifth session, it requested a definition of “writing” to be added to the list of definitions in draft article 2, in reference to the requirement for an award in draft article 9 to be made in writing and signed by a neutral (A/CN.9/744, para. 59). At its twenty-sixth session, the Working Group likewise (and in relation to the same requirement in draft article 9) requested a definition of “signature” to be inserted in the Rules (A/CN.9/762, para. 44).

38. In an attempt to achieve greater clarity in the Rules, the means by which to satisfy the requirement for an award to be made in writing and signed for the purposes of draft article 9, have been included in draft article 9 itself, rather than defined as separate terms. Both terms are peculiar to draft article 9 (although the term “electronic signature” is also used in draft articles 4A and 4B) and may not warrant a separate definition in these Rules.

Paragraphs (2) and (3) “ODR provider”

39. Paragraphs (2) and (3) have been slightly modified to make clearer the presumptive link between ODR platform and provider, although the Working Group may still wish to consider whether this link is sufficiently clearly articulated in the Rules (see para. 22 above).

40. Paragraph (3) has been amended, alongside a new draft article 11, to ensure the Rules provide for a link between the dispute resolution clause and the determination of the ODR provider. This may be considered desirable because, as “ad hoc” proceedings are not possible under the Rules, it is important that the

contract between the parties specify the provider which will perform the administrative functions under the Rules.

41. The Working Group may wish to consider whether it is necessary to specify whether the ODR provider need maintain an ODR platform, or whether such information may be better suited for a document setting out guidelines for ODR providers.

Paragraph (6) “neutral”

42. The definition of the neutral has been slightly modified in order to achieve greater clarity and simplicity of drafting.

43. Draft article 3 (Communications)

“1. All communications in the course of ODR proceedings shall be communicated by electronic means to the ODR provider via the ODR platform designated by the ODR provider. [The electronic address of the ODR platform to which documents may be submitted shall be specified in the dispute resolution clause].

“2. As a condition to using the Rules each party must, [at the time it provides its explicit agreement to submit the disputes relating to the transaction to ODR under the Rules, also] provide its electronic contact information.”

“3. [The designated electronic address[es] of the claimant for the purpose of all communications arising under the Rules shall be [that][those][notified by the claimant to the ODR provider under article 3(2)] and as updated to the ODR provider at any time thereafter during the ODR proceedings (including by specifying an updated electronic address in the notice, if applicable)].

“4. [The electronic address[es] for communication of the notice by the ODR provider to the respondent shall be [[that] [those] notified by the respondent to the ODR provider when accepting the Rules [under article 3(2) above] and as updated to the claimant or ODR provider at any time prior to the issuance of the notice. Thereafter, the respondent may update its electronic address by notifying the ODR provider at any time during the ODR proceedings.]

“[5. A communication shall be deemed to have been received when, following submission to the ODR provider in accordance with paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (6). [The neutral may in his or her discretion extend any deadline in the event the addressee of any communication shows good cause for failure to retrieve that communication from the platform.]

“6. The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses.

“7. The ODR provider shall promptly notify all parties and the neutral of the availability of any electronic communication at the ODR platform.”

*Remarks**Paragraph (1)*

44. At its twenty-fifth session, the Working Group agreed that paragraph (1) would reflect the principle that all communications in the ODR process take place through the ODR platform (A/CN.9/744, paras. 62-63).

45. The Working Group may wish to consider (i) when and how the designation of an ODR platform by an ODR provider will take place; and (ii) whether the dispute resolution clause should include the electronic address to which a claimant should submit a claim, or whether such an indication would be premature. In any event, the Working Group may wish to consider how a claimant would obtain information regarding the relevant ODR platform.

Paragraph (2)

46. At its twenty-fifth session, the Working Group agreed to retain paragraph (2), which sets out as a pre-condition for the use of the Rules the requirement that the parties provide their contact information (A/CN.9/744, para. 39). The word “electronic” has been added before the words “contact information” for the sake of clarity.

47. Because paragraph (2) relates to the matter of communication rather than scope, it has been relocated from draft article 1 (see A/CN.9/744, para. 42, and paras. 68-71). As it expresses a pre-condition to the operation of the Rules, a deadline by which this condition must be satisfied (taking into account the language in draft article 3) may be desirable. Bracketed language has been inserted in this respect.

Paragraphs (3) and (4)

48. At its twenty-fifth session, the Working Group requested the Secretariat to prepare draft language to reflect different options with regard to draft article 3, paragraphs (3) and (4), for further consideration (A/CN.9/744, para. 71). Further to that request, these paragraphs have been re-drafted to address concerns that (a) any notice is directed in the first instance to an electronic address (or addresses) provided by the respondent at the time of its agreement to submit disputes to the Rules; and (b) the given electronic address or addresses remains consistent and up-to-date throughout the proceedings.

49. Both parties are required to provide their respective electronic addresses as a pre-condition for using the Rules pursuant to paragraph (2), and consequently previous options inconsistent with that provision have been deleted.

Paragraph (5)

50. The Working Group decided at its last session that paragraph (5), which, as originally drafted, reflected article 10 of the United Nations Convention on the Use of Electronic Communications in International Contracts (the “Electronic Communications Convention”, or the “ECC”), should be re-drafted, bearing in mind the close relationship of this paragraph with paragraph (6), and moreover taking into account article 2(5) of the UNCITRAL Arbitration Rules (A/CN.9/744, para. 73).

51. Consequently, draft paragraph (5) now provides for “deemed receipt”, thus avoiding the ambiguity of previous language requiring a communication to be “capable of being retrieved”, at the time the ODR provider notifies the parties that the relevant communication is available on the platform. While a deemed receipt provision may transfer slightly more risk of non-receipt of communication to the parties, as compared to a presumptive receipt provision (because the presumption can be rebutted), it also may provide for more certainty of timing.

52. Draft paragraph (5) also provides, in square brackets, for the discretionary power of the neutral to extend deadlines should the addressee show good cause for failure to retrieve that communication from the platform.

2. Commencement

53. Draft article 4A (Notice)

“1. The claimant shall communicate to the ODR provider a notice in accordance with the form contained in paragraph (4). The notice should, as far as possible, be accompanied by all documents and other evidence relied upon by the claimant, or contain references to them.

“2. [The notice shall be promptly communicated by the ODR provider to the respondent.][The ODR provider shall promptly notify the respondent that the notice is available at the ODR platform.]

“3. ODR proceedings shall [be deemed to] commence when, following communication to the ODR provider of the notice pursuant to paragraph (1), the ODR provider notifies the parties of the availability thereof in accordance with paragraph (2).

“4. The notice shall include:

“(a) the name and designated electronic address of the claimant and of the claimant’s representative (if any) authorized to act for the claimant in the ODR proceedings;

“(b) the name and electronic addresses of the respondent and of the respondent’s representative (if any) known to the claimant;

“(c) the grounds on which the claim is made;

“(d) any solutions proposed to resolve the dispute;

“(e) a statement that the claimant is not currently pursuing other remedies against the respondent with regard to the specific dispute in relation to the transaction in issue;

[“(f) the location of the claimant];

“[(g) the claimant’s preferred language of proceedings];

[“(h) the signature of the claimant and/or the claimant’s representative in electronic form including any other identification and authentication methods];

“[...]

*Remarks**General*

54. At its twenty-fifth session the Working Group requested that draft article 4 be restructured into separate articles, on notice and response respectively (A/CN.9/744, para. 76).

55. The Working Group may wish to consider, further to A/CN.9/WG.III/WP.113, paragraphs 10-14, and A/CN.9/WG.III/WP.115, Section IV(B), the proposal that the Working Group adopt an approach of enumerating, in draft article 4A, paragraph (4), and draft article 4B, paragraph (3), a list of possible claims, and responses thereto, to be included in the notice and response respectively. Alternatively, the Working Group may consider that draft article 1(2) sufficiently delineates the scope of claims which may be appropriate for online dispute resolution.

56. A subparagraph contained in a previous draft of the Rules requiring the claimant to set out at the time of submitting its notice whether it agrees to participate in ODR proceedings has been removed as potentially confusing, in light of the agreement required at the time of transaction in draft article 1.

Paragraph (3)

57. This paragraph has been slightly modified to align the commencement of proceedings, predicated on the receipt of notice, with the deemed receipt provision in draft article 3(5). In any event, the Working Group may wish to consider whether paragraph (3) is necessary, as the date of commencement of proceedings is not relevant to any other provision in the Rules, and, should parallel proceedings be initiated elsewhere, *res judicata* considerations would likely be governed by national law.

*Paragraph (4)**Paragraph (4)(e)*

58. The Working Group may wish to note that, at its twenty-third session, it was suggested that paragraph (4)(e), together with a companion provision in draft article 4B, paragraph (3)(e), could assist in preventing a multiplicity of proceedings relating to the same dispute (see A/CN.9/721, para. 122).

Paragraph 4(f)

59. The Working Group may wish to consider whether the location of the claimant has any practical relevance as it may not be an indicator of language or relevant jurisdiction.

Paragraph (4)(g)

60. Paragraph (4)(g) has been amended slightly to clarify that the preferred language specified at this stage is that of the claimant. A corresponding amendment has been made in draft article 4B, paragraph (3)(f), to reflect the Working Group's request (reflected in draft article 12) that the language of proceedings should be agreed by parties at the commencement of ODR proceedings.

Paragraph (4)(h)

61. The Working Group may wish to recall that at its twenty-second session it observed that complex identification and authentication methods may not be necessary for the purposes of ODR, and that current UNCITRAL texts on electronic commerce already address methods of electronic signature that are reliable and appropriate for the purposes for which they were used (article 7(2)(b) of UNCITRAL Model Law on Electronic Commerce; see A/CN.9/716, para. 49). The issue of identification and authentication of parties in ODR might be more appropriately dealt with in a document separate from the Rules such as guidelines and minimum standards for ODR providers. It should also be noted that the term “electronic signature” differs from “digital signature”. Electronic signature⁹ refers to any type of signature that functions to identify and authenticate the user including identity management.¹⁰

62. Draft article 4B (Response)

“1. The respondent shall communicate to the ODR provider a response to the notice in accordance with the form contained in paragraph (3) within [seven (7)] calendar days of receipt of the notice. The response should, as far as possible, be accompanied by all documents and other evidence relied upon by the respondent, or contain references to them.

“[2.

[Option 1: The respondent may also, in response to the notice, communicate to the ODR provider via the same ODR platform in the same proceedings a claim which arises out of the same transaction identified by the claimant in the notice (‘counter-claim’).] The counter-claim shall be communicated no later than [seven (7)] calendar days [after the notice of the claimant’s claim is communicated to the ODR provider. [The counter-claim shall be dealt with in the ODR proceedings together with the claimant’s claim.]

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].”

[Option 2: “The respondent may, in response to the notice, communicate a counter-claim to the ODR provider. ‘Counter-claim’ means a[n independent] claim by the respondent against the claimant which arises out of the same transaction identified by the claimant in the notice [with the same ODR provider]].”] The counter-claim shall be communicated no later than

⁹ Article 2 (a) of Model Law on Electronic Signatures defines electronic signatures as “data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message”. Digital signature generally uses cryptography technologies such as public key infrastructure (PKI), which require specific technology and means of implementation to be effective.

¹⁰ Identity management could be defined as a system of procedures, policies and technologies to manage the life cycle and entitlements of users and their electronic credentials. It was illustrated that verifying the identity of person or entity that sought remote access to a system, that authored an electronic communication, or that signed an electronic document was the domain of what had come to be called “identity management”. The functions of identity management are achieved by three processes: identification, authentication and authorization (see A/CN.9/692 and A/CN.9/728).

[seven (7)] calendar days after the notice of the claimant's claim is communicated to the ODR provider. The counter-claim shall be dealt with in the ODR proceedings together with the claimant's claim.]

[A counterclaim must include the information in article 4A, paragraphs (4)(c) and (4)(d)].]”

“3. The response shall include:

“(a) the name and designated electronic address of the respondent and the respondent's representative (if any) authorized to act for the respondent in the ODR proceedings;

“(b) a response to the statement and allegations contained in the notice;

“(c) any solutions proposed to resolve the dispute;

“(d) a statement that the respondent is not currently pursuing other remedies against the claimant with regard to the specific dispute in relation to the transaction in issue;

“[(e) the location of the respondent];

“[(f) whether it agrees with the language of proceedings provided by the claimant pursuant to article 4A, paragraph 4(g) above, or whether another language of proceedings is preferred;]

“[(g) the signature of the respondent and/or the respondent's representative in electronic form including any other identification and authentication methods;]

“[...]

Remarks

General

63. A provision contained in a previous draft of the Rules, requiring the respondent to set out at the time of response whether it agrees to participate in ODR proceedings, has been removed as creating uncertainty in light of the agreement required at the time of transaction in draft article 1.

Paragraph (2)

64. Draft article 4B, paragraph (2), reflects the decision of the Working Group to include a provision on counter-claims in the Rules (A/CN.9/739, para. 93).

65. At its twenty-fourth session, the Working Group requested that the Secretariat prepare a definition of counter-claim as an alternative to that proposed in option 1, and moreover suggest where such a definition might be included in the Rules (A/CN.9/739, para. 93). Consequently, option 2 was inserted in brackets. The Working Group may wish to retain the stand-alone definition proposed in option 2 in this paragraph, or separately, in draft article 2 (Definitions).

66. In addition to considering whether the definition as currently drafted would be sufficiently broad to encompass counter-claims in B2B disputes, the Working Group may also wish to consider the following issues:

(a) Should the respondent file a new claim or include the counter-claim in the response? If the former, should the counter-claim be in the form set out in draft article 4A?

(b) Can the response to the notice be presumed to encompass any counter-claim in the absence of an express statement or indication by the respondent that such a counter-claim is being made? Will the neutral have the discretion to decide that a response encompasses or constitutes a counter-claim, in the absence of such an express statement?

(c) Will there be an option for the claimant to file a response to the counter-claim, or might the neutral have the discretion to request that the claimant do so?

(d) How will it be determined whether the counter-claim falls within the ambit of the initial claim in the notice by the claimant? (A/CN.9/739, para. 92). The Working Group may wish to consider the extent to which this question is addressed by draft article 7(4) (power of the neutral to rule on his own jurisdiction, including the existence or validity of the agreement to submit the dispute to ODR);

(e) Does the filing of a counter-claim prevent the respondent from filing a new claim on the same transaction and with a different ODR provider, in practice?

Paragraph (3)

67. Paragraph (3) addresses the content of the response to the notice and mirrors the provisions of draft article 4A, paragraph (4).

Paragraph (3)(a)

68. As with draft article 4A, paragraph (4), the issue of data protection or privacy and online security in the context of communicating information relating to the parties in the course of ODR proceedings ought to be taken into consideration (A/CN.9/721, para. 108).

Paragraph (3)(f)

69. Paragraph (3)(f) has been amended slightly in order that it conforms with the language requested by the Working Group in draft article 12 (Language of proceedings), which suggests that the language of proceedings should be agreed by parties at the commencement of ODR proceedings (see also para. 60 above).

(A/CN.9/WG.III/WP.119 and Add.1) (Original: English)

**Note by the Secretariat on online dispute resolution for
cross-border electronic commerce transactions: draft procedural
rules, submitted to the Working Group on Online Dispute
Resolution at its twenty-seventh session**

ADDENDUM

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3. Negotiation**1. Draft article 5 (Negotiation and settlement)***Negotiation*

“1. [Upon communication of the response [and, if applicable, counter-claim] referred to in article 4B to the ODR provider[, and notification thereof to the claimant]], the parties shall attempt to settle their dispute through direct negotiation, including, where appropriate, the communication methods available on the ODR platform.]

“2. If the respondent does not communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3) within seven (7) calendar days, it is presumed to have refused to negotiate and the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).

“3. If the parties have not settled their dispute by negotiation within ten (10) calendar days of submission of the response to the ODR platform [and notification thereof to the claimant], then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of the neutral in accordance with article 6 (Appointment of Neutral).

“4. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days.

Settlement

“5. If settlement is reached [during the negotiation stage] [and/or at any other stage of the ODR proceedings], [the terms of such settlement shall be recorded on the ODR platform], [at which point,] the ODR proceedings will automatically terminate.”

*Remarks**General*

2. The provisions of draft article 5 have been reordered, taking into account the proposals of the Working Group at its twenty-fifth session and with a view to reflecting more clearly the probable chronology of negotiation and settlement (see A/CN.9/WG.III/WP.117/Add.1, para. 2). The Working Group may wish to consider including the provisional subheadings provided in this article in order to better distinguish between the negotiation and settlement phases, particularly if the Working Group is inclined to consider settlement as a process that could take place at any time during the proceedings, including during the facilitated settlement stage and/or prior to the conclusion of any decision-making stage (although see A/CN.9/744, para. 85).

3. In relation to a settlement stage, the Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether a separate provision providing for disputes arising out of the settlement might be required in this respect. A paragraph contained in a previous draft of the Rules providing for the possibility of re-opening or re-commencing proceedings should a settlement not be implemented has been deleted, as being at odds with principles of law whereby settlement agreements amount to contracts that must be enforced in accordance with the terms of that contract, and moreover as conflating the enforcement of a settlement with other stages of ODR proceedings (i.e. the rendering of a decision or award).

Paragraph (1)

4. At its twenty-fifth session, the Working Group requested the Secretariat to modify the drafting of paragraph (1) to take into account suggestions that the negotiation stage should be more clearly defined and furthermore to ensure that the Rules supported implementation of negotiated settlements (A/CN.9/744, paras. 79-81). Consequently, paragraph (1) now addresses the timing and content of the negotiation stage. This paragraph formerly addressed the consequences of settlement (namely, termination of proceedings), which now appears as draft paragraph (5).

Paragraphs (2) and (3)

5. Paragraphs (2) and (3) both provide, in different circumstances, for ODR proceedings to move to the next stage of proceedings (facilitated settlement). That stage would be the same in both Tracks of a two-track system (A/CN.9/WP.119, paras. 15-20). Therefore previous language which referred to stages of proceedings following the facilitated settlement stage has been removed as unnecessary and potentially confusing.

6. In paragraph (2), the phrase “[respond to the notice]” has been replaced by “communicate to the ODR provider a response to the notice in accordance with the form contained in article 4B, paragraph (3)” in the interest of maintaining consistency with the requirements for the notice set out in draft article 4B, and also in order to avoid ambiguity in relation to the timing of receipt (see A/CN.9/WP.119, para. 21).

7. In paragraph (3), bracketed language has been included with the aim of clarifying the timing of receipt of the response, and to maintain consistency with the other provisions in this article.

8. Additional language has also been added to paragraph (3) to clarify the stage at which a neutral would be appointed.

Paragraph (4)

9. At the twenty-fifth session of the Working Group, it was suggested that limiting the time period during which an extension could be agreed would be preferable to facilitate efficient proceedings; ten days was agreed to be sufficient in this respect (A/CN.9/744, paras. 84, 86).

10. The Working Group may wish to consider whether the intent of this paragraph is to extend the deadline for filing a response (under draft article 4B), or for reaching a settlement (under draft article 5(5)). Although these options are not mutually exclusive, the Working Group may wish to recall its consensus that only one of these options should be included (A/CN.9/744, para. 85). There was some discussion regarding whether paragraph (4) should govern only the commencement of proceedings, and hence be applicable only to a response, or whether it should instead place some limitation on the capacity of the parties to negotiate through the ODR system by limiting the time in which they can reach settlement through such negotiation (without prejudice to their ability to negotiate outside the ODR system in any event) (A/CN.9/744, para. 85).

Paragraph (5)

11. The Working Group may wish to consider whether a settlement may be reached at any stage of ODR proceedings, in which case, it may be advisable to include settlement in a separate draft article to distinguish it from the negotiation process (see para. 2 above).

12. Preference was expressed by the Working Group for settlements to be clearly recorded on the ODR platform (A/CN.9/744, para. 90). Therefore, it may be considered to include in the Guidelines for ODR Neutrals and Providers provisions on the length of time those settlement agreements would be kept on the platform or in the records of the ODR provider, issues of confidentiality, and other considerations; and in that respect, the Working Group may wish to decide whether the words “on the ODR platform” in paragraph (5) allow for sufficient flexibility in relation to the record to be kept by the ODR provider.

13. The Working Group may further wish to consider any technical aspects regarding formation of settlement agreements, including whether a separate provision on disputes arising out of the settlement might be required in this respect.

4. Neutral

14. Draft article 6 (Appointment of neutral)

“1. The ODR provider shall appoint the neutral [by selection from a list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions]] and shall promptly notify the parties of such appointment.

“[2. The neutral, by accepting appointment, shall be deemed to have undertaken to make available sufficient time to enable the ODR proceedings to be conducted and completed expeditiously in accordance with the Rules.]

“3. The neutral shall declare his or her independence and shall disclose to the ODR provider any circumstances [arising at any time during the ODR proceedings] likely to give rise to justifiable doubts as to his or her impartiality or independence. The ODR provider shall communicate such information to the parties.

“[4. If, as a consequence of his or her involvement in the facilitation of settlement, any neutral develops doubts as to his or her ability to remain impartial or independent in the future course of the ODR proceedings under articles 8 (bis) or 9, that neutral shall [resign and inform the parties and the ODR provider accordingly] [disclose the same to the ODR provider]. The ODR provider shall promptly communicate such information to the parties.]

“5. Either party may object to the neutral’s appointment within [two (2)] calendar days [(i) of the notification of appointment [without giving reasons therefor] [; or (ii) of a fact or matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral, [including a neutral’s declaration or disclosure pursuant to paragraphs (3) [or (4)]] [setting out the fact or matter giving rise to such doubts.] at any time during the ODR proceedings].

“5 bis. Where a party objects to the appointment of a neutral [under paragraph 5(i) above], that neutral shall be automatically disqualified and another appointed in his or her place by the ODR provider. Each party shall have a maximum of [three (3)] challenges to the appointment of a neutral following each notice of appointment, following which the appointment of a neutral by the ODR provider will be final[, subject to paragraph 5(ii) above]. [Alternatively if no challenges are made within two (2) days of any notice of appointment, the appointment will become final, subject to paragraph 5(ii) above.] [Where a party objects to the appointment of a neutral under paragraph 5(ii) above, [the ODR provider] shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced].

“[6. Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral.]

“7. If the neutral has to be replaced during the course of ODR proceedings, the ODR provider through the ODR platform shall appoint a neutral to replace him or her [pursuant to paragraph (1)] [and will inform the parties promptly of that selection]. The ODR proceedings shall resume at the stage where the neutral that was replaced ceased to perform his or her functions.

“8. The number of neutrals shall be one [unless the parties agree otherwise].”

Remarks

Paragraph (1)

15. It was suggested that the words “*or belonging to other arbitral institutions*” be inserted in square brackets in order to accommodate access to a wider range of neutrals, including neutrals from arbitral institutions (A/CN.9/744, para. 103). The Working Group may wish to consider (i) whether ODR providers will be encouraged (under a Guidelines document) to maintain lists of neutrals, and the purpose of such a list; (ii) if so, whether permitting selection of neutrals “belonging to other arbitral institutions” would detract from the purpose of maintaining a list of neutrals; and (iii) if lists of qualified neutrals are not to be maintained by ODR providers, whether the phrase “[*by selection from a list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions]*” should be deleted.

16. The Working Group may wish to note that the words “*and shall promptly notify the parties of such appointment*” were previously located (in slightly different form) elsewhere in this article, but have been relocated to paragraph (1) to clarify the chronology of communication of a neutral’s appointment to the parties.

Paragraph (2)

17. Draft article 6(2) has been moved from draft article 7(1), following the determination of the Working Group that this paragraph was more closely related to the appointment of the neutral (A/CN.9/744, para. 104).

Paragraph (3)

18. The Working Group may wish to recall its proposal that the neutral’s duty of independence and impartiality be drafted as an ongoing one (A/CN.9/744, para. 92).

Paragraph (4)

19. Paragraph (4) has been relocated from draft article 8 to draft article 6, which addresses appointment of a neutral, in order that it remains applicable to both Track I and Track II.¹ Paragraph (4) furthermore resonates with the other provisions in draft article 6 regarding impartiality of a neutral and, where applicable, the procedure for appointing a new neutral. In this respect, the Working Group may wish to consider whether, when a neutral develops doubts as to his or her ability to remain impartial or independent, he or she ought to resign, or to disclose the

¹ Albeit with a slight modification required to remove “article 8 (bis)” from this paragraph should Track I be applicable, and to remove “article 9” should Track II be applicable.

information to the ODR provider, in which case paragraph (5)(ii) would apply at a party's discretion. Language has been inserted to provide for the latter option, so that instead of resigning on the basis of doubt alone, the neutral would be obliged to inform the ODR provider of the information giving rise to such doubts, following which the parties could object pursuant to the procedures provided for in paragraph (5).

Paragraph (5)

20. At its twenty-fifth session, the Working Group requested the Secretariat to draft a separate provision in draft article 6 permitting a party to object to the appointment of a neutral at any stage of proceedings where there was a justification for such objection (A/CN.9/744, para. 94). Consequently, the former paragraph (3) has been split into two paragraphs, (5) and (5) bis, to differentiate between the right of a party to object to the appointment of a neutral at any time, and the consequences of such objection.

21. There are two possible routes by which a party might object to a neutral. The first, set out in paragraph (5)(i), expresses the ability of either party to object to an appointment immediately after the notification of appointment. In that case, the neutral would be automatically replaced.

22. The second, set out in paragraph (5)(ii), permits either party to object to a neutral's appointment at any time during proceedings, should justifiable doubts arise as to that neutral's independence, and within two days of learning of the facts leading to such doubts. The Working Group may wish to consider (i) whether a two-day period is sufficient; (ii) whether the objecting party would need to furnish an objective justification for such a fact or matter (see A/CN.9/744, para. 94, as well as the ongoing duty to self-report required by the neutral in draft articles 6(3) and 6(4)); (iii) if so, whether a decision would need to be made on replacement of the neutral; and (iv) if a decision was required, whether the existing neutral would be competent to make such decision on that challenge (bearing in mind the current competence-competence provision in article 7(4)).

23. With regard to point (iv) above, if the neutral is not considered the appropriate person to make this decision, a question for consideration is whether the responsibility for such assessment falls to the ODR provider. Language has been inserted in the last sentence of paragraph (5) bis to accommodate such a decision. Alternatively, this may be an issue to be resolved either by a review mechanism internal to the ODR provider (see draft article 9 (ter)) or by guidelines or rules for ODR providers.

24. Paragraph (5) bis has been slightly amended to include a reference to the "final appointment" of a neutral (subject to the ongoing duty of a neutral to disclose information impugning his or her impartiality), in order to clarify the point at which paragraph (6) takes effect.

Paragraph (6)

25. Paragraph (6) has been amended to reflect the principle that within a three-day period the parties may object to the provision of information to the neutral, but that after the expiration of that period the full set of information would be conveyed to the neutral (A/CN.9/744, para. 97).

Paragraph (7)

26. The first set of bracketed language has been included to reflect the fact that any new appointment should also be from the list of neutrals referred to in paragraph (1), and that the parties would be notified accordingly.

Paragraph (8)

27. At its twenty-fifth session, the Working Group agreed to retain paragraph (8) as drafted, on the basis that it provided clarity while also permitting a certain degree of flexibility (A/CN.9/744, paras. 101-102). The Working Group may wish to consider whether (i) in low-value disputes, it would be appropriate or necessary to have more than one neutral; and (ii) the Rules as currently drafted accommodate more than one neutral. In relation to (ii), the following questions would need to be considered: how, and when, would the parties agree to have more than one neutral? How would the neutrals communicate with one another? If the parties appointed an even number of neutrals, how would decisions be made in the case of deadlock? Where the Rules provide for a neutral to perform a certain function (i.e. request information from the parties), would all neutrals be required to fulfil that function were more than one neutral to be appointed?

28. The Working Group may wish to consider whether moving paragraph (8) to follow paragraph (1) might create a more logical chronology.

29. **Draft article 7 (Power of the neutral)**

“[1. Subject to the Rules [and the Guidelines and Minimum Requirements for ODR Neutrals], the neutral may conduct the ODR proceedings in such manner as he or she considers appropriate.]

“[1 bis. The neutral, in exercising his or her functions under the Rules, shall conduct the ODR proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the dispute. In doing so, the neutral shall remain at all times wholly independent and impartial and shall treat both parties equally.]

“2. Subject to any objections under article 6, paragraph (6), the neutral shall conduct the ODR proceedings on the basis of documents submitted by the parties and any communications made by them to the ODR provider, the relevance of which shall be determined by the neutral. [The ODR proceedings shall be conducted on the basis of these materials only unless the neutral decides otherwise.]

“3. At any time during the proceedings the neutral may [require] [request] or allow the parties (upon such terms as to costs and otherwise as the neutral shall determine) to provide additional information, produce documents, exhibits or other evidence within such period of time as the neutral shall determine.

“4. The neutral shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence or validity of any agreement to refer the dispute to ODR. For that purpose, the dispute resolution clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A determination by

the neutral that the contract is null shall not automatically entail the invalidity of the dispute resolution clause.

“[5. Where it appears to the neutral that there is any doubt as to whether the respondent has received the notice under the Rules, the neutral shall make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so may where necessary extend any time period provided for in the Rules. [As to whether any party has received any other communication in the course of the ODR proceedings, the neutral may make such inquiries or take such steps as he or she deems necessary to satisfy himself or herself with regard to such receipt, and in doing so, may, where necessary, extend any time period provided for in the Rules.]]”

Remarks

Paragraphs (1) and (1) bis

30. Paragraphs (1) and (1) bis (formerly paragraph (2)) characterize (i) the functions of the neutral; and (ii) the neutral's broad discretion to conduct the ODR proceedings as he or she sees appropriate, subject to certain constraints (see A/CN.9/744, para. 105).

31. The Working Group may wish to consider whether a document to be prepared in relation to guidelines and minimum requirements for neutrals (see A/CN.9/WG.III/WP.114) should be explicitly incorporated into paragraph (1) as a standard to which the neutral is subject in his or her conduct of proceedings.

Paragraph (2)

32. The Working Group may wish to recall its agreement that paragraph (2) should be subject to the ability of a party to object to the provision by the ODR provider to the neutral of information generated during the negotiation stage of ODR proceedings (A/CN.9/744, para. 108).

33. The Working Group may wish to consider deleting the last sentence of paragraph (2), as it does not confer additional powers on the neutral and nor does it serve to proscribe the power of the neutral in practice. Furthermore it may be considered slightly confusing when read alongside paragraph (3).

Paragraph (3)

34. The Working Group may wish to recall that it considered modifying slightly the powers of the neutral in order to allow the neutral to request, but not to require, the parties to provide additional information (A/CN.9/744, para. 109).

35. The Working Group may also wish to consider whether the provision on costs might be at odds with the current language in draft article 15.

Paragraph (5)

36. The Working Group may wish to recall its request to the Secretariat to redraft paragraph (5) (previously paragraph (6)) in order to oblige the neutral to conduct enquiries where any doubt existed regarding receipt of the notice, and to give the

neutral the discretion to do so regarding all other communications (A/CN.9/744, paras. 115-117). Square bracketed language has been inserted to reflect this request.

5. Facilitated settlement

37. Draft article 8 (Facilitated settlement)

“1. The neutral shall communicate with the parties to attempt to reach an agreement (“facilitated settlement”). If the parties reach a settlement agreement, then such settlement agreement shall be recorded on the ODR platform], [at which point,] the ODR proceedings will automatically terminate.”

Track I

“2. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral] (the “expiry of the facilitated settlement stage”), the ODR proceedings shall automatically move to arbitration, pursuant to article 9.”

Track II

Option 1:

“2. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral], the ODR proceedings shall automatically terminate.”

Option 2:

“2. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral] (the “expiry of the facilitated settlement stage”), the ODR proceedings shall automatically move to the final stage of proceedings pursuant to article 8 (bis).”

Remarks

General

38. The previous language serving as a mechanism to trigger the next stage of proceedings should the facilitated settlement fail to result in a settlement agreement has been replaced by, in relation to Track I, a mechanism for the commencement of arbitration, and in relation to Track II, two options for the Working Group’s consideration.

39. The facilitated settlement stage has been defined in paragraph (1), in order more clearly to define this second stage of proceedings. The end of the facilitated settlement stage has also been defined, as the expiry of ten calendar days from the appointment of the neutral, in order to provide a time-based trigger for moving to the next stage of proceedings.

Paragraph (1)

40. In lieu of the words “settlement” or “agreement”, which were used apparently interchangeably in this paragraph, the term “settlement agreement” has been inserted.

41. Square-bracketed language has been inserted in paragraph (1) to reflect the settlement language in draft article 5(5). The Working Group may wish to consider whether another option might be to simply note that, if settlement is achieved, the provisions on settlement in draft article 5(5) will apply.

Paragraph (2)

42. Paragraph (2), as the trigger for the relevant next stage of proceedings, would necessarily require different wording in Track I (arbitration track) and Track II (non-arbitration track). Previous language allowing for automatic progression to an arbitration stage has consequently been deleted from the Track II version of the Rules (A/CN.9/762, para. 22).

43. In relation to Track II, two options have been included for the consideration of the Working Group. Under the first option, the proceedings would terminate after the facilitated settlement stage had expired, if no settlement agreement had yet been reached.

44. The second option would permit a non-binding decision to be rendered and for its enforcement to be subject to private enforcement mechanisms such as trustmarks. In this respect, the Working Group may wish to recall the support given by the Working Group at its twenty-sixth session for consideration of a “third track” providing for a decision by a neutral to render a non-binding decision enforceable by private enforcement mechanisms (A/CN.9/762, paras.19-20).

45. Although a “Track III” of the Rules could theoretically be devised in order to accommodate both options set out in paragraphs 43 and 44 above, the Working Group may wish to consider whether creating three discrete sets of Rules might create excessive complexity regarding the understanding of, and thereby diminish the user-friendliness of, the Rules.

46. Should Option 1 be selected in relation to Track II, draft article 8 (bis) would be deleted from (and for the avoidance of doubt would not appear anywhere in) the Rules.

6. Decision

47. Draft article 8 (bis) (Decision by a neutral)

“1. The neutral shall at the expiry of the facilitated settlement stage proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

“2. The neutral shall evaluate the dispute based on the information submitted by the parties and shall render a decision. The ODR provider shall communicate the decision to the parties [and the decision shall be recorded on the ODR platform].

“3. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts so require.

“4. The decision shall not be binding on the parties. However, the parties are encouraged to abide by the decision and the ODR provider may introduce the use of trustmarks or other methods to identify compliance with decisions.”

Remarks

General

48. Draft article 8 (bis) would only apply should the Working Group decide to retain Option 2 (Track II) in draft article 8(2).

49. The first two paragraphs of draft article 8 (bis) mirror the provisions required for the neutral to render a decision pursuant to draft article 9, and in practice the decision-making process would likely look similar, although without a binding and enforceable arbitral award as the outcome.

50. In respect of both draft article 8 (bis) and draft article 9, the Working Group may wish to consider whether any issues relating to proceedings where the same person acts as mediator and decision maker might arise.

Paragraph (3)

51. This paragraph has been relocated to paragraph (3) of draft article 8 (bis) and correspondingly to paragraph (3) of draft article 9, in light of its applicability only to a decision-making stage of proceedings.

52. The second sentence reflects the Working Group’s proposal that there should be provision in the Rules for, in exceptional circumstances, reversing the burden of proof in situations where the party required to prove a fact was not in possession of the evidence needed to do so, or could not readily or easily obtain it (A/CN.9/762, paras. 66-67).

53. The Working Group may wish to consider whether, if each party has the burden of proving facts relied on to support its claim or defence, as a matter of principle the neutral should also have the power to require or request production of documents and information as currently included in the Rules in draft article 7(3).

7. Arbitration

54. Draft article 9 (Arbitration)

“1. The neutral shall, at the expiry of the facilitated settlement stage, proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage.

“2. The neutral shall evaluate the dispute based on the information submitted by the parties and shall render an award. The ODR provider shall communicate the award to the parties [and the award shall be recorded on the ODR platform].

“3. Each party shall have the burden of proving the facts relied on to support its claim or defence. The neutral shall have the discretion to reverse such burden of proof where, in exceptional circumstances, the facts of the ODR proceedings so require.

“4. The award shall be made in writing and signed by the neutral, and shall indicate the date on which it was made and the place of arbitration.

“[4 bis. The requirement in paragraph (3) for:

- (a) the award to be in writing shall be met where the information contained in the award is accessible so as to be usable for subsequent reference; and*
- (b) the award to be signed shall be met where data is used to identify the neutral and to indicate his or her approval of the information contained in the award.]*

“5. The award shall state brief grounds upon which it is based.

“6. The award shall be rendered promptly and in any event within seven (7) calendar days (with possible extension of additional seven (7) calendar days) after the date for the communication of final submissions provided by the neutral under paragraph (1). Failure to render an award within this time limit shall not constitute a basis for challenging the award.

“[6. bis. An award may be made public with the consent of all parties or where and to the extent disclosure is required of a party by legal duty, to protect or pursue a legal right or in relation to legal proceedings before a court or other competent authority.]

“7. The award shall be final and binding on the parties. The parties shall carry out the award without delay.

“8. In all cases, the neutral shall decide ex aequo et bono, in accordance with the terms of the contract, taking into consideration any relevant facts and circumstances[, and shall take into account any usage of trade applicable to the transaction].”

Remarks

General

55. The Working Group agreed at its twenty-sixth session that the word “award” should be retained throughout draft article 9 (A/CN.9/762, para. 35). It was furthermore clarified at that session that the term “award” would only apply to an arbitration stage of ODR proceedings (A/CN.9/762, para. 30).

56. Track I of the Rules will conclude with an arbitration stage and will result in an award which is binding on all parties, save by application of law to the contrary. Thus the Working Group’s suggestion to include in this article for further consideration wording to the effect that an award would not be binding in a case involving a consumer whose participation in ODR originated in a pre-dispute agreement to arbitrate which purported to deprive the consumer of his or her right of access to a court for resolution of the dispute, and where the law of the consumer’s jurisdiction guaranteed such right (A/CN.9/762, paras. 50, 52) has not been included (see A/CN.9/WG.III/WP.119, para. 17).

57. For the avoidance of doubt, under Track II, proceedings will conclude pursuant to draft article 8 (at the end of a facilitated settlement stage) or by

non-binding decision pursuant to draft article 8 (bis), and draft article 9 will not apply.

Paragraphs (1) and (2)

58. The previous paragraph (1) has been reorganized into two paragraphs ((1) and (2)) in order to clarify the timing of proceedings following the expiry of the facilitated settlement stage, as well as the procedural steps to be taken by a neutral in rendering an award. The Working Group may wish to consider whether the award, like the settlement agreement, should be recorded on the ODR platform.

Paragraph (4)

59. The requirement for the decision or award to be in writing and signed by the neutral reflects the language in article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration, as well as the Working Group's decision at its twenty-sixth session for the award to contain the date on which it was made and the place of arbitration (A/CN.9/762, para. 43).

Paragraph (4) bis

60. The Working Group at its twenty-fifth session proposed that a definition for the word "writing" be added to the list of definitions, and reflect the language in Article 6 of the UNCITRAL Model Law on Electronic Commerce (A/CN.9/744, para. 59). At its twenty-sixth session the Working Group requested that the Secretariat include a definition for the word "signature", in accordance with existing UNCITRAL standards (A/CN.9/762, para. 44; see also A/CN.9/WG.III/WP.119, paras. 40-41).

61. The requirements for the award to be in writing and signed have been inserted as a new paragraph (4) bis and reflect articles 6 and 7 respectively of the UNCITRAL Model Law on Electronic Commerce. Reference was also made to the definition of "electronic signature" in the UNCITRAL Model Law on Electronic Signatures 2001.

Paragraph (5)

62. The Working Group expressed broad consensus at its twenty-sixth session that wording requiring brief grounds for the neutral's decision should be included in this article (A/CN.9/762, para. 38).

Paragraph (6)

63. Paragraph (6) (formerly paragraph (1)) has been relocated in order to clarify the chronology of proceedings at an arbitration stage. The Working Group may wish to recall its agreement to permit an extension of 7 calendar days in relation to the time in which the neutral may render his or her award (A/CN.9/762, para. 37).

64. The Working Group may wish to consider the possibility of a neutral failing to render a decision within the time provided in paragraph (6) (A/CN.9/739, para. 133); and in addition, whether it would be desirable or possible to impose reputation-based penalties on ODR parties defaulting on their obligations (A/CN.9/739, para. 136).

Paragraph (6) bis

65. The Working Group may recall its decision to consider further whether awards should be made public, and its mandate to the Secretariat to insert in square brackets a provision reflecting the content of Article 34(5) of the UNCITRAL Arbitration Rules in this respect (A/CN.9/762).

Paragraph (7)

66. At its twenty-sixth session the Working Group agreed to remove the square brackets around this paragraph (A/CN.9/762, para. 52).

Paragraph (8)

67. The requirement for a neutral to decide “*ex aequo et bono*”, or in good faith and based on equity, has been inserted to provide for the applicable law in relation to an arbitral decision. The Working Group may recall that at its twenty-sixth session it noted that the previous wording of this paragraph failed adequately or completely to address the need for a substantive law (A/CN.9/762, para. 58).

68. An *ex aequo et bono* determination incorporates the principles of speed, common sense and equity that the Working Group has indicated are fundamental to ODR proceedings (A/CN.9/716, para. 101). This type of arbitration (where the neutral may decide the dispute on the basis of principles he or she believes to be just, without having to refer to any particular body of law) is currently not known or used in all legal systems. The explanatory note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 (the “Model Law”) states that although the Model Law refers to *ex aequo et bono* principles in article 28(3), it does not intend to regulate this area. The Model Law rather calls the attention of the parties on the need to provide clarification in the arbitration agreement. Likewise the Model Law makes clear that in all cases where the dispute relates to a contract (including arbitration *ex aequo et bono*) the arbitral tribunal must decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction. The same language is reflected in paragraph (8) of these Rules.

69. The principle of *ex aequo et bono* also appears in article 35 of the UNCITRAL Arbitration Rules, in circumstances where the parties authorize an arbitral tribunal to decide on that basis.

70. The Working Group may wish to note that in some jurisdictions an express agreement between the parties to arbitrate on the basis of *ex aequo et bono* principles is required. The inclusion of the applicable law in a dispute resolution clause between the parties may therefore be desirable (see A/CN.9/WG.III/119, para. 30). However, as previously stated in the commentary, and as set out in draft article 1 of the Rules themselves, the Rules are contractual in nature and would thus not override national law, including in relation to areas of applicable law. Nor would the Rules (cf. the Model Law) seek to regulate this area.

71. **[Draft article 9 (bis) Correction of award**

“Within [five (5)] calendar days after the receipt of the award, a party, with notice to the other party, may request the neutral to correct in the award any

error in computation, any clerical or typographical error, [or any error or omission of a similar nature]. If the neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefor] within [two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of the award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.]]”

Remarks

72. The Working Group may wish to recall that at its twenty-sixth session it requested that a new draft article 9 (bis) be added to provide for the correction of awards (A/CN.9/762, paras. 55-56). A similar suggestion that a provision regarding interpretation of award be included has not been inserted in this draft, in the interest of improving simplicity.

73. Draft article 9 (ter) Internal review mechanism

“[1. Either party may request annulment of the award within ten (10) calendar days of the communication of the award, by application to the ODR provider via the ODR platform, on the grounds that (a) the place of arbitration unfairly prejudiced that party; or (b) there has been a serious departure from a fundamental rule of procedure prejudicing that party’s right to due process.]

“[2. The ODR provider shall appoint a neutral (i) unaffiliated with the ODR proceedings the subject of the request, and (ii) from the list of qualified neutrals maintained by the ODR provider [or belonging to other arbitral institutions], to assess the request within five (5) calendar days. Once the neutral is appointed, the ODR provider shall notify the parties of such appointment.

“[3. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral appointed in accordance with article 6.]”

Remarks

General

74. The Working Group may wish to consider whether the Rules should permit or oblige ODR providers to create a second-tier procedural review mechanism in limited circumstances. Such a strictly procedural, non-merit-based review mechanism would provide for a more self-contained ODR process and permit online reviews of any post-award of procedural unfairness. Such a review mechanism could function so that a party could, after an arbitral award was rendered, appeal to the review mechanism to annul an award if it felt it had received a lower level of procedural protection than in its own jurisdiction. An internal review would not be a review on the merits.

75. On the one hand, such a mechanism could reduce the importance of the place of proceedings and reduce the need for recourse to court in the place of arbitration, which may be impractical; on the other hand, such a mechanism might not be

practical in the context of an ODR provider resolving a high number of disputes per year.

76. Such a provision would only be relevant in an arbitration stage whereby an award was rendered under draft article 9.

77. Draft article 10 (Place of proceedings)

“[The ODR provider shall select the place of proceedings, such place to be selected from among the list set out in the Appendix to [Track I of] these Rules.]”

Remarks

78. The Working Group may wish to recall its decision that the means of determining the place of arbitration should be addressed in the Rules (A/CN.9/762, para. 41). Draft article 10 is relevant to proceedings conducted pursuant to Track I only, as the seat of proceedings would be irrelevant to any stage not including arbitration.

79. An arbitration, even an online arbitration, must have a seat or place of arbitration, in order to establish the procedural law governing the arbitration and to avoid uncertainty and debate about the legal validity of the award. The seat ought also to be a signatory country to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) to increase the chances of the New York Convention being applicable to an award. The Working Group may wish to consider including a long or short list of countries to be included in an Appendix to Track I, based on signatory status to the New York Convention and the Convention on the Use of Electronic Communications in International Contracts, and also whether a country has adopted legislation based on the UNCITRAL Model Law on International Commercial Arbitration.

80. The Working Group may wish to consider how the seat should be determined, i.e., whether the ODR provider should be permitted to select the seat from a pre-determined list, as currently provided in draft article 10, thus promoting flexibility and allowing regional providers to select a seat within their region, or whether alternative options might be preferable — for example, a single seat for all ODR proceedings, analogous to the Court of Arbitration for Sport, which specifies that the place of all arbitrations under its rules shall be Switzerland. Were a single “global seat” such as this to be considered desirable by the Working Group, that seat could be specified in draft article 10 and in the dispute resolution clause between parties, and may therefore lead to more certainty.

8. General provisions

81. Draft article 11 (ODR provider)

“[The ODR provider shall be specified in the dispute resolution clause.]”

Remarks

82. This provision has been included in order that the Rules contain a means of ensuring that the ODR provider to be used by the seller is specified in the arbitration clause. Such a specification is required both to provide maximum transparency,

certainty and choice for the buyer, and moreover to ensure that the ODR proceedings are able to take effect, given that no “ad hoc” proceedings are envisaged under the Rules (see also para. 39 of A/CN.9/WG.III/WP.119).

83. The Working Group may wish to consider the consequences of the failure of the dispute resolution clause to specify the ODR provider and specifically how the provider would be selected in that instance.

84. Draft article 12 (Language of proceedings)

“[1. Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings[, having regard to the parties’ due process rights under article [x]].

“2. All communications, with the exception of any communications falling under paragraph (3) below, shall be submitted in the language of the proceedings (as agreed or determined in accordance with this article), and where there is more than one language of proceedings, in one of those languages.

“3. Any documents attached to the communications and any supplementary documents or exhibits submitted in the course of the ODR proceedings may be submitted in their original language, provided that their content is undisputed.

“4. When a claim relies on a document or exhibit whose content is disputed, the neutral may order the party serving the document or exhibit to provide a translation of that document into [a language which the other party understands] [the other language of the proceedings] [failing which, the language the other party included in its notice or response as its preferred language]].”

Remarks

General

85. At its twenty-sixth session, the Working Group proposed new wording for draft article 12 (Language of proceedings) (A/CN.9/762, paras. 75-81). That wording, along with some alternative proposed language intended to capture the sense of that drafting in a more concise manner, or in language more consistent with other UNCITRAL texts, has been included.

86. A proposal was made at the Working Group’s twenty-sixth session, as well as at its twenty-fifth session, to include a separate paragraph along the following lines (A/CN.9/762, para. 75; A/CN.9/739, para. 143): “An ODR provider dealing with parties using different languages shall ensure that its system, Rules and neutrals are sensitive to these differences and shall put in place mechanisms to address the needs of parties in this regard”. The Working Group may wish to consider whether such a provision is more appropriately placed in guidelines and minimum requirements for ODR providers; in particular, the Working Group has previously acknowledged that the Rules cannot place obligations on ODR providers (A/CN.9/744, para. 78), and in this respect, it may wish to consider to what extent the Rules are able to, or ought to, mandate the systems implemented and used by an ODR provider.

Paragraph (1)

87. The language proposed by the Working Group at its twenty-sixth session in relation to paragraph (1) read: “The ODR proceedings shall be conducted in the language or languages agreed upon by the parties at the commencement of the ODR proceedings.” Given the Working Group’s indication that the language of proceedings should be agreed at the outset of proceedings, the wording of article 4A, paragraph (4)(g), and article 4B, paragraph (3)(f), has been slightly amended to provide for the possibility of that agreement. Notably, those provisions only currently permit each party to specify a single preferred language; thus, the parties could either agree on one language, or propose in total two different languages, in which case the neutral would need to determine if both languages would be the “languages of proceedings”. The Working Group may also wish to note that the contract between the parties may itself specify the language of proceedings.

88. The language proposed by the Working Group at its twenty-sixth session in relation to paragraph (2) read: “In the event the parties do not agree on the language of proceedings, the language or languages of proceedings shall be determined by the neutral taking into account the parties’ due process rights under article [x]”.

89. For clarity and brevity, those two paragraphs proposed by the Working Group and as set out in paragraphs 86 and 87 above have been reformulated and consolidated, and now comprise paragraph (1) of draft article 12. Moreover paragraph (1) now reflects more closely the wording in article 19 of the UNCITRAL Arbitration Rules.

90. The reference to parties’ due process rights proposed by the Working Group at its twenty-sixth session has been retained in square brackets. The Working Group may wish to recall its discussion regarding whether a reference to the power of the neutral presently set out in draft article 7(1) bis, to provide a fair and efficient process for resolving disputes, might be sufficient, rather than a reference to an as yet to be determined article (A/CN.9/762, para. 76).

Paragraph (2)

91. The Working Group may wish to consider whether this paragraph would be better placed in draft article 3, Communications.

Paragraph (4)

92. The Working Group may wish to determine whether a translation, if required, be into a language “the other party understands”, or into the other language of the proceedings, if any, failing which the language the other party indicated as its preferred language pursuant to draft article 4A (Notice) or 4B (Response).

93. The Working Group may wish to recall that several delegations had expressed concerns in relation to a potential requirement for translation of documents, given that such a requirement might impose disproportionate costs on consumers (A/CN.9/762, para. 80).

94. The Working Group may also wish to note that in cases where the neutral needs to review supporting documentation submitted by the parties, the ODR

provider may need to appoint a neutral who has understanding of the relevant language(s).

95. Draft article 13 (Representation)

“A party may be represented or assisted by a person or persons chosen by that party. The names and designated electronic addresses of such persons [and the authority to act] must be communicated to the other party by the ODR provider.”

96. Draft article 14 (Exclusion of liability)

“[Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the ODR provider and neutral based on any act or omission in connection with the ODR proceedings under the Rules.]”

Remarks

97. Draft article 14 deals with the question of exclusion of liability of the persons involved in the ODR proceedings. It has been re-drafted to mirror article 16 of the UNCITRAL Arbitration Rules.

98. Draft article 15 (Costs)

“[The neutral shall make no [decision] [award] as to costs and each party shall bear its own costs.]”

Remarks

99. The term “costs” refers to an order by a neutral for the payment of money from one party (usually the losing party) to another (usually the successful party) in compensation for the successful party’s expenses in bringing his or her case.

E. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: timelines, submitted to the Working Group on Online Dispute Resolution at its twenty-seventh session

(A/CN.9/WG.III/WP.120)

[Original: English]

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I. Introduction

1. At its twenty-sixth session, the Working Group requested the Secretariat to provide at its twenty-seventh session a list of the time periods contained throughout the draft procedural rules on online dispute resolution for cross-border electronic commerce transactions (the “Rules”). The Working Group suggested that such a list be considered, alongside a general provision regarding modification or extension of deadlines with consent of the parties, at a future session of the Working Group (A/CN.9/762, para. 57).

2. Documents A/CN.9/WG.III/WP.119 and its addendum set out draft procedural rules on online dispute resolution for cross-border electronic commerce transactions and provide for two presumptive tracks, to constitute discrete stand-alone sets of Rules: one track terminating in an arbitration stage (“Track I”) and the other track terminating without recourse to arbitration (“Track II”), either (subject to the election of the Working Group) at the close of the facilitated settlement stage, or if a settlement has not been reached, with a non-binding decision by a neutral enforceable via private mechanisms such as trustmarks (see A/CN.9/WG.III/WP.119, paras. 15-20). Consequently this note sets out time periods common to each Track, and time periods in the Rules relevant to proceedings conducted under Track I or Track II.

3. Where the time period in a relevant provision has not been finally agreed and remains in square brackets for the Working Group’s consideration in the draft Rules, those square brackets are replicated in this note.

II. Online dispute resolution for cross-border electronic transactions: timelines

A. Time periods common to Track I and Track II

General

4. A number of provisions require the prompt determination by the ODR provider or neutral, or prompt notification to the parties or neutral of communications at the ODR platform. By way of non-exhaustive example:

- (i) The ODR provider shall promptly communicate acknowledgements of receipt of electronic communications between the parties and the neutral to all parties [and the neutral] at their designated electronic addresses (draft article 3(6)).
- (ii) The ODR provider shall promptly notify all parties and the neutral of the availability of any electronic communication at the ODR platform (draft article 3(7)).
- (iii) Subject to an agreement by the parties, the neutral shall, promptly after its appointment, determine the language or languages to be used in the proceedings (draft article 12(1)).

5. In the interest of concision, not all such provisions are replicated in this note. Likewise provisions that may involve an element of timing (e.g. an obligation that a party must provide its electronic contact information at the time of transaction, in draft article 3((2)) but which are not linked to a specific deadline, have been omitted.

Commencement of the ODR Proceedings: Response

6. The respondent shall communicate to the ODR provider a response to the notice ... within seven (7) calendar days of receipt of the notice (draft article 4B(1)).

7. A counterclaim by the respondent shall be submitted no later than [seven (7)] calendar days after the notice of the claimant's claim is communicated to the ODR provider (draft article 4B(2), Options 1 and 2).

Negotiation and appointment of neutral

8. [Upon communication of the response ... to the ODR provider ... the parties shall attempt to settle their dispute through direct negotiation ...] (draft article 5(1)).

9. If the respondent does not communicate to the ODR provider a response to the notice ... within seven (7) calendar days ... then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of a neutral in accordance with article 6 (draft article 5(2)).

10. If the parties have not settled their dispute by negotiation within ten (10) calendar days ... then the ODR proceedings shall automatically move to the facilitated settlement stage, at which point the ODR provider shall promptly proceed with the appointment of a neutral in accordance with article 6 (draft article 5(3)).

11. The parties may agree to a one-time extension of the deadline [for the filing of the response] [for reaching settlement]. However no such extension shall be for more than ten (10) calendar days (draft article 5(4)).

Objection to neutral's appointment

12. Either party may object to the neutral's appointment [(i)] within [two (2)] calendar days of the notification of appointment ... [or (ii) a fact or a matter coming to its attention that is likely to give rise to justifiable doubts as to the impartiality or independence of the neutral ... at any time during the ODR proceedings] (draft article 6(5)).

13. [Where a party objects to the appointment of a neutral under draft article 6(5)(ii), [the ODR provider] shall make a determination within [three (3)] calendar days, regarding whether that neutral shall be replaced] (draft article 6(5) bis).

14. [Either party may object, within three (3) calendar days of the final appointment of the neutral, to the provision by the ODR provider to the neutral of information generated during the negotiation stage. Following the expiration of this three-day period and in the absence of any objections, the ODR provider shall convey the full set of existing information on the ODR platform to the neutral] (draft article 6(6)).

B. Time periods only applicable to Track I

Expiry of facilitated settlement stage

15. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral] (the "expiry of the facilitated settlement stage"), the ODR proceedings shall automatically move to arbitration (draft article 8(2), Track I).

Arbitration

16. The neutral shall, at the expiry of the facilitated settlement stage, proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage (draft article 9(1)).

17. The neutral ... shall render an award (draft article 9(2)). The award shall be rendered promptly and in any event within seven (7) calendar days (with possible extension of additional seven (7) calendar days) after the date for the communication of final submissions (draft article 9(6)).

[Correction of award]

18. Within [five (5)] calendar days after the receipt of the award, a party, with notice to the other party, may request the neutral to correct in the award any error in computation, any clerical or typographical error, [or any error or omission of a similar nature]. If the neutral considers that the request is justified, he or she shall make the correction [including a brief statement of reasons therefor] within

[two (2)] calendar days of receipt of the request. Such corrections [shall be recorded on the ODR platform and] shall form part of the award. [The neutral may within [five (5)] calendar days after the communication of the award make such corrections on its own initiative.] (draft article 9 (bis)).]

[Internal review mechanism]

19. Either party may request annulment of the award within ten (10) calendar days of the communication of the award ... (draft article 9 (ter)(1)).

20. The ODR provider shall appoint a neutral ... to assess the request for annulment within five (5) calendar days (draft article 9 (ter)(2)).

21. That neutral shall render a final decision on the request for annulment within seven (7) calendar days of his or her appointment. If the award is annulled the ODR proceedings shall, at the request of either party, be submitted to a new neutral constituted in accordance with article 6.]

C. Time periods only applicable to Track II

Expiry of facilitated settlement stage

22. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral], the ODR proceedings shall automatically terminate (draft article 8(2), Option 1, Track II).

23. If the parties have not settled their dispute by facilitated settlement [within ten (10) calendar days of appointment of the neutral] (the “expiry of the facilitated settlement stage”), the ODR proceedings shall automatically move to the final stage of proceedings pursuant to article 8 (bis) (draft article 8(2), Option 2, Track II).

Decision by a neutral (draft article 8, Option 2, Track II)

24. The neutral shall at the expiry of the facilitated settlement stage proceed to communicate a date to the parties for final submissions to be made. Such date shall be not later than ten (10) calendar days from the expiry of the facilitated settlement stage (draft article 8 (bis)(1)).

F. Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules — Proposal by the European Union observer delegation, submitted to the Working Group on Online Dispute Resolution at its twenty-seventh session

(A/CN.9/WG.III/WP.121)

[Original: English]

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I. Introduction

1. During the course of the twenty-seventh session of Working Group III (Online Dispute Resolution), the European Union observer delegation submitted to the Secretariat the following text, which is reproduced below in the form in which it was received by the Secretariat.

II. Proposal by the European Union observer delegation

A. The discussions of Working Group III: Where do we stand today?

1. UNCITRAL's mandate

In 2010, UNCITRAL entrusted its Working Group III with developing a legal standard on Online Dispute Resolution (“ODR”) for cross-border electronic commerce transactions, including business-to-business and business-to-consumer transactions.¹ Working Group III has since discussed drafts of Rules for an ODR process for cross-border low-value, high-volume electronic commerce transactions (the “ODR Rules”). It has agreed that the ODR Rules would take the form of generic contractual Rules that would be agreed upon by online merchants and their online customers in the context of an electronic commerce transaction.² The idea is that the possibility to settle potential disputes arising from an electronic commerce transaction through an ODR procedure that complies with an internationally recognized standard — i.e. with the “UNCITRAL ODR Rules” — would increase buyers’ and vendors’ confidence in buying and selling online and across borders.

¹ Report of the 43rd session of the UNCITRAL Commission (2010), A/65/17, para. 257, confirmed by Report of the 44th session of the UNCITRAL Commission (2011), A/66/17, para. 218 and Report of the 45th session of the UNCITRAL Commission (2012), A/67/17, para. 79.

² See Report of the 25th session of Working Group III (New York, May 2012), A/CN.9/744, para. 16.

The broad scope of the initiative (not only business-to-business transactions, but also business-to-consumer transactions) reflects two basic realities of low-value, high-volume electronic commerce transactions:

First, low-value, high-volume transactions very often involve consumers. One can even say that low-value, high-volume transactions are a paradigm case for consumer transactions;

Second, online transactions are different from offline transactions. While in offline transactions the vendor usually knows whether the transaction is a business-to-business or a business-to-consumer transaction, in online transactions the online vendor simply puts his terms and conditions on his website and those terms and conditions get agreed by the buyer ticking the relevant box — no matter the category the buyer falls into (business or consumer).³

Against this background, UNCITRAL has instructed its Working Group III to be particularly mindful of consumer protection legislation and, in general terms, to consider specifically the impact of its deliberations on consumer protection.⁴ This mandate also responds to another fundamental fact: consumers — in developing countries and in developed countries — are key drivers for the economy worldwide⁵ and especially for tapping the potential of electronic commerce. In order to achieve the goal of instilling confidence in these key players in buying online and across borders, the ODR Rules need to meet their expectations.

2. The design of the ODR Rules — Arbitration as a model for designing a global standard for ODR for low-value, high-volume electronic commerce transactions?

ODR processes and the mechanisms ensuring compliance with their outcomes can be designed in a multitude of ways. Up to its 26th session (Vienna, November 2012), Working Group III engaged in intensive discussions on whether or not the ODR Rules should be designed so as to end in an arbitration phase. In that context, it was also discussed whether a potential arbitration process could be designed on the assumption that relevant arbitration agreements — when concluded at the time of the transaction, i.e. before the dispute has arisen (“pre-dispute arbitration agreements”) — would in all instances be binding on both parties.

Focussing the discussions on a potential arbitration model proved to be controversial for two reasons:

First, designing the ODR Rules on an arbitration model only would not have reflected the current reality of ODR processes worldwide. Indeed, many successful ODR processes today are not designed on the model of arbitration.⁶ Other than

³ This means that, in online transactions, even if the terms and conditions stipulated that they only apply when the buyer is a business (business-to-business transaction), in fact they would also be agreed upon when the buyer is a consumer — unless there was a mechanism in place that would allow the online vendor’s website to categorize the buyer (as being a business or a consumer).

⁴ See Report of the 44th session of the UNCITRAL Commission (2011), A/66/17, para. 218.

⁵ In the European Union, for example, consumer expenditure accounts for 56 per cent of the European Union’s GDP.

⁶ See Vikki Rogers, *Managing Disputes in the Global Market Place. Reviewing the Progress of UNCITRAL’s Working Group III on ODR*, to be published in the Spring issue of “Dispute Resolution Magazine” (draft version accessible via:

arbitration processes, they do not provide for outcomes which are binding on the buyer, while compliance with the procedural outcome is ensured through private enforcement mechanisms. Furthermore, arbitration processes are “heavy” procedurally, and the added value of online arbitration in terms of cross-border enforcement of arbitral awards under such a process is doubtful. It is doubtful if arbitral awards rendered under such a process would be capable of being enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷ Even assuming that this was the case, it is unrealistic to believe that arbitral awards rendered in the context of low-value, high-volume transactions could be enforced across borders under the 1958 New York Convention. This is particularly true when the claimant is a consumer or a small or medium-sized business. In that context, it should be noted that being awarded an arbitral decision does not mean that the claimant can automatically enforce that award against the other party. In order to enforce an arbitral award, the award creditor (claimant) needs to go to the local enforcement court at the place where the award debtor (respondent) has his assets and request that the award be declared enforceable. In other words, in order to enforce his award, the claimant needs to revert to the judicial system. This is problematic in cases where the judicial system at the place where the respondent resides or otherwise has his assets does not perform well.⁸ Furthermore, requesting a court to declare an arbitral award enforceable is costly. The costs are even higher when the award debtor (respondent) is in another country. Especially in a context like that envisaged by the ODR Rules — i.e. in the context of cross-border low-value, high-volume transactions — it is very likely that the cost of enforcing an arbitral award is much higher than the sum awarded. It would therefore be disproportionate for award creditors (claimants) — especially when they are consumers or small or medium-sized businesses — to try and enforce their awards.

Second, regarding business-to-consumer transactions, the legal standard concerning the effect of pre-dispute arbitration agreements on consumers is split among States. There are two diverging standards:

In one group of states (“Group I States”) pre-dispute arbitration agreements are considered binding on all parties, irrespective of whether one party is a consumer or not.⁹

<http://blogs.law.stanford.edu/codr2013/files/2013/03/Dispute-Resolution-Magazine-Final-Draft.pdf> [accessed on 6 May 2013]).

⁷ See background note A/CN.9/WG.III/WP.110 in which the UNCITRAL Secretariat draws attention to a number of open questions in that regard.

⁸ The UNCITRAL ODR initiative is intended to also help the development of electronic commerce in countries where the judicial system does not perform well. If the UNCITRAL initiative is designed in a way that sends award creditors (claimants) back to those judicial systems, parties from those countries lose out.

⁹ Such jurisdictions include the United States of America and a number of other States. Regarding the situation in the United States, however, it should be noted that on 7 May 2013 a bill for an “Arbitration Fairness Act of 2013” was tabled in the United States Senate. The bill foresees to amend Title 9 of the United States Code, inter alia, by adding a new § 402, according to which “[...] *no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of [...] [a] consumer dispute [...]*.” If the Arbitration Fairness Act gets adopted, the United States would no longer be a “Group I State”, but rather fall within the category of “Group II States”.

In another group of states (“Group II States”) pre-dispute arbitration agreements are considered not binding on the consumer or can be invalidated by him. However, consumer arbitration agreements are considered binding on both parties (i.e. including on the consumer) when they are entered into *after* the dispute has arisen.¹⁰

3. The outcome of the 26th session of Working Group III (Vienna, November 2012)

As having an arbitration track in the Rules was important for some “Group I States” and as “Group II States” underlined that — if the ODR Rules were to contain an arbitration track — regarding pre-dispute consumer arbitration agreements, the ODR Rules as a *global* standard for an ODR process could not be designed on the model of the standards of one group of States alone, Working Group III agreed on the following compromise at the end of its 26th session:

1. The Rules should adopt a “two-track approach”, meaning that they should be designed flexibly so as to provide for one procedural track leading to arbitration (“arbitration track”) and one procedural track not leading to arbitration (“non-arbitration track”);
2. In the arbitration track, the Rules would need to reflect the divergent standards in Group I States and Group II States concerning pre-dispute consumer arbitration agreements. This would mean in practice that the arbitration track could be designed on the assumption of binding pre-dispute consumer arbitration agreements whenever the transaction involved a consumer from a Group I State. Whenever a consumer from a Group II State was involved in the transaction, the arbitration track would need to respect the relevant standard of Group II States.¹¹

B. The issue: Respecting divergent standards concerning pre-dispute consumer arbitration agreements in the “arbitration track”

1. Why Working Papers 119 and 119/Add.1 do not fully implement the outcome of the 26th session of Working Group III

The Working Papers (WPs) published by the UNCITRAL Secretariat in preparation of the 27th session of Working Group¹² only partially implement what the Working Group had agreed at its preceding 26th session:

1. It is to be welcomed that WPs 119 and 119/Add.1 implement the so-called “two-track approach”;

¹⁰ Such jurisdictions include Japan, the Member States of the European Union (in accordance with the recently adopted European Directive on alternative dispute resolution for consumer disputes), Canadian jurisdictions, a number of Latin American States and some African States. South Korea has a legal standard which is similar to that of the jurisdictions stated. If the “Arbitration Fairness Act of 2013” (see previous footnote) gets adopted, the United States would equally fall into this group of States.

¹¹ See Report of the 26th session of UNCITRAL Working Group III, A/CN.9/762, paras. 18, 19 and 22.

¹² More specifically, WPs 119 (A/CN.9/WG.III/WP.119) and 119/Add.1 (A/CN.9/WG.III/WP.119/Add.1).

2. However, as concerns the so-called “arbitration track” of the Rules (called “Track I” in the WPs), the WPs fail to ensure respect for the standard concerning pre-dispute consumer arbitration agreements applicable in “Group II States”. Instead, the ODR Rules as they stand in WPs 119 and 119/Add.1 are drafted on the basis of the “Group I State” standard alone.

The Working Group had agreed, that if the ODR Rules would include an arbitration stage, they would need to include a mechanism that also respects the standards of Group II States concerning pre-dispute consumer arbitration agreements.¹³ Group II States had made it clear that this would need to entail that consumers from such States must not “be put on the arbitration track of the Rules”, meaning that if the online buyer was a consumer from a Group II State, the Rules should make sure that either an arbitration track cannot be agreed upon in the first place, or — if the consumer agrees to the arbitration track of the Rules (e.g. because the online seller only offers Track I of the Rules) — the ODR provider should not be able to start the arbitration phase of the procedure unless the consumer agrees to start that arbitration phase *after* the dispute has arisen (e.g. by a “second click”).¹⁴

2. Why saying that the ODR Rules are only contractual in nature is not enough — a practical example

Simply saying that the Rules are intended to be only contractual in nature (i.e. not part of a Convention or a Model Law) and that they therefore are incapable of setting aside consumer protection legislation in Group II States, is not enough. Although being factually correct as a statement, this finding does not solve the problem. This becomes evident from the following example:

Example: If a consumer from a Group II State enters into an “arbitration track agreement” as currently envisaged by WPs 119 and 119/Add.1 with an online merchant established in a Group I State and they agree to submit relevant disputes to an ODR provider established in a Group I State, the consumer protection legislation of the Group II State concerned does not apply to relevant ODR proceedings. Of course, the ODR Rules do not affect the relevant Group I State consumer protection legislation; but if the relevant Group I State legislation does not apply, it does not help the consumer that the consumer protection legislation of his country is not prejudiced by the ODR Rules.

In the above scenario, the ODR provider might render an arbitral award against the consumer and order him to pay, e.g. \$200. The online seller would then try to enforce this award against the consumer in the Group II State in which the consumer is resident. This would mean in practice: The consumer would receive — from his own enforcement court/authority — a writ informing him that an award has been issued against him ordering him to pay \$200 and that he has to pay on that award unless he raises objections before the enforcement court/authority within a specified period of time.

The overwhelming majority of consumers (who are not lawyers specialized in international arbitration) would be much intimidated and would simply pay —

¹³ See Report of the 26th session of UNCITRAL Working Group III, A/CN.9/762, paras. 18, 2nd sentence, 22.

¹⁴ See Report of the 26th session of UNCITRAL Working Group III, A/CN.9/762, para. 22.

because they would not know what to do or because the cost for hiring a highly specialized lawyer (who would tell them that under the relevant Group II State legislation the arbitration agreement was not binding on or could be cancelled by them and that therefore they could oppose recognition and enforcement of the arbitral award and would not have to pay the \$200) would be too high.

- In practice, therefore, the relevant consumer protection legislation would not be applied and therefore would not protect relevant consumers, if they had agreed on the “arbitration track” of the Rules as they currently stand.
- As has been seen above,¹⁵ UNCITRAL instructed Working Group III not only to be mindful of the need not to displace consumer protection legislation. The Commission also decided that, in general terms, in the implementation of its mandate, the Working Group should also consider specifically the impact of its deliberations on consumer protection. Simply arguing that the Rules are contractual in nature and therefore cannot displace consumer protection legislation would therefore fail to respect the Commission’s mandate to also consider the practical impact of the draft Rules.
- Finally, the scenario described above (consumer gets confronted with foreign arbitral award, is intimidated and pays without raising objections to the recognition and enforcement of the award), would ultimately lead to consumers abstaining from shopping online and across borders. Rather than instilling consumer confidence in shopping online and across borders, the ODR Rules would thus deter consumers from using the potential of electronic commerce. This would run counter the rationale of the UNCITRAL ODR initiative as stated by the UNCITRAL Commission.
- If the Rules were designed as currently set out in WPs 119 and 119/Add.1, Working Group III would therefore fail to fulfil its mandate.

C. The challenge: Ensuring that online buyers are “put on the right track”

In a situation of divergent standards concerning arbitration, the easiest way forward for designing a global standard on ODR could be to envisage — in line with the current reality of many ODR systems — an ODR process not modelled on arbitration.

If, however, the Working Group opts to retain an arbitration track in the Rules, the challenge is to ensure that online buyers are “put on the right track”. “Putting online buyers on the right track” means that the Rules would include a mechanism that would ensure that in the event that the buyer is a consumer from a Group II State the ODR process would not end in arbitration, unless the consumer agrees on an arbitration track after the dispute has arisen.

D. The way forward: Including technology in our deliberations

At the outset, two ways forward appear to offer themselves:

1. A mechanism ensuring that online buyers are “put on the right track” could lie with the ODR provider. The ODR Rules could contain a definition of

¹⁵ See point A.1. of this document.

“consumers” and two annexes listing Group I States and Group II States, while the — to be developed — principles for ODR providers could foresee that ODR providers would have to ensure that if the dispute involves a consumer from a Group II State, the ODR process would not move to an arbitration stage, unless the consumer gave his agreement to do so post dispute.

2. As some delegations stressed that it is important for them that it be clear — at the time of the transaction — if an ODR process ending in arbitration has been agreed, those delegations might not consider the above solution as a way forward. The mechanism ensuring that online buyers are put on the right track would therefore need to lie at the time of the transaction, i.e. when the parties agree on the ODR clause. As the ODR clause is offered on the online merchant’s website and agreed when the buyer ticks the “I agree” box, the mechanism needs to bite exactly here, i.e. on the online merchant’s website.

The Mechanisms described at (2) above would allow the online merchant’s website to identify if the buyer is from a Group I State or a Group II State and — in the event that the buyer was from a Group II State — if the buyer is qualified as a business or as a consumer. In the event that the website identified the buyer as a Group II State consumer, it would automatically offer the “non-arbitration track” (Track II) of the Rules, otherwise it would offer the track the online merchant offers for transactions with other buyers (Track II or Track I).

In the ODR Rules, the above approach could be implemented as follows:

The Rules would contain two Annexes:

- Annex I listing Group I States;
- Annex II listing Group II States.

States would notify the UNCITRAL secretariat, prior to adoption of the ODR Rules, if they intend to be listed in Annex I or Annex II.

- In Article 2 of the draft Rules, a definition of “consumer” would be added. A number of international instruments contain a definition of “consumer” (e.g. Article 2 of the Hague Convention on Choice of Court Agreements); these definitions could serve as a model.
- The Rules would stipulate that in the event that the buyer is a consumer from a Group I State, Track I can be agreed only after the dispute has arisen.

In essence, therefore, the mechanism described would mean that the online merchant’s website has the potential of choosing whether Track I or Track II of the ODR Rules is offered to the buyer. Implementing such a mechanism on online merchants’ websites is very easy in terms of IT and does not constitute a burden for online merchants. In that regard, it is important to note:

- All online merchants maintain a website that contains an order form in which buyers need to fill in their address (shipment/billing). Online merchants’ systems therefore already dispose of the data they would need to ascertain whether the buyer is from a Group I State or a Group II State.
- Collecting the data necessary for establishing whether or not the buyer is a consumer could be collected in a very simple way: when the system establishes (from the address the buyer fills into the order form) that the buyer

is from a Group II State, the system would ask the buyer a question — in accordance with the definition of “consumer” in Article 2 of the ODR Rules — that would allow it to establish his quality as a business or a consumer (e.g. “Are you making this purchase for your personal or for your professional purposes?”).

- Connecting the result of the above data collection with the choice of Track I or Track II of the ODR Rules is a very straightforward IT operation.
- Online merchants that intend to offer the UNCITRAL ODR Rules on their websites will have to rework their websites anyway. Including a straightforward mechanism as described here, in effect, does not constitute an additional burden.

IV. INSOLVENCY LAW

A. Report of the Working Group on Insolvency Law on the work of its forty-second session (Vienna, 26-30 November 2012)

(A/CN.9/763)

[Original: English]

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I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (Insolvency Law) (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101) and at its forty-first session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.103 and Add.1, 104 and 105).

4. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any number of the issues set forth in the proposal.

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-second session in Vienna from 26-30 November 2012. The session was attended by representatives of the following States members of the Working Group: Austria, Bolivia (Plurinational State of), Brazil, Canada, Chile, China, Colombia, Czech Republic, El Salvador, France, Germany, Greece, Israel, Italy, Japan, Mexico, Nigeria, Norway, Pakistan, Paraguay, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Venezuela (Bolivarian Republic of).

6. The session was attended by observers from the following States: Belarus, Belgium, Cyprus, Denmark, Dominican Republic, Guatemala, Indonesia, Lithuania, Madagascar, Poland, Qatar, Slovenia and Switzerland.

7. The session was also attended by observers from the European Union.

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

(a) *Organizations of the United Nations system*: International Monetary Fund (IMF) and the World Bank;

(b) *Invited intergovernmental organizations*: Islamic Development Bank (ISDB);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Institute (ELI), European Law Students Association (ELSA), Groupe de Réflexion sur l'Insolvabilité et sa Prévention (GRIP 21), INSOL International (INSOL), Inter-American Bar Association (IABA), International Bar Association (IBA), International Credit Insurance and Surety Association (ICISA), International Insolvency Institute (III), International Swaps and Derivatives Association (ISDA), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Mr. Carlos Lorenzo Cudas Zavala (Paraguay)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.106);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.107);

(c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.108);

(d) A note by the Secretariat on the insolvency of large and complex financial institutions (A/CN.9/WG.V/WP.109); and

(e) A note on technical assistance and cooperation (A/CN.9/WG.V/WP.110).

11. The Working Group adopted the following agenda:

1. Opening of the session.

2. Election of officers.

3. Adoption of the agenda.

4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; and (c) insolvency of large and complex financial institutions.

5. Other business.

6. Adoption of the report.

III. Deliberations and decisions

12. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) insolvency of large and

complex financial institutions, on the basis of documents A/CN.9/WG.V/WP.107, A/CN.9/WG.V/WP.108 and A/CN.9/WG.V/WP.109. The Working group also discussed issues relating to technical assistance and cooperation on insolvency law on the basis of document A/CN.9/WG.V/WP.110. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests

13. The Working Group commenced its session with a discussion of two issues raised by the Commission at its forty-fifth session relating to whether the Working Group's mandate on centre of main interests covered issues relating to enterprise groups and if so when the Working Group should handle this topic. In relation to the scope of the mandate on centre of main interests, the Working Group noted that it was necessary to look at issues of centre of main interests as it related to enterprise groups because most commercial activity was currently conducted through enterprise groups. The Working Group also noted the description of the mandate contained in paragraph 10 of document A/CN.9/WG.V/WP.107 and that, as originally worded, it was intended to cover centre of main interests in the context of enterprise groups. The Working Group recommended that the Commission should confirm the Working Group's view that the scope of the Working Group's mandate on centre of main interests as originally approved included centre of main interests in the context of enterprise groups.

14. Regarding the timing of such consideration, it was agreed by the Working Group that that topic should be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests of individual debtors.

15. The Working Group then started its discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency as contained in document A/CN.9/WG.V/WP.107.

A. Purpose and origin of the Model Law

16. The Working Group adopted the substance of paragraphs 3 and 3A and the revisions to the footnotes to paragraphs 4 to 8 as drafted.

B. Purpose of the Guide to Enactment and Interpretation

17. The substance of paragraph 9 was adopted as drafted.

C. Main features of the Model Law

1. Access

18. The Working Group agreed that the first three sentences of paragraph 49B should be amended by inserting the word “both” between “address” and “inbound” in the first sentence and the words “with respect to outbound requests” and “with respect to inbound requests” at the beginning of the second and third sentences respectively, as follows: “The provisions on access address both inbound and outbound aspects of cross-border insolvency. With respect to outbound requests, the person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative) is authorized to act in a foreign State (article 5) on behalf of local proceedings. In respect of inbound requests, a foreign representative has the following rights of direct access to courts in the enacting State (article 9); ...”

2. Recognition

19. The Working Group agreed to delete the word, “inter alia” in the third sentence of paragraph 37A and to replace the words, “as a matter of course” with “without further requirement” in the penultimate sentence of the same paragraph. The substance of paragraph 37A was otherwise adopted as drafted. Paragraph 37B was amended by inserting an additional sentence at the end of the paragraph to the effect that the public policy exception should be used in limited cases and that differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws violates another State’s public policy.

20. The Working Group adopted paragraphs 37C, E and F as drafted.

3. Cooperation and coordination

21. The Working Group adopted paragraphs 33B and 33E as drafted.

D. Article-by-article remarks

Chapter I. General provisions

Articles 1-8

Article 1. Scope of application

22. Paragraph 65 was adopted as drafted.

Article 2. Definitions

23. The Working Group adopted the substance of paragraphs 68, 23A and 23A bis as drafted.

Subparagraphs (a) and (b)

24. The Working Group approved paragraphs 23B, 23C, 24G and 31 as drafted.

Subparagraphs (c) to (f)

25. The Working Group approved paragraph 73 as drafted; agreed to insert the words “to the court” in the second last sentence of paragraph 73A and to revise the relevant phrase to read “evidence acceptable to the court”; and approved paragraphs 74 and 75B as drafted.

Articles 3, 5 and 8

26. The Working Group approved paragraphs 78, 84 and 91 as drafted.

Chapter II. Access of foreign representatives and creditors to court in this State*Articles 10 to 12*

27. The Working Group approved paragraphs 96, 98, 100, 101 and 102 as drafted.

Chapter III. Recognition of a foreign proceeding and relief*Article 15-24**Article 15: Application for recognition of a foreign proceeding*

28. The Working Group approved paragraphs 119 and 120 as drafted.

*Article 16. Presumptions concerning recognition**Paragraph 1*

29. It was suggested that the final two sentences of paragraph 122B did not appear to be entirely consistent with the first sentence of the paragraph, which encouraged originating courts to include information in their orders to facilitate the task of recognition. A proposal was made to delete the final two sentences of the paragraph in order to make it clearer. However, the Working Group agreed that it intended to avoid the potential problem that an originating court could make findings beyond what was necessary, which might then inappropriately influence decisions that should be made independently by the receiving court. The Secretariat was requested to prepare a revised text of paragraph 122B in order to resolve any perceived inconsistency but to maintain the intention of the Working Group.

30. The Secretariat prepared the following revised text of paragraph 122B:

“122B. Inclusion of that information in the orders made by the court commencing the foreign proceeding should be encouraged in order to facilitate the task of recognition in relevant cases, although making findings with respect to the issues that it is the function of the receiving court to decide — such as the location of the centre of main interests or whether the foreign proceeding is main or non-main — is to be avoided.* As noted below, those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further at paras. 124B-C below).

* Except where jurisdiction is dependent upon establishing centre of main interests or the presence of an establishment.”

31. Concern was raised that, while reflecting the earlier discussion in the Working Group, the revised text could be perceived as inappropriately requiring the originating court to tailor its orders with the receiving court in mind and seeking to restrict the originating court in the issues it might consider. However, it was recognized that a cautionary note could be usefully raised in the Guide to Enactment and Interpretation, since judges often consult both it and the Legislative Guide. In addition, it was agreed that the information in issue would refer primarily to the foreign proceedings and to the foreign representative as referred to in article 16(1) of the Model Law.

32. Following discussion, paragraph 122B was agreed as follows:

“122B. Inclusion of information regarding the nature of the foreign proceedings and the foreign representative as defined in article 2 in the orders made by the court commencing the foreign proceeding can facilitate the task of recognition in relevant cases. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further at paras. 124B-C below).”

Paragraph 3

33. The Working Group adopted the substance of paragraph 123A as drafted.

34. The Working Group approved the substance of paragraph 123B with the following change: delete the word “frequently” at the beginning of the second sentence and insert the phrase “and in that situation” before the phrase “no issue concerning”.

35. The Working Group agreed with the recommendation in footnote 6 of A/CN.9/WG.V/WP.107 that the word “prove” in the first sentence of paragraph 123C should be deleted and replaced with “satisfy the court as to”. Paragraph 123C was adopted with the suggested revision.

Centre of main interests

36. The Working Group expressed a preference in favour of version 2 of paragraph 123D, with the following revisions: (a) place the third sentence referring to the EC Regulation¹ in a footnote; and (b) incorporate the third and fourth sentences from version 1 of paragraph 123E. The Working Group requested the Secretariat to prepare a revised version of the paragraph for further consideration.

37. The Secretariat prepared the following revised text of paragraph 123D:

“123D. The concept of a debtor’s centre of main interests is fundamental to the operation of the Model Law.* The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor’s centre of main interests correspond to those attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where the debtor is likely to commence insolvency proceedings. As has been noted, the Model Law

¹ European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings.

establishes a presumption that place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not always coincide with the place of its registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. Where the place of registration is not the debtor's centre of main interests, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a given State is the debtor's centre of main interests."

"* As noted in paragraph 31A, the concept of centre of main interests also underlies the scheme set out in the EC Regulation."

38. After discussion on the revised text, the Working Group agreed on the substance of paragraph 123D, with the following revisions: (a) replace the phrase "the debtor is likely to commence insolvency proceedings" with the phrase "insolvency proceedings concerning the debtor are likely to commence" in the third sentence; and (b) replace the phrase "Where the place of registration is not the debtor's centre of main interests," at the beginning of the sixth sentence with the phrase "Where it is uncertain that the debtor's place of registration is its centre of main interests,".

Factors relevant to the determination of centre of main interests

39. Following discussion, the Working Group agreed that factors (a) and (b) should be retained in paragraph 123F as more important, and principal factors relevant to determining the centre of main interests. It was also agreed that the focus of factor (a) should be ascertainability to creditors, as they represented the most significant group of stakeholders, and that the phrase "third parties" should be deleted. In considering factor (b), it was decided that determination of the location should be based on where the central administration of the debtor occurred, and that the phrase "or operations" and the word "management" should be deleted. In respect of factor (c), the Working Group agreed that while it was a factor of less importance than factors (a) and (b), it should be retained as a potentially useful factor for determining centre of main interests, but be included in paragraph 123I rather than deleted.

40. The Working Group also agreed that paragraph 123I was not intended to be an exhaustive list, that the order in which the factors were listed in that paragraph was not indicative of any particular importance or weight that should be given to those factors, and that the first line of paragraph 123I should refer to the "principal" factors.

41. There was discussion regarding the appropriate sequencing of paragraphs 123F, G and I. In view of the decisions made with respect to the factors in paragraphs 123F and I, the Secretariat was requested to consider any consequential deletions that should be made to paragraph 123G and to its placement.

42. The Secretariat prepared the following revised text of paragraph 123F, which was approved in substance by the Working Group:

“123F. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been commenced is the debtor’s centre of main interests. The factors are: (a) the location is readily ascertainable by creditors, and (b) the location is where the central administration of the debtor takes place.”

43. The Secretariat prepared the following revised text of paragraphs 123G and 123I:

“123G. Frequently, these factors will point to a single jurisdiction as the centre of main interests. In some cases, however, there may be a conflict between the factors, requiring a more careful review of the facts. The inquiry is thus one of fact and the court will analyse the factors to discern, objectively, where a particular debtor has its centre of main interests. In all cases, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor’s centre of main interests.

“123I. When the principal factors noted above do not yield a ready answer regarding the debtor’s centre of main interests, a number of other factors concerning the debtor’s business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. These additional factors may include the following: [...]. The order in which these factors are set out is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a particular case.”

44. It was observed that following the approval of the revised text of paragraph 123F, consequential changes were required to paragraphs 123G and 123I on the basis that there were now only 2 factors in paragraph 123F. It was agreed that in making those revisions, an appropriate emphasis on the holistic nature of the analysis of the factors should be maintained. The Working Group agreed to revise paragraphs 123G and 123I as follows:

“123G. When the principal factors noted above do not yield a ready answer regarding the debtor’s centre of main interests, a number of other factors concerning the debtor’s business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of a particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor’s centre of main interests.

“123I. The order in which the additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case. The additional factors may include the following: [...].”

Movement of centre of main interests

45. The Working Group agreed that paragraphs 123K and L could be simplified to reflect the ideas that a debtor’s centre of main interests (as opposed to its place of

registration) might move; that where it moved in close proximity to the commencement of insolvency proceedings, the factors discussed in paragraph 123F may be more difficult to satisfy; and that the court should look more closely at those factors as they related to a debtor in that position to ensure a proper decision with respect to recognition was made. It was also agreed that the movement of a debtor's centre of main interests should not give rise to an assumption of fraud. The Working Group requested the Secretariat to prepare a revised version of the paragraphs for further consideration.

46. The Secretariat prepared the following revised text of paragraph 123K:

“123K. Cases have occurred in which the debtor has moved its centre of main interests in close proximity to the commencement of insolvency proceedings, in some instances even between the time of the application for commencement and the actual commencement of those proceedings. In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the place of registration (or habitual residence) may have been designed to thwart the legitimate expectations of creditors and third parties or undertaken as the result of insider exploitation or biased motivation. As a general rule, whenever there is evidence of such a move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in para. [...] above more carefully and take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable to third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.”

47. After discussion, the Working Group agreed that the phrase “Cases have occurred in which the debtor has moved its centre of main interests” in the first sentence should be replaced with the phrase “A debtor's centre of main interests may move prior to commencement of insolvency proceedings; in some instances”, and that the phrase “As a general rule,” at the beginning of the penultimate sentence should be deleted. The Working Group did not reach agreement on whether or not to include the second and third sentences of paragraph 123K: some suggested that the examples in the sentences were useful as demonstrating two possible extremes, while others were of the view that providing the examples could invite unnecessary, and possibly subjective, scrutiny of the matter. As a compromise, it was agreed that the second and third sentences should be included as a footnote enclosed in square brackets and that the phrase “centre of main interests” in the third sentence should replace the phrase “place of registration (or habitual residence)”. It was also agreed that the cross-reference should be to the factors in paragraphs 123F and 123I.

48. The substance of paragraph 123M was adopted as drafted.

*Article 17. Decision to recognize a foreign proceeding**Paragraph 1*

49. In paragraphs 124B and C, the Working Group agreed to retain the reference to “information” and delete the reference to “evidence”. With that amendment, the Working Group adopted the substance of the paragraphs as drafted.

*Paragraph 2**Timing of the determination with respect to centre of main interests*

50. The substance of paragraphs 128A-B was adopted as drafted.

51. The Working Group approved the substance of paragraph 128C with the following revisions: (a) replace the words “debtor ceased trading” with a reference to the cessation of the business activity of the debtor; (b) delete the second sentence referring to the EC Regulation; and (c) replace the words “The same issue” at the beginning of the fifth sentence with the words “The same reasoning”.

52. The Working Group agreed that the timing of the determination with respect to centre of main interests should also apply to establishment. The Secretariat was requested to include appropriate text to reflect that decision.

53. It was also agreed that the text need not include further explanation of habitual residence.

Abuse of process

54. It was noted that the material in paragraph 123L relating to false claims as to the location of centre of main interests should be included in paragraph 123J. A suggestion to relocate paragraph 123J to the remarks under article 6 was not supported.

Paragraphs 3 to 4

55. The Working Group adopted the substance of paragraphs 125, 130 and 131 as drafted.

*Article 18. Subsequent information**Subparagraphs (a) to (b)*

56. The Working Group adopted the substance of paragraphs 133 and 134 as drafted.

*Article 19. Relief that may be granted upon application for recognition of a foreign proceeding**Paragraphs 1 to 4*

57. The substance of paragraphs 135 to 140 was adopted as drafted.

*Article 20. Effects of recognition of a foreign main proceeding**Paragraphs 1 to 4*

58. The Working Group adopted the substance of paragraphs 144 to 146, 149, and 151 to 153 as drafted.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

59. The substance of paragraphs 154, 156, 158 and 160 was adopted as drafted.

Article 22. Protection of creditors and other interested persons

60. The Working Group adopted the substance of paragraphs 162 to 164 as drafted.

Article 23. Actions to avoid acts detrimental to creditors

61. The substance of paragraphs 165 to 167 was adopted as drafted.

Article 24. Intervention by a foreign representative in the proceedings in this State

62. The Working Group adopted the substance of paragraph 170 as drafted.

Chapter IV. Cooperation with foreign courts and foreign representatives*Article 27. Forms of cooperation*

63. The substance of paragraphs 183 and 183A was adopted as drafted.

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*

64. The Working Group adopted the substance of paragraphs 185 and 187A as drafted.

Chapter VI. Assistance from the UNCITRAL Secretariat*B. Information on the interpretation of legislation based on the Model Law*

65. The substance of paragraphs 201 and 202 was adopted as drafted.

V. Directors' obligations in the period approaching insolvency

66. The Working Group resumed its consideration of the topic of directors' obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.108.

A. Purpose of legislative provisions

67. The Secretariat drew the Working Group's attention to two issues for consideration under the purpose of the legislative provisions. The first related to the

choice of a term or description to be given to persons who would be responsible for taking the necessary action to avoid insolvency or minimize the effects of insolvency. The second issue was with regard to use of the words “likely”, “imminent” or “unavoidable” to describe the period before insolvency within which the obligations or duties should be carried out.

68. Concerning the term or description to be given to persons in a company who would be responsible for taking the necessary action, it was agreed that a more generic description like “those charged with making decisions concerning management of the company” should be used on the basis that the term “directors” had different meanings in various jurisdictions, and that the generic description would cover persons who were not de facto directors but made decisions on behalf of the company. The Working Group agreed to use the more generic description with a modification to delete the words “charged with”. This change should be reflected throughout the draft recommendations.

69. Regarding the use of the words “likely”, “imminent” or “unavoidable”, the Working Group agreed to delete the words “likely” and use “imminent or unavoidable”. This change should be reflected throughout the draft recommendations.

B. Contents of legislative provisions

Recommendation 1 — The obligation

70. The Working Group agreed that the words “law relating to insolvency” should be retained throughout the draft recommendations. Since that formulation differed from the references to “the insolvency law” in parts one, two and three of the Legislative Guide, some text should be included to explain that the broader formulation had been adopted to take account of the relevance of other law, particularly company law, to the obligations of directors.

71. Various views were expressed with respect to paragraph 2 of draft recommendation 1 and the steps that should be taken, bearing in mind the goal of encouraging directors to use reorganization and appropriate informal procedures in a timely manner, the need to broaden the focus of directors to include the interests of creditors and the desirability of specifying steps that were particular to the period approaching insolvency, rather than steps that were typically included in the general obligations of a director. Reasonable steps, it was suggested, might be grouped under several phases, such as those relating to evaluation of the current situation of the business, identification of the options that might be open to the company to avoid or, where it was unavoidable, to minimize the impact of insolvency and finally, the taking of appropriate action. It was proposed that paragraph 32 of the commentary discussed reasonable steps in some detail and should inform revision of recommendation 1, paragraph 2. It was suggested that although avoidance of insolvency and minimization of its impact where it was unavoidable were different situations that might be regarded as requiring different measures, many of the steps that should be taken in either event overlapped and different sets of steps were not required.

72. Concern was expressed that including an obligation to avoid transactions that might be subject to avoidance if insolvency proceedings commenced, might establish a ground for liability that did not typically exist under avoidance provisions. In response, it was suggested that since the Legislative Guide on Insolvency Law provided the mechanism for avoidance of certain transactions, it was appropriate to include in this work an obligation to avoid such transactions where those transactions had no reasonable business justification. It was agreed that draft recommendation 1 should refer to “obligations” as there was reference to more than one obligation and that that revision should be reflected throughout the draft recommendations.

73. After discussion, the Secretariat was requested to prepare a revised text, taking into account the issues discussed, for further consideration.

74. The Secretariat prepared the following revised text of recommendation 1:

“1. The law relating to insolvency should specify that from the point in time referred to in recommendation 2, the person specified in recommendation 3 will have the obligations to have due regard to the interests of creditors and other stakeholders and to take reasonable steps to:

- (a) Avoid insolvency; and
- (b) Where it is unavoidable, minimize the extent of insolvency.

“2. Reasonable steps might include:

(a) Evaluating the current financial situation of the company and ensuring proper accounts are being maintained and that they are up-to-date; being independently informed as to the current and ongoing financial situation of the company; holding regular board meetings to monitor the situation; seeking professional advice, including insolvency or legal advice; holding discussions with auditors; calling a shareholder meeting;

(b) Evaluating the options that might be available to the company to avoid insolvency or, where it is unavoidable, to minimize its impact and modifying management practices to take account of the interests of a range of stakeholders; protecting the assets of the company so as to maximize value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; not committing the company to enter into the types of transaction that might be subject to avoidance unless there is an appropriate business justification;

(c) Taking appropriate action, including continuing to trade in circumstances where it is appropriate to do so to maximize going concern value; holding negotiations with creditors or commencing other informal procedures; commencing formal reorganization or liquidation proceedings.”

75. The Working Group approved paragraph 1 as drafted.

76. With respect to paragraph 2, the Working Group approved the substance of the steps included with a few changes as follows: conform the language in paragraph (b) relating to “the interests of a range of stakeholders” to the wording used in the chapeau to paragraph 1 to ensure the priority of the interests of creditors; and add some wording at the end of paragraph (c) relating to commencement of

formal proceedings to address a concern that commencement of such proceedings should only occur where it was appropriate to do so, but also taking into account those jurisdictions where there may be an obligation to commence in certain situations. With respect to the latter, it was suggested that the manner in which that issue was treated in recommendation 1 should conform to the manner in which it was treated in part two of the Legislative Guide.

77. As to the structure of subparagraphs (a)-(c) of paragraph 2, there was concern that since the steps listed in those subparagraphs might apply to both of the situations in paragraph 1, no distinction should be made between those two situations in terms of the steps that it might be reasonable to take. Nevertheless, it was also noted that commencement of formal proceedings might be more appropriate when insolvency was unavoidable, and that other steps might be more appropriate where insolvency could be avoided. The Working Group agreed that it might be possible to merge the steps listed in paragraphs 2, subparagraphs (a) and (b), together with the first two steps listed in subparagraph (c). The commencement of formal proceedings should be addressed separately and should take account of the appropriateness of that step to the financial situation being faced by the business, as well as any obligation to commence that might exist under national law, as noted above. The Secretariat was requested to prepare a further revision of the recommendation for consideration at a future session.

Recommendation 2 — The time at which the obligation arises

78. The Working Group approved the draft recommendation with the deletion of the word “likely”.

Recommendation 3 — Persons that owe the obligation

79. The Working Group agreed to amend draft recommendation 3 by deleting the square brackets around the words “the person”, deleting the words “defined under national law as fulfilling the role of a director” and “undertaking the responsibilities of a director” and retaining the words “formally appointed as a director and any other person exercising factual control and performing the functions of a director.” The remaining draft recommendations should also use the phrase “the person who owes the obligation.” The amended recommendation would state:

“3. The law relating to insolvency should specify the person who owes the obligation, which may include any person formally appointed as a director and any other person exercising factual control and performing the functions of a director.”

Recommendation 4 — Liability

80. With respect to subparagraph 1, the Working Group agreed after discussion that: the phrase “creditors have suffered loss or damage” should be retained and that the phrase “creditors’ interests have been harmed” should be deleted; and that the phrase “committed in the period referred to in recommendation 2” should be deleted.

81. With those revisions, the substance of draft recommendation 4 was adopted.

Recommendation 5 — Elements of liability and defences

82. The Working Group agreed that, although the aspects of the recommendation referring to draft recommendation 1 would have to be discussed once that recommendation had been revised and agreed, the phrase “creditors have suffered loss or damage” should be retained and the phrase “creditors’ interests have been harmed” should be deleted. The Working Group also agreed that the final sentence of the draft recommendation should be deleted.

Recommendation 6 — Remedies

83. After discussion, the Working Group agreed, with respect to the first sentence of the draft recommendation, that (a) it should be made clear that payment would not be due until after the question of a director’s liability had been litigated and that the damages referred to would be assessed by the court; (b) that any compensation payable was linked to the liability in recommendation 4, paragraph 2; and (c) that the remedies for liability “should” include payment in full to the insolvency estate. With respect to the second sentence, concern was expressed that the current formulation was too broad, referring generally to rights and claims in a manner that might preclude directors from exercising their rights as creditors and participating in the ordinary processes of insolvency in the period before any cause of action with respect to draft recommendation 1 had been litigated. It was proposed that the draft recommendation should be limited to restricting a director’s right to set-off. In that regard, a proposal was made to use the original formulation in draft recommendation 7, paragraph (c) of A/CN.9/WG.V/WP.104 — “a limitation on the exercise of set-off with respect to any debts owed by the company to the director”. That proposal was supported.

84. Further concerns were raised with respect to the issue of set-off in recommendation 6, particularly with respect to distinguishing between pre- and post-application aspects of set-off as they related to directors’ obligations and liability, and the relevance, for example, of director insurance. It was observed that set-off was difficult to define and could exist in several different forms, both legal and equitable and that it raised important issues of timing and questions of conduct. The uncertainty caused by set-off might be remedied through the use of subordination. It was suggested that those issues might be further considered in the commentary or in a footnote to recommendation 6. The Secretariat was requested to prepare a revised text, taking into account the issues discussed, for further consideration.

Recommendation 7 — Conduct of proceedings for breach of the obligation

85. The substance of the draft recommendation was approved with the addition of a cross-reference to recommendation 4.

Recommendations 8 and 9 — Funding of proceedings for breach of the obligation

86. The substance of draft recommendations 8 and 9 was approved by the Working Group.

Recommendation 10 — Additional measures

87. Differing views were expressed with respect to the second sentence in square brackets. One view was that the financial sanctions provided for in draft recommendation 6 should be complemented by additional measures so as to prevent egregious behaviour by directors and to protect the public from directors who had acted negligently or improperly. Another view was that other examples additional to disqualification should be included. A different view was that such a limitation was not warranted on the basis that it would be punitive, infringe on certain constitutional rights, discourage competent directors from taking up such positions and be outside the ambit of insolvency law. After discussion, the Working Group agreed that the second sentence should be deleted.

88. Regarding the first sentence, there was concern that deletion of the second sentence emptied the first sentence of much of its meaning. Some support was expressed in favour of deleting recommendation 10 completely and having recommendation 6 as the only remedy. A different view was that the first sentence could be retained to flag that States might include in national legislation measures additional to the payment of compensation. A suggestion was made that any revised recommendation should address the nature, duration, and proportionality of such measures. The Working Group agreed to delete the first sentence as drafted, but would consider further proposals.

89. The Secretariat prepared the following revised text of recommendation 10:

“10. In order to deter behaviour of the kind leading to liability under recommendation 4, the law relating to insolvency may include remedies additional to the payment of [compensation][damages] provided in recommendation 6.

“* The additional remedies that may be available will depend upon the types of remedies available in a particular jurisdiction and what, in addition to the payment of compensation, might be proportionate to the behaviour in question and appropriate in the circumstances of the particular case. Examples of such remedies are discussed in paras.--- [of the commentary].”

90. In its consideration of the revised text, the Working Group was reminded that the Legislative Guide already contained similarly structured recommendations that simply flagged an issue of importance. A number of different views were expressed on whether to insert the text as a recommendation or to include it in the commentary. These included that such measures were frequently a part of insolvency law; that they were outside the scope of insolvency law and belonged, for example, in the realm of company law; and that this was instead a grey area that required further consideration purely on its merits without reference to national approaches. In support of the latter view, it was observed that such a recommendation could be both enlightening and pedagogical. After discussion, the prevailing view was to support the consideration of the recommendation together with its footnote at a future session.

C. Commentary

91. The Working Group next considered the draft commentary with respect to directors' obligations in the period approaching insolvency as contained in document A/CN.9/WG.V/WP.108, paragraphs 6 to 51. The Working Group agreed that the commentary should be restructured to reflect the order of the recommendations and to include the recommendations following the relevant sections of the commentary. Further, a number of issues were identified in the commentary where the terminology used differed from that agreed in the recommendations or found elsewhere in the Legislative Guide on Insolvency Law, or where the drafting should be adjusted to accord with agreement reached on the recommendations. The Secretariat was requested to take into account the comments of the Working Group in preparing revised text of the commentary.

D. Issues relating to directors of enterprise group members

92. The Working Group considered the issues relating to directors of enterprise group members. It was agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration. The Working Group agreed that once it had completed its consideration of recommendations 1-10 and the related commentary, it could consider whether to address the issues that might be relevant in the context of enterprise groups. To facilitate those deliberations, the Secretariat was requested to provide further information, particularly as to different national approaches and solutions that might inform the discussion in the Working Group.

E. Cross-border issues

93. The Working Group agreed to defer its consideration of those issues to a future session.

VI. Circulation of texts to States for comment

94. The Working Group requested that consolidated revised versions of both the texts on centre of main interests and directors' obligations incorporating all revisions agreed by the Working Group be made available for consideration at its next session. The Working Group observed that once these texts had been further considered by the Working Group, they could then be circulated to States for comment prior to possible adoption by the Commission at its forty-sixth session in 2013.

VII. Insolvency of large and complex financial institutions

95. The Working Group considered that topic on the basis of document A/CN.9/WG.V/WP.109 and in particular the questions raised for the consideration of the Working Group in paragraph 64 of that document. The Working Group welcomed the very useful summary of work undertaken to date by

international organizations provided by the paper and, in particular, the extent to which the paper indicated the use by those organizations of the work undertaken by the UNCITRAL in the areas of cross-border insolvency and enterprise groups.

96. The Working Group agreed that it would be very useful for the Secretariat to continue monitoring the work of those other organizations, perhaps focusing specifically on the cross-border aspects of that work, and to provide further papers describing that work for the information of the Working Group and the Commission, subject to the availability of resources. The need to avoid duplication of work was emphasized, as was the desirability of limiting the areas of inquiry to those in which the Working Group had particular competence and expertise. It was observed that in much the same way that the work of UNCITRAL with respect to cross-border insolvency and enterprise groups had informed the work of the institutions addressed in the working paper, the work of those organizations on financial institution insolvency might inform the further work to be undertaken by the Working Group with respect to centre of main interest and enterprise groups. The desirability of possibly fostering greater cooperation and coordination between UNCITRAL and the international organizations working on financial institutions insolvency was also noted. A further benefit to be derived from monitoring the developments with respect to financial institution insolvency was that the global financial crisis had spurred considerable legislative reform and activity that could provide a background against which to assess the continuing relevance of the approach and solutions provided by the Legislative Guide on Insolvency Law.

VIII. Technical assistance and cooperation

97. The Working Group next considered issues relating to technical assistance and cooperation as outlined in document A/CN.9/WG.V/WP.110. It was reported that UNCITRAL texts on insolvency are used widely by the World Bank in its technical assistance activities, and that the European Union referred regularly to UNCITRAL insolvency texts in the current revision of its insolvency regulation. It was noted that the 10th Multinational Judicial Colloquium organized jointly by UNCITRAL, INSOL and the World Bank would be held in The Hague in 2013, and that participants had proven to be strong promoters of UNCITRAL insolvency texts.

98. It was observed that the accessibility of UNCITRAL insolvency texts could be improved through their translation into additional languages, and noted that several States had already performed such translations. UNCITRAL was encouraged to continue to pursue opportunities for cooperation with relevant entities such as the World Bank and the IMF, and to consider opportunities for awareness-raising and technical assistance presented by increased economic integration in regional groups such as the Association of Southeast Asian Nations (ASEAN). The members of the Working Group were also invited to raise awareness of UNCITRAL insolvency texts in their States and to encourage their adoption. In addition, the Working Group agreed that its members would keep the Secretariat abreast of additional instances in which the insolvency texts had been adopted or used, particularly in the case of the Legislative Guide, the use of which was more difficult to track than the Model Law on Cross-Border Insolvency.

**B. Note by the Secretariat on the interpretation and application of
selected concepts of the UNCITRAL Model Law on Cross-Border
Insolvency relating to centre of main interests (COMI), submitted to the
Working Group on Insolvency Law at its forty-second session**

(A/CN.9/WG.V/WP.107)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics, concerning a proposal by the United States of America, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude

the development of a convention.¹ The second topic concerning the liability of directors of a company in pre-insolvency is addressed in A/CN.9/WG.V/WP.104.

4. Pursuant to a decision taken by the Working Group at its fortieth session that, as a working assumption, the Guide to Enactment of the Model Law should be revised and enriched (A/CN.9/738, para. 13), proposals to revise the Guide to Enactment are set forth in documents A/CN.9/WG.V/WP.95 and Add.1, A/CN.9/WG.V/WP.99, A/CN.9/WG.V/WP.103 and Add.1 and A/CN.9/WG.V/WP.105, as well as the reports of the Working Group of its thirty-ninth, fortieth and forty-first sessions (A/CN.9/715, 738 and 742 respectively).

5. This note builds upon those documents and sets forth further draft revisions based upon the deliberations and decisions of the Working Group at its forty-first session. The reader will be assisted in understanding the changes made to the Guide to Enactment by consulting both the published version of that document and documents A/CN.9/WP.103 and Add.1.

6. Paragraphs of the published version of the Guide to Enactment that have not been revised or that do not include revised text are not included in this note, except as strictly necessary. For ease of reference, the paragraph numbers from that published version have been retained to indicate the reordering of the text and the additions that have been made. The numbering of the paragraphs in this note is therefore not necessarily sequential. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. All headings from the published text have been included and relevant paragraph numbers added in square brackets in the heading to indicate content and facilitate comparison with the published text.

7. Footnotes to be retained from the published version of the Guide without revision are not repeated (although the footnote markers remain in the text), but since the placement of some footnotes has been changed, their location is indicated by a note in square brackets. The text of new or revised footnotes has been included. The sections of the Guide entitled “Discussion in UNCITRAL and in the Working Group”, which lists relevant document references, have also been omitted, but will be included in the final version, updated to reflect both the original and current deliberations.

Enterprise groups

8. At the forty-fifth session of the Commission (2012), a question was raised as to whether the mandate of the Working Group included the issue of COMI in the context of enterprise groups. It was noted that while the report of the fortieth session of the Working Group (A/CN.9/738, para. 37) included the following with respect to that issue: “... and particularly with respect to the concept of COMI of an enterprise group, it was suggested that once the Working Group had reached agreement on the factors relevant to identifying the COMI of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context,” no indication was given in that report as to whether the Working Group had agreed with that suggestion.

¹ See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

9. The Working Group may wish to note that the report of its forty-first session (A/CN.9/742, para. 46), includes the following: “It was recalled that the Working Group had agreed that revision of the Guide to Enactment should focus on the individual debtors covered by the Model Law and that the question of treatment of enterprise groups in cross-border insolvency proceedings could be further considered once that work was completed.” No reference to that report was made at the Commission.

10. A further concern expressed at the forty-fifth session of the Commission was whether the current mandate of Working Group V covered issues of COMI as it might relate to enterprise groups. The Working Group will recall that the current mandate is based upon a proposal of the United States, as described in paragraph 3 above; the mandate specifically includes the phrase “as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8”. The references included in that proposal to the cross-border insolvency issues affecting enterprise groups are encapsulated in the second part of the mandate adopted by the Commission, namely “and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition”.

11. To address any ambiguity that may exist concerning these two issues, the Working Group may wish to clarify its views and make a recommendation to the Commission on (a) whether the current mandate of Working Group V covers enterprise groups in a manner that includes issues of COMI; and (b) the order in which it proposes to address the various elements of the current mandate.

GUIDE TO ENACTMENT AND INTERPRETATION OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

I. PURPOSE AND ORIGIN OF THE MODEL LAW

A. *Purpose of the Model Law [paras. 1-3A]*

3. Delete the word “interface” in square brackets and retain the words “framework for cooperation”. In subparagraph (a), insert the following footnote with respect to the term “enacting State”: “The “enacting State” refers to a State that has enacted legislation based on the Model Law. Unless otherwise provided, that term is used in the Guide to Enactment to refer to the State receiving an application under the Model Law”.

3A. For jurisdictions that currently have to deal with numerous cases of cross-border insolvency, as well as jurisdictions that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency, the Model Law is an essential reference for developing an effective cross-border cooperation framework.

B. *Origin of the Model Law [paras. 13, 18, 19]*

C. *Preparatory work and adoption [paras. 4-8]*

5. Revise the footnote to read: [footnote 3] The first was the UNCITRAL-INSOL Colloquium on Cross-Border Insolvency (Vienna, 17 to 19 April 1994) (for the report on the Colloquium, see document A/CN.9/398 and www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html; for the proceedings of the Colloquium, see *International Insolvency Review*, Special Conference Issue, vol. 4, 1995; and for the considerations of UNCITRAL relating to the Colloquium, see *Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 215-222). The second colloquium, organized to elicit the views of judges, was the UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency (Toronto, 22 to 23 March 1995) (for the report on the Judicial Colloquium, see document A/CN.9/413 and www.uncitral.org/uncitral/en/commission/colloquia_insolvency.html; and for the considerations of UNCITRAL relating to the Judicial Colloquium, see *Official Records of the General Assembly, Fiftieth Session, Supplement No. 17* (A/50/17), paras. 382-393).

6. Revise the footnote to read: [footnote 5] For the reports of the Working Group see: eighteenth session (Vienna, 30 October to 10 November 1995), document A/CN.9/419 and Corr.1; nineteenth session (New York, 1 to 12 April 1996), document A/CN.9/422; twentieth session (Vienna, 7 to 18 October 1996), document A/CN.9/433; and twenty-first session (New York, 20 to 31 January 1997), document A/CN.9/435; all documents are available from www.uncitral.org/uncitral/en/commission/sessions.html.

7. Revise the footnote to read: [footnote 6] The Second UNCITRAL-INSOL Multinational Judicial Colloquium on Cross-Border Insolvency was held at New Orleans from 22 to 23 March 1997. A brief account of the Colloquium appears in the report of UNCITRAL on the work of its thirtieth session (Vienna, 12 to 30 May 1997) (*Official Records of the General Assembly, Fifty-second Session*,

Supplement No. 17 (A/52/17), paras. 17-22) and the report on the Colloquium is available from www.uncitral.org/pdf/english/news/SecondJC.pdf.

II. PURPOSE OF THE GUIDE TO ENACTMENT AND INTERPRETATION

[paras. 9-10]

9. Revise the third sentence to read: “Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances.”

III. THE MODEL LAW AS A VEHICLE FOR THE HARMONIZATION OF LAWS

[*Introd.*, para. 11]

A. *Flexibility of a model law* [para. 12]

B. *Fitting the Model Law into existing national law* [paras. 20-21, 49]

IV. MAIN FEATURES OF THE MODEL LAW [Introd., para. 49A]

A. *Access* [paras. 49B-D, 37]

49B. In the second sentence, replace the words “An insolvency representative from the enacting State” with the words “The person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative)” and insert the following footnote after “(referred to as the insolvency representative)”: “This terminology is used for consistency with the Legislative Guide on Insolvency Law, which explains that an “insolvency representative” is “a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate”: Introduction, para. 12 (v).”

Revise the third sentence to read: “A foreign representative has the following rights: of direct access to courts in the enacting State (article 9); to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11); and to apply for recognition of the foreign proceedings in which they have been appointed (article 15). Upon recognition, a foreign representative is entitled to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12); to initiate in the enacting State an action to avoid or otherwise render ineffective acts detrimental to creditors (article 23); and to intervene in any local proceedings in which the debtor is a party (article 24).”

B. *Recognition* [paras. 37A-F]

37A. In the second sentence, after the words “concerning the nature of the foreign proceeding”, add the words “(i.e. that the foreign proceeding is, inter alia, a collective proceeding² for the purposes of liquidation or reorganization under the control or supervision of the court)”.

37B. In the first sentence, delete the word “recognizing” and add the words “in which recognition is sought” after the word “State”. In the fourth sentence, replace the word “it” with the words “the exception”.

² On what constitutes a collective proceeding see paras. [...] below.

37C. In the first sentence, insert the word “either” before “a main proceeding”. At the end of the second sentence insert the words “(see paras. on timing)”. In the third sentence, delete the word “such” and insert the word “main” before the word “proceeding”.

37E. Add the words “(article 17, paragraph 4)” at the end of the paragraph.

37F. In the second sentence, add “as noted above” after the word “additionally”.

C. Relief [paras. 37G-H, 32-33A]

32. Delete the word “fair” in the third sentence.

D. Cooperation and coordination [paras. 33B-G]

Cooperation

33B. After the first sentence, insert the following sentences: “Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets.”

Coordination of concurrent proceedings

33E. Insert the words “in the enacting State” before the words “(article 28)” and the words “in that State” before the word “terminate”.

V. ARTICLE-BY-ARTICLE REMARKS

Preamble [paras. 54, 55]

Use of the term “insolvency” [paras. 51-53, 56]

CHAPTER I. GENERAL PROVISIONS — ARTICLES 1-8

Article 1. Scope of application

Paragraph 1 [paras. 57, 59]

Paragraph 2 (Specially regulated insolvency proceedings) [paras. 60-65]

60-64. [...]

65. Revise the words in parentheses by replacing “the law” with “a law”.

Non-traders or natural persons [para. 66]

Article 2. Definitions

Subparagraphs (a)-(d) [paras. 67-68A]

68. In the last line of the paragraph, replace the word “of” with the words “specified in”.

68A. [...]

Subparagraph (a) — Foreign proceeding [paras. 71, 23-23Abis]

23A. In the first sentence, replace the word “troubled” with the word “distressed”.

23Abis. The following paragraphs discuss the various characteristics required of a “foreign proceeding” under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph (a) should be considered as a whole.

(i) Collective proceeding³ [paras. 23B-C, 24-24A]

23B. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up⁴ or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purposes of liquidation or reorganization (see below, paras. 24F and G).

23C. In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it. An example would be those insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see Legislative Guide on Insolvency Law, part two, chap. II, paras. 7-9). Examples of the manner in which a collective proceeding for the purposes of article 2 might deal

³ **Note to the Working Group:** Paragraphs 23B and C have been revised on the basis of the text proposed at the forty-first session of the Working Group (A/CN.9/742, para. 28) and the discussion and conclusions reached at that session (A/CN.9/742, paras. 30-31).

⁴ “Winding up” is a procedure in which the existence of a corporation and its business are brought to an end.

with creditors includes providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination and to receive an equitable distribution or satisfaction of those claims, to participate in the proceedings, and to receive notice of the proceedings in order to facilitate their participation. The Legislative Guide deals extensively with the rights of creditors, including the right to participate in proceedings (part two, chapter III, paras. 75-112).

(ii) *Pursuant to a law relating to insolvency [para. 24B]*

(iii) *Control or supervision by a foreign court [paras. 24C-E]*

(iv) *For the purpose of reorganization or liquidation [paras. 24F-G]*

24G. In the first sentence, delete the words “including those referred to in the Legislative Guide as expedited proceedings (see para. 24D)” and insert at the end of that sentence the following footnote: “Such contractual arrangements would clearly remain enforceable outside the Model Law without the need for recognition; nothing in the Model Law or Guide to Enactment is intended to restrict such enforceability.”

Interim proceeding [paras. 69-70]

Subparagraph (b) — foreign main proceeding [paras. 31-31C]

31. In the second sentence, insert the words “(the European Convention)” after the reference to the European Union Convention on Insolvency Proceedings.

Subparagraph (c) — foreign non-main proceeding [para. 73]

73. In the second sentence, replace the word “in” with “within”.

Subparagraph (d) — foreign representative [para. 73A]

73A. Subparagraph (d) recognizes that the foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings. The Model Law does not specify that the foreign representative must be authorized by the court (as defined in article 2, subparagraph (e)) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointment made on an interim basis (see above paras. 69-70). The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other acceptable evidence of that appointment. The definition in subparagraph (d) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (e) [para. 74]

74. Delete the words “and the Judicial Perspective” at the end of the paragraph.

Subparagraph (f) [paras. 75-75B]

75B. Delete the sentence in square brackets at the end of the paragraph.

Article 3. International obligations of this State [paras. 76-78]

78. In the first sentence, replace the words “for them” with the words “in order”.

Article 4. [Competent court or authority]¹ [paras. 79-83]

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 [paras. 84-85]*

84. Revise the last part of the paragraph to read: “although retaining article 5 would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.”

*Article 6. Public policy exception [paras. 86-89]**Article 7. Additional assistance under other laws [para. 90]**Article 8. Interpretation [paras. 91-92]*

91. Revise the second sentence to read: “More recently, it has been recognized that such a provision would also be useful in a non-treaty text such as a model law on the basis that a State enacting a model law would have an interest in its harmonized interpretation.”

CHAPTER II. ACCESS OF FOREIGN REPRESENTATIVES AND CREDITORS TO COURTS IN THIS STATE — ARTICLES 9-14

*Article 9. Right of direct access [para. 93]**Article 10. Limited jurisdiction [paras. 94-96]*

96. In the second sentence, replace the words “as it would” with the word “to”.

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency] *[paras. 97-99]*

98. In the first sentence, delete the words “(or procedural legitimation)” and add the following footnote after the word “standing”: “Also known as “procedural legitimation”, “active legitimation” or “legitimation”.”

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency] *[paras. 100-102]*

100. Delete the word “procedural” before the word “standing” and the words “(or “procedural legitimation”)” and insert after the word “standing” a reference to the footnote to paragraph 98.

101. Revise the last words to read: “any such motions”.

102. At the end of the paragraph, add the words “(see below, paras. 169 and 172).”

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency] [paras. 103-105]

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency] [paras. 106-111]

CHAPTER III. RECOGNITION OF A FOREIGN PROCEEDING AND RELIEF

Article 15. Application for recognition of a foreign proceeding

Article 15 as a whole [paras. 112-118]

Paragraph 4 [para. 119]

119. Revise the second sentence to read: “If that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time, as contemplated by article 17, paragraph 3, if the court is in a position to consider the application without the need for translation of the documents.⁵”

Notice [paras. 120-121]

120. In the first line, delete the word “also”. In the third sentence, replace the words “because of this need for expeditiousness” with “accordingly”. In the fourth sentence, replace the words “According to that way of thinking” with the words “In these circumstances” and the word “would” with the word “could”.

Article 16. Presumptions concerning recognition [para. 122]

Paragraph 1 [paras. 122A-122B]

122B. Inclusion of that information in the orders made by the court commencing the foreign proceeding should be encouraged in order to facilitate the task of recognition in relevant cases, although as noted below those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further at paras. 124B-C below). It is desirable that originating courts confine themselves to making findings with respect to the debtor’s centre of main interests only when required to do so in order to determine their own competence. Making such findings with a view to influencing the decisions of a receiving court should be avoided.

Paragraph 2 [para. 123]

Paragraph 3 [paras. 123A-G, 123I, 123K-M]

123A. In the penultimate sentence, replace the words “is the debtor’s centre of main interests” with the words “was the debtor’s centre of main interests”.

123B. At the beginning of the second sentence, replace the words “In the majority of cases” with the word “Frequently”.

⁵ **Note to the Working Group.** The issue in paragraph 119 is whether the court requires a translation of the documents or can proceed without that translation because the documents are comprehensible to the court, rather than whether the court “understands” the documents; the documents may be written in the language of the court but not understandable as such.

123C. However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged centre of main interests, the party alleging the centre of main interests is not at the place of registration will be required to prove [satisfy the court as to]⁶ the location of the centre of main interests. The court of the enacting State will be required to consider independently where the debtor's centre of main interests is located.

*Centre of main interests*⁷ [paras. 123D-E]

*Version 1*⁸

123D. The predictability and transparency of a debtor's centre of main interests may have significant economic importance to creditors. Creditors doing business with the debtor may evaluate the jurisdiction in which they would likely have to demonstrate their claims in the event of an insolvency proceeding, and calculate the risk of credit extension in light of the insolvency law likely to apply. In making that evaluation, third parties may be influenced by information in the public domain and what could be learned in the ordinary course of dealing with the debtor. That may include reference to, for example, details reported in public disclosures made by the debtor, statements made in marketing materials and facts disclosed in contracts and agreements.

123E. The concept of centre of main interests underlies the scheme set out in the EC Regulation. The Model Law also accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor's centre of main interests correspond to those attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where the debtor is likely to commence insolvency proceedings. As has been noted, the Model Law establishes a presumption that place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not coincide with the place of its registration. It is thus important to consider the factors that independently indicate a given place is the debtor's centre of main interests and which should be consulted where there is proof contrary to the presumption in article 16, paragraph (3).

⁶ **Note to the Working Group.** Article 16(3) specifically refers to proof to the contrary in order to satisfy the presumption. It has been suggested, however, that the word "proof" in paragraph 123C is too strong and the alternative "satisfy the court" would be preferable. The Working Group may wish to consider that issue.

⁷ **Note to the Working Group.** The previous versions of paragraphs 123D and E have been deleted and substituted with text approved at the forty-first session of the Working Group as indicated in A/CN.9/742, para. 52, with some editing and revision by the Secretariat. A second version of those paragraphs is proposed for further consideration.

⁸ **Note to the Working Group.** The text supported by Working Group V at its forty-first session (A/CN.9/742, para. 52) refers to the expectations of creditors and the place that creditors might expect proceedings to commence. However, since the first factor to be considered in determining COMI refers to the "ascertainability" of that place by creditors, the draft text has been aligned with that concept. In reviewing the drafting of these paragraphs, the Working Group may wish to consider the relationship between "expectations" on the one hand and "ascertainability" on the other.

Version 2

123D. The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law. The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The concept of centre of main interests also underlies the scheme set out in the EC Regulation. The Model Law establishes a presumption that the centre of main interests is the place of registration. However, in reality, the debtor's centre of main interests may not always coincide with the place of its registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. Where the place of registration is not the debtor's centre of main interests, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a given State is the debtor's centre of main interests.

Factors relevant to the determination of centre of main interests⁹ [paras. 123F-G, I]

123F. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been commenced is the debtor's centre of main interests. The factors are: (a) the location is readily ascertainable by [creditors] [third parties], (b) the location is where the [management] [central administration or operations] of the debtor takes place, [and (c) the location is one in which the debtor's principal assets or operations are found].¹⁰

123G. Frequently, these factors will all point to a single jurisdiction as the centre of main interests. In some cases, however, there may be conflicts among the factors, requiring a more careful review of the facts. While no one factor is consistently determinative and each factor may be more or less relevant or important to building up a picture of the real location of a debtor's centre of main interest, the court may nevertheless need to give greater or lesser weight to a given factor, depending on the circumstances of the particular case. The inquiry is thus one of fact and the court will analyse the factors to discern, objectively, where a particular debtor has its centre of main interests. In all cases, the endeavour is a

⁹ **Note to the Working Group.** The previous version of paragraphs 123F and 123G has been deleted and a new draft prepared on the basis of the text proposed at the forty-first session of the Working Group (A/CN.9/742, para. 52) and the discussion in the Working Group (A/CN.9/742, para. 53). Paragraph 123G is based on the second half of the text of 123F proposed in A/CN.9/742, para. 52.

¹⁰ **Note to the Working Group.** Various suggestions were made as to the three key factors for determining COMI (A/CN.9/742, paras. 52 and 53). The suggestions with respect to ideas expressed by factors (a) and (b) (however formulated) were generally supported. However, two opposing views were expressed with respect to location of principal assets. The view opposing inclusion of that factor noted that it could potentially point to a number of different locations and might create uncertainty as to what constituted "principal" assets (para. 53). The view in favour of its inclusion was that in liquidation there may no longer be a place of central administration of the debtor and the location of its principal assets might be a helpful indicator. The Working Group did not generally support deletion of that factor and it is included in square brackets for further consideration.

holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests.

[123I.¹¹ When the factors noted above do not yield a ready answer regarding the debtor's centre of main interests, a number of other elements concerning the debtor's business may be considered. These may include: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.]

*Movement of centre of main interests*¹² [paras. 123K-M]

123K. Cases have occurred in which the debtor has moved its place of registration (or habitual residence in the case of an individual debtor) in close proximity to the commencement of insolvency proceedings, in some instances even between the time of the application for commencement and the actual commencement of those proceedings. In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former home jurisdiction and might be described as a legitimate reason for changing the country of registration. Determining the centre of main interests based on the place of registration in such cases is unlikely to raise issues of concern for the receiving court.

123L. In other examples, the move of the place of registration (or habitual residence) may be considered to be purely opportunistic, designed to thwart the legitimate expectations of creditors and third parties or undertaken as the result of insider exploitation or biased motivation. As a general rule, whenever there is evidence of a move of the place of registration in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving

¹¹ **Note to the Working Group.** The Working Group requested the Secretariat to consider paragraphs 123E-I with a view to seeing what material might usefully be retained. Paragraph 123I has been revised to include a new introductory sentence. The Working Group may wish to consider whether all of these factors should be retained or whether the list might be reduced by deleting, for example, the site of the controlling law or the law governing the main contracts of the company; the location from which reorganization of the debtor was being conducted; and the jurisdiction whose law would apply to most disputes. What was previously paragraph 123H has been added to the end of paragraph 123D.

¹² **Note to the Working Group.** Paragraph 123J dealing with abuse of process has been moved to article 17 on the basis that it deals generally with abuse of process as a grounds for declining recognition, not only with abuse of process as it relates to COMI, specifically to the movement of COMI in close proximity to the commencement of insolvency proceedings. The previous version of 123K has been deleted and new paragraphs 123K-L prepared on the basis of the Working Group's request at its forty-first session (A/CN.9/742, para. 56).

court, in determining whether to recognize those proceedings, to consider the factors identified in para. [...] above more carefully and take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable to third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings. If the applicant falsely claims the centre of main interests to be in a particular State, the receiving court may determine that there has been a deliberate abuse of process. The Model Law does not prevent receiving courts from applying domestic law or procedural rules in response to any such abuse of process.

123M. It is unlikely that a debtor could move its place of registration (or habitual residence) after the commencement of insolvency proceedings, since many insolvency laws contain specific provisions preventing such a move. In any event, if this were to occur, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the time relevant to that determination is the date of commencement of the foreign proceeding (see paras. 128A-C below).

Article 17. Decision to recognize a foreign proceeding [paras. 124-124C, 126-128C, 123J, 125, 129-132]

Paragraph 1 [paras. 124-124C]

124B. Revise the first sentence to read: "In reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any [evidence] [information]¹³ that may have been presented to the originating court."

124C. Revise the first sentence to read: "Accordingly, recognition of a foreign proceeding would be assisted if the originating court mentioned in its orders any [evidence] [information] that would facilitate a finding by a receiving court that the proceeding is a foreign proceeding within the meaning of article 2."

Paragraph 2 [paras. 126-128]

Timing of the determination with respect to COMI [paras. 128A-128C]

128A. In the first line, replace the words "the date that is relevant" with the words "the relevant date".

128C. Revise the first sentence to read: "With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.¹⁴" Delete the existing second sentence and insert the

¹³ **Note to the Working Group.** With respect to paragraph 122B, the Working group agreed to refer only to the inclusion of "information" in orders of the originating court. It may wish to consider whether paragraphs 124B and C should also refer only to "information".

¹⁴ Under some insolvency laws, the effects of commencement are backdated to the date of the application for commencement or the date of application becomes the date of commencement by virtue of automatic commencement. In both cases, it is appropriate to refer to the date of commencement for the purposes of the COMI determination, since the Model Law is concerned only with existing foreign proceedings and when they commenced.

following: “That approach is consistent with the date at which the determination as to centre of main interests is made under the EC Regulation in order to commence insolvency proceedings.”

Abuse of process [para. 123J]¹⁵

123J. One issue that has arisen is whether, on a recognition application, the court should be able to take account of abuse of its processes as a ground to decline recognition. There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Since what constitutes abuse of process depends on domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law or procedural rules to respond to a perceived abuse of process. However, the broader purpose of the Model Law, namely to foster international cooperation as a means of maximizing outcomes for all stakeholders, as set out in article 1, as well as the international origins of the Model Law, and the need to promote uniformity in its application, as set out in article 8, should be borne in mind. Courts considering the application of domestic laws and procedural rules might also recall that the public policy exception in article 6 (see paras. 86-89 above) is intended to be narrowly construed and invoked only when the taking of action under the Model Law would be manifestly contrary to a State’s public policy. As a general rule, article 6 should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

Paragraph 3 [para. 125]

125. In the middle of the second sentence, delete the words “and the court should in practice be able to conclude the recognition process within such a short period of time”.

Paragraph 4 [paras. 129-131]

130. At the end of the first sentence, add the words “or if the status of the foreign representative’s appointment has changed or the appointment has been terminated”.

131. In the first sentence, delete the words “under national laws”.

Notice of decision to recognize foreign proceedings [para. 132]

Article 18. Subsequent information

Subparagraph (a) [para. 133]

133. Revise the fourth and fifth sentences to read: “Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the

¹⁵ **Note to the Working Group.** Paragraph 123J, which was previously located in the remarks pertaining to article 16 has been relocated to article 17, on the basis that abuse of process is not restricted to the question of determining the centre of main interests and may be related to the decision to recognize more generally.

foreign representative's appointment are frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of "substantial" changes. It is of particular importance that the court be kept informed of such modifications when its decision on recognition concerns a foreign "interim proceeding" or a foreign representative has been "appointed on an interim basis" (see article 2, subparagraphs (a) and (d)).

Subparagraph (b) [para. 134]

134. In the third sentence, delete the words "existence of the" and the words "have been".

Article 19. Relief that may be granted upon application for recognition of a foreign proceeding

Paragraph 1 [paras. 135-137]

135. Delete the words "which is" before the words "available only upon recognition".

136. At the end of the paragraph, replace the words "more narrow" with "narrower".

137. In the first sentence, delete the word "already".

Paragraph 2 [para. 138]

138. Revise the second sentence to read: "Paragraph 2 is the appropriate place for the enacting State to make provision for such notice."

Paragraph 3 [para. 139]

139. In the first sentence, replace the words "the relief" before "terminates" with the word "it".

Paragraph 4 [para. 140]

140. Revise the middle of the first sentence to read: "if a foreign main proceeding is pending".

Article 20. Effects of recognition of a foreign main proceeding [Introd., paras. 141-147]

144. In the first sentence, delete the word "also".

145. Revise the penultimate sentence to read: "For example, if the arbitration does not take place in either the enacting State or the State of the main proceeding, it may be difficult to enforce the stay of the arbitral proceedings." In the last sentence delete the words "provisions of".

146. In the first sentence, delete the word "also" before "enforcement measures".

Paragraph 2 [paras. 148-150]

149. Revise the fourth sentence to read: “If courts are to be given such a power, some legal systems would normally require the grounds on which the court could modify or terminate the mandatory effects of recognition under article 20, paragraph 1 to be specified.”

Paragraph 3 [paras. 151-152]

151. In the first sentence, add the words “the application of” before the words “article 20”.

152. Revise the second sentence to read: “However, paragraph 3 may still be useful in such States because the question of the cessation of the running of the limitation period might be governed, pursuant to rules concerning conflict of laws, by the law of a State other than the enacting State; furthermore, the paragraph would be useful as an assurance to foreign claimants that their claims would not be prejudiced in the enacting State.”

Paragraph 4 [para. 153]

153. In the first sentence, delete the word “merely”.

Article 21. Relief that may be granted upon recognition of a foreign proceeding [Introd., paras. 154-156]

154. Revise the middle of the third sentence to read: “are typical of the relief most frequently granted in insolvency proceedings”.

156. Revise the closing phrase to read: “subject the relief granted to any conditions it considers appropriate.”

*Paragraph 2 [para. 157]**Paragraph 3 [paras. 158-160]*

158. In the penultimate sentence, add the words “non-main” before “proceedings” and in the last sentence, replace the word “admonish” with the word “advise”.

160. Revise the opening words to read “The idea underlying article 21, paragraph 3, is also reflected in article 19.”.

Article 22. Protection of creditors and other interested persons [paras. 161-164]

162. Revise the final words of the first sentence to read: “articles 19 and 21”. In the second sentence, replace the word “better” with “appropriately”.

163. In the last sentence, replace the words “such a definition” with “an appropriate text” and insert the word “against” after the word “discriminating”.

164. In the first sentence, replace the word “apprise” with the word “notify”.

Article 23. Actions to avoid acts detrimental to creditors [paras. 165-166, 166A, 167]

165. In the last sentence, delete the word “procedural” and add a cross-reference to the footnote to paragraph 98.

166. In the first sentence, add a reference to the footnote to paragraph 98 after the word “standing”. Revise the second sentence to read: “The provision is drafted narrowly in that it neither creates any substantive right regarding such actions nor provides any solution involving conflict of laws; the Model Law does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place.” In the third sentence, replace the words “the provisions” with “article 17”.

167. In the first sentence, delete the word “procedural” and add a cross-reference to the footnote to paragraph 98.

Article 24. Intervention by a foreign representative in proceedings in this State [paras. 168-172]

170. In the first sentence, delete the word “procedural” and add a cross-reference to the footnote to paragraph 98.

CHAPTER IV. COOPERATION WITH FOREIGN COURTS AND FOREIGN REPRESENTATIVES [paras. 38-39, 173-178]

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives [para. 179]

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 [para. 180]

Article 27. Forms of cooperation [paras. 181-183A]

183. In the first sentence, replace the word “possibility” with the word “opportunity”.

183A. At the end of the paragraph, insert a cross-reference to the Practice Guide on Cross-Border Insolvency 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 [paras. 184-187]

185. In the fourth sentence, replace the words “opted for” with the word “chosen”.

187A. Where under the law of the enacting State the debtor must be insolvent to commence an insolvency proceeding, the Model Law establishes a rebuttable presumption that recognition of a foreign main proceeding constitutes the requisite proof of insolvency of the debtor for that purpose (article 31) (see paras. 194-197).

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] and a foreign proceeding [paras. 188-191]

Article 30. Coordination of more than one foreign proceeding [paras. 192-193]

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding [paras. 194-197]

Article 32. Rule of payment in concurrent proceedings [paras. 198-200]

VI. ASSISTANCE FROM THE UNCITRAL SECRETARIAT [paras. 201-202]

B. Information on the interpretation of legislation based on the Model Law

201. Revise the e-mail and Internet home page addresses as follows: e-mail: uncitral@uncitral.org; Internet home page: www.uncitral.org.

202. Revise the first and second sentences to read: The Model Law is included in the Case Law on UNCITRAL Texts (CLOUT) information system, which is used for collecting and disseminating information on case law relating to the conventions and model laws developed by UNCITRAL. The purpose of the system is to promote international awareness of those legislative texts and to facilitate their uniform interpretation and application.

**C. Note by the Secretariat on directors' obligations in the period
approaching insolvency, submitted to the Working Group on
Insolvency Law at its forty-second session**

(A/CN.9/WG.V/WP.108)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the second topic, proposed by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), INSOL International (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6), concerning the responsibility and liability of directors and officers of an enterprise in insolvency and pre-insolvency cases.¹ In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with core areas of company law.

4. Discussion of this topic commenced at the Working Group's thirty-ninth session (December 2010, Vienna) and continued at its fortieth and forty-first sessions (October-November 2011, Vienna and 30 April-4 May 2012, New York). The deliberations and conclusions of the Working Group are set forth in the reports of those sessions (A/CN.9/715, A/CN.9/738 and A/CN.9/742, respectively).

5. In accordance with the working assumption adopted by the Working Group at its forty-first session (A/CN.9/742, para. 74) that the work will form part of the Legislative Guide on Insolvency Law, this note includes both draft commentary (part I, paragraphs 6-51) and recommendations 1-10, as well as some general remarks on directors' obligations in the context of enterprise groups (part II) and cross-border issues (part III). The material set forth below builds upon documents A/CN.9/WG.V/WP.96, 100 and 104, as well as decisions taken by the Working Group at its thirty-ninth, fortieth and forty-first sessions. Paragraphs of the draft commentary contained in document A/CN.9/WG.V/WP.104 that have not been revised or that do not include revised text are not included in this note and are indicated thus — "6. [...]". For ease of reference, this note retains the paragraph numbers used in document A/CN.9/WG.V/WP.104. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. The reader's understanding of the changes proposed in this document will be assisted by comparing it with document A/CN.9/WG.V/WP.104.

I. Directors' obligations in the period approaching insolvency

A. Introduction

6. [...]

7. [...]

¹ The first topic, concerning centre of main interests and related issues is discussed in A/CN.9/WG.V/WP.107.

8. At the end of the first sentence, add the words “in the period before insolvency proceedings commence.” In the third sentence, delete the words commencing with “Nevertheless” and ending with “proceedings” and insert the following words “The nature and extent of the duties directors might have in that period when the business might be experiencing financial distress but is not yet insolvent are not well established, but they”.

9. At the end of the first sentence add the words “that will be critical to the company’s survival, with consequent benefits to its owners, creditors, customers, employees and others.” In the third sentence, add the word “relevant” before the word “stakeholders”. Insert new fourth and fifth sentences as follows: “Under some laws, those stakeholders will be the corporation itself and its shareholders. Under other laws, they may involve a broader community of interests that includes creditors.” Revise the final sentence to read: “Directors afraid of the possible financial repercussions of making difficult decisions in those circumstances may prematurely close down a business rather than seek to trade out of the problems, they may engage in inappropriate behaviour, including unfairly disposing of assets or property or they may also be tempted to resign, often adding to the difficulties that the company is facing.”

9A. Revise the first sentence to read: “The different interests and motivations of stakeholders are not so easy to balance and provide a potential source of conflict.” In the second sentence, revise the first few lines to read: “For example, shareholders of the enterprise, who typically are unlikely to share in any distribution in insolvency proceedings, are interested in maximizing their own position by seeking to trade out of insolvency” and the closing words to read: “and leave nothing for shareholders.”

10. In the fourth sentence, replace the words “from trading” with the words “for trading”. In the last sentence, revise the closing words to read: “act in a timely manner.”

11. In the last sentence, revise the middle section to read: “for early action through the use of restructuring negotiations or reorganization and to stop directors from externalizing”.

12. In the third sentence, replace the fourth word “they” with the words “the obligations” and in the third and fourth sentences replace the word “management” with “directors”.

13. Insert a new second sentence as follows: “A rule which presumes mismanagement based solely on the fact of financial distress often causes otherwise knowledgeable and competent directors to leave, and the opportunity to reorganize the company and return it to profitability is missed.” At the end of the fourth sentence, add the following words: “and is more likely to balance the rights and legitimate expectations of all stakeholders, distinguishing cases of bad conduct from those involving bad luck or the impact of exogenous factors.”

14. In the second sentence, add the words “may be inclined to” before the words “second guess”. In the third sentence, replace “courts tend to” with the words “courts have tended to”. In the penultimate sentence, add the word “all” before the word “creditors”.

15. In the second last sentence, add the word “currently” before the words “may not be addressed”. At the beginning of the last sentence, add the word “However”.
16. In the first sentence, add the words “as noted above,” after the colon.
17. [...]
18. In the first sentence, replace the words “seeking to preserve” with the word “preserving” and after the word “discouraging” add the words “wrongful conduct and”. In the last sentence, add the word “unclear,” after the word “Inefficient” and at the end of the sentence add the following words “and exacerbate the financial difficulty they are intended to address.”
19. In the last sentence, replace the words “are enforceable” with the words “become enforceable”.

B. Identifying the parties who owe the obligations

20. [...]
21. [...]
22. In the second sentence, place square brackets around the words “or” and “or ought to make”.
23. [deleted]

C. When the obligations arise: the period approaching insolvency

24. Combine the first two sentences to read: The focus of this [part] is upon the obligations that might arise at some point before the commencement of insolvency proceedings and become enforceable once those proceedings commence and as a consequence of that commencement, applying retroactively in much the same way as avoidance provisions (see discussion at part two, chap. II, paras 148-150, 152). Revise the sentence commencing with the word “Although” to read: “Although a potentially imprecise concept, it is intended to describe a period in which there is a deterioration of the company’s financial stability to the extent that, if it remains unaddressed and no remedial action is taken, insolvency becomes imminent (i.e. where the company will generally be unable to pay its debts as they mature (recommendation 15 (a) of the Legislative Guide) or unavoidable.” Add a further two sentences as follows: “Determining exactly when these obligations arise is a critical issue for directors seeking to make decisions in a timely manner consistent with those obligations. Moreover, without a clear reference point, it would be difficult for directors to predict with confidence what point in time in the period before insolvency proceedings commence a court would have reference to in considering an action for breach of those obligations.”
25. Revise the first sentence to read: “There are various possibilities for determining the time at which directors’ obligations might arise in the period before commencement of insolvency proceedings.” In the second sentence, replace the word “creates” with the word “provides”. At the end of the paragraph, add the words “in terms of encouraging directors to take early action.”

26. In the fourth sentence, replace the words “are used as” with the word “form”. Revise the final sentence to read: “The rationale for imposing obligations on directors based on these tests of solvency is to encourage them to act so as to avoid insolvency or, where it is unavoidable, to take steps to minimize its extent, including, where appropriate, by initiating formal insolvency proceedings.”

27. Insert a new fourth sentence as follows: “Essentially, the standard requires a director’s judgement to be assessed against the knowledge that a reasonable director should or ought to have had in the circumstances.”

D. The nature of the obligations

28. At the end of the paragraph, revise the words after the parentheses to read: “and the avoidance in insolvency proceedings of actions taken by directors, including transactions entered into, in the vicinity of insolvency.”

(a) Obligation to commence insolvency proceedings

29. [...]

(b) Civil liability

30. [...]

31. After the words “minimize losses to the company” add the words “(including to its shareholders)”.

32. [...]

(a) [...]

(b) Add the following sentence at the end of the subparagraph: “Directors may need to devote more time and attention to the company’s affairs at such a time than is required when the corporation is healthy.”

(c)-(f) [...]

(g) Revise the reference to “the environment” to “as well as environmental concerns”. At the end of the subparagraph, before the words “of excessively”, add the words “that might be the result”;

(h) In the first sentence after the words “Directors could ensure that the” add the words “assets of the company are protected and that the”. Insert a new second sentence as follows: “In certain circumstances, not all assets will require protection, for example, those that are worth less than the amount for which they are secured, are burdensome, of no value or hard to realize (see part two, chap. II, para. 88).” At the end of the paragraph, insert the following sentence: “Directors with substantial stockholdings or who represent major shareholders may not be considered disinterested or objective and might need to take especial care when voting on transactions in the vicinity of insolvency”;

(i) [...]

Joint and several liability

32A. Typically, liability for breach of their obligations attaches to directors jointly and severally, although under some laws the court may have the discretion to order one of a number of directors to bear the whole burden of liability or one director to contribute more when, for example, it is found that culpability for the damage caused is not equal. Joint and several liability as the starting point may enhance the deterrent factor of imposing such obligations since directors will have an incentive to monitor the conduct of their fellow directors so as to avoid liability for their conduct.

32B. Directors may take steps to avoid or reduce their liability for decisions that are subsequently called into question. This may require them to comply with certain formal requirements, such as entering a dissent in the minutes of the meeting; delivering a written dissent to the secretary of the meeting before its adjournment; or delivering or sending a written dissent promptly after the adjournment of the meeting to the registered office of the corporation. Directors who are absent from a meeting at which such decisions were taken may be deemed to have consented unless they follow applicable procedures, such as taking steps to record their dissent within certain specified periods of time after becoming aware of the relevant decision.

32C. Liability may be minimized through insurance or the use of indemnities. Once a claim has been made against a director, it may be possible under some laws to reach a settlement through negotiation with the insolvency representative; in some jurisdictions that is the usual approach.

(c) Avoidance of transactions

33. In the second sentence, insert the words “some laws render” after the words “In addition” and delete the words “may be rendered” after the word “directors”. In the fourth sentence after the word “Liability” insert the words “under those provisions”.

E. The standard to be met

34. Delete the word “typically”.

35. [...]

36. In the first sentence, insert the words “or entering into the transaction” after the word “debt”. In the second sentence, replace the words “that there is insolvency” with the words “that the company is insolvent.” In the fourth sentence, replace the word “occurs” with the words “takes place”.

37. In the third sentence commencing “Examples of behaviour”, add the words “under those laws” after the word “liability”. At the beginning of the final sentence, add the words “Under some laws that adopt this approach, a”.

F. Enforcement of the directors' obligations on commencement of insolvency proceedings

1. Defences

38. In the last line, replace the word “duties” with the word “obligations”.
39. In the second sentence, add the words “as a” before the word “defence”.
40. [...]

2. Remedies

41. At the beginning of the first sentence, delete the words “Many laws provide” and revise the words after “director’s obligations” to read: “are provided under”. Add a new penultimate sentence as follows: “Typically, there is no punitive damages element.”

(a) Damages and compensation

42. Revise the third sentence to read: “In general, as noted above, the liability of members of a board is likely to be joint and several, but in some cases it may attach to specific directors.”
43. Revise the last words to read: “also make provision for the award of damages.”
44. Revise the first two sentences to read: “Where directors are found liable, the amount recovered may be specified as being for the benefit of the insolvency estate, on the basis that the principal justification for pursuing directors is to recover some of the value lost as a result of the directors’ actions in the form of compensation for the estate. It is thus for the benefit of all, rather than individual, creditors.” In the second sentence, replace the words “there is” with the words “the company has”. In the third sentence, replace the words “such cases” with the words “support of that approach”. At the end of the paragraph, add the following sentence: “Where, however, the insolvency law permits creditors to pursue directors (see below), there may be grounds for suggesting that compensation be applied, in the first instance, to cover the costs of the creditor or creditors commencing the proceeding and to satisfy their claims or to modify the priority of their claims.”²
45. Revise the last word to read: “breach of the obligations.”

(b) Disqualification

46. [...]
47. [...]

3. Parties who may bring an action

48. At the end of the first sentence, add the words “i.e. before or after the commencement of insolvency proceedings.” Revise the second sentence to read:

² **Note to the Working Group.** The Working Group may wish to consider whether the commentary should address the question of whether or not the director has the capacity to pay any compensation ordered and the consequences of a lack of that capacity.

“Considerations similar to those applicable to the exercise of avoidance powers, addressed under recommendation 87 (see part two, chap. II, paras. 192-195) may apply.”

49. In the first sentence, after the words “against the director”, delete the words commencing with “to seek” and ending with “transaction or”.

49A. Although a major justification for imposing obligations on directors in the vicinity of insolvency is the protection of creditor interests, not all laws permit creditors to pursue a director for breach of those obligations. Under some laws in some circumstances, such as where the insolvency representative takes no action, creditors, and sometimes shareholders, may have a derivative right to bring an action (see part two, chap. II, paras. 192-195). Under other laws, a single creditor can only pursue directors with the consent of the majority of creditors or the creditor committee or creditors can request the creditors’ representative or committee or the court to undertake any such action, as creditors have no independent right to pursue a claim.

49B. Where it is deemed appropriate for the law to permit creditors to pursue directors, a distinction might be drawn between creditors whose debt arose in the period approaching insolvency as a direct result of the conduct being examined and creditors whose debt predated that period. The former might have, in addition to a right to commence proceedings for the benefit of the insolvency estate, a personal right to claim damages against the director on the basis that the conduct being examined occurred in the twilight period and exacerbated the financial difficulties of the debtor. Under some laws, that individual right is limited to situations where the egregious behaviour in question has been directed at a particular creditor. Should it be regarded as desirable to permit creditors to pursue a director, the insolvency law as it applies to avoidance proceedings might provide a useful example of the procedure to be followed (see part two, paras. 192-195). The law might require, for example, the prior consent of the insolvency representative to ensure that they are informed as to what creditors propose and have the opportunity to refuse permission, thus avoiding any negative impact those proceedings may have on administration of the estate.

[49C. Where the consent of the insolvency representative or creditors is required, but not obtained or refused, the insolvency law might permit a creditor to seek court approval to pursue a director. The insolvency representative should have a right to be heard in any resulting court hearing to explain why it believes the proceedings should not go ahead. At such a hearing, the court might give leave for the proceeding to be commenced or may decide to hear the case on its own merits. Such an approach may work to reduce the likelihood of any deal making between the various parties. Where creditor-initiated actions are permitted with respect to avoidance, some laws require creditors to pay the costs of those proceedings or allow sanctions to be imposed on creditors to discourage potential abuse of those proceedings; the same approach might be adopted with respect to actions brought by creditors against directors.]³

³ **Note to the Working Group.** This paragraph is based upon material included in the Legislative Guide with respect to avoidance proceedings (specifically part two, chap. II, para. 193). The

50. Revise the first sentence to read: “Under those laws imposing an obligation on directors to commence insolvency proceedings (see para. 29), the company itself, its shareholders and creditors may have a claim for damages in the event of a breach of that obligation.” At the end of the paragraph, add the following sentence: “It is desirable that the insolvency law ensure coordination of any proceedings that might potentially be commenced by these different parties.”

4. Funding of proceedings

51. Revise the paragraph to read as follows: “A potential difficulty arising in those jurisdictions that permit insolvency representatives to bring an action relates to payment of their costs in the event that an action brought against the directors is unsuccessful. The lack of available funding is often cited as a key reason for the relative paucity of cases pursuing the breach of such obligations. While funding might be made available from the insolvency estate where there are sufficient assets to do so, as is often the case with avoidance proceedings, insolvency representatives may be unwilling to expend those assets to pursue litigation unless there is a very good chance of success (see part two, chap. II, para. 196). In many cases, however, there will be insufficient funds available in the insolvency estate to pursue a director, even if there is a strong likelihood that the litigation will be successful. Devising alternative approaches to funding in such circumstances may offer, in appropriate situations, an effective means of restoring to the estate value lost through the actions of directors, addressing abuse, investigating unfair conduct and furthering good governance. The right to commence such a proceeding, or the expected proceeds of the proceeding if successful, might be assigned for value to a third party, including creditors or a lender might be approached to provide funds. Where the cause of action is pursued by a party other than the insolvency representative, the costs of commencing such a proceeding might be recovered from any compensation paid. Under some laws, claims against directors might be settled through negotiation with insolvency representatives, avoiding the need to find funding. In some jurisdictions this occurs infrequently, while in others it is usual practice and insolvency representatives typically “invite” contributions from directors. As an additional issue, it may be appropriate to consider the court in which such proceedings could be commenced; this issue is discussed above in part two, chapter I, paragraph 19.”

Draft recommendations 1-10

Purpose of legislative provisions

The purpose of provisions addressing the obligations of [those charged with making decisions concerning the management of a company] [directors] that arise when insolvency is likely [imminent] or unavoidable is:

- (a) To protect the legitimate interests of creditors and other stakeholders;
- (b) To ensure [those charged with making decisions concerning the management of a company] [directors] are informed of their roles and responsibilities in those circumstances;

Working Group may wish to consider whether this paragraph should be included here or whether a cross-reference to the relevant paragraphs of the Legislative Guide would suffice.

(c) To provide appropriate remedies for breach of those obligations, which may be enforced after insolvency proceedings have commenced.

Paragraphs (a)-(c) should be implemented in a way that does not:

- (a) Adversely affect successful business reorganization;
- (b) Discourage participation in the management of companies, particularly those experiencing financial difficulties;
- (c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

Remarks

1. Paragraph (b) has been added to the purpose clause in accordance with the Working Group's decision at its forty-first session (A/CN.9/742, para. 99) to include the purpose of serving as a tool to educate directors on their roles and responsibilities in the period approaching insolvency. The second part of new paragraph (c) has been added to clarify that the obligations only become enforceable once insolvency proceedings commence. What was formerly paragraph (c) is now included as a second sentence.

Contents of legislative provisions

Recommendation 1 [previously recs. 4, 6]

The obligation

1(1) The [insolvency law] [law relating to insolvency] should specify that from the point in time referred to in recommendation 2, the persons specified in recommendation 3 will have an obligation to have due regard to the interests of creditors and other stakeholders and:

- (a) Take reasonable steps to avoid insolvency
 - (b) Where insolvency is unavoidable, to minimize the extent of insolvency.
- (2) Reasonable steps might include: ensuring [they are] [he or she is] fully informed about the affairs of the company; seeking professional advice where appropriate; [and] ensuring the assets of the company are protected; [and not committing or permitting the company to enter into the types of transaction that might be subject to avoidance in accordance with [part two, chapter two] [recommendation 87].

Remarks

2. The sequence of the draft recommendations has been revised to focus firstly on the obligation and then upon when it arises and who owes it. However, one consequential drafting issue the Working Group may wish to consider concerns the use of the term "director" in the purpose clause and recommendations 1 and 2. Since the party owing the obligation is the subject of a substantive recommendation (rec. 3), it may be appropriate to refer in other recommendations to the person specified in recommendation 3 or to refer to the person in a more generic manner, such as the person charged with making decisions concerning or responsible for the management of the company.

3. At its forty-first session, the Working Group requested the Secretariat to reconsider recommendations 1, 4, 5 and 6 (A/CN.9/742, para. 93). The current draft of recommendation 1 combines the previous drafts of recommendations 4 and 6. Paragraph 1 addresses the elements of the obligation, while paragraph 2 expands upon what might constitute the reasonable steps required to be taken under paragraph 1.

4. The reference to the insolvency law (or the law relating to insolvency) is intended to indicate that the obligation in recommendation 1 applies only under that law and that although the breach of the obligation must occur before the commencement of insolvency proceedings in accordance with recommendation 2, liability can only arise once those proceedings commence. If this is not sufficiently clear, it may be desirable to repeat the second part of purpose clause (c) in the body of the recommendations.

5. The second arm of the obligation in recommendation 1 requires reasonable steps to be taken to avoid insolvency or to minimize the extent of insolvency where insolvency is unavoidable. This suggests that the obligation could arise at two potentially different points in time. In practice, however, the distinction between the two points in time may depend on the sequence of events and may only be seen with clarity after the event. For example, a catastrophic event or exogenous shock may lead to insolvency becoming unavoidable, without passing through any period in which corrective action could be taken. Alternatively, insolvency may become likely due to external factors such as a particular event or momentary downturn in the market, but not eventuate because of an improvement in those external factors or because of steps taken to avoid the consequences.

6. The Working Group may wish to consider whether the question of timing raises an issue that needs to be addressed in the drafting of the recommendations (particularly recommendations 1 and 2), or whether the current formulation is sufficiently clear.

Recommendation 2 [previously rec. 3]

The time at which the obligation arises

2. The [insolvency law] [the law relating to insolvency] should specify that the obligation in recommendation 1 arises at the point in time when the person specified in recommendation 3 knew, or ought reasonably to have known, that insolvency was likely [imminent] or unavoidable.

Remarks

7. At the forty-first session, it was agreed that recommendation 3 be retained as drafted (A/CN.9/142, para. 82). Some concern has been expressed, however, as to whether the current formulation covers both the financial situation of the debtor as a matter of fact (i.e. that insolvency was in fact “likely [imminent] or unavoidable” at the point of time in question) and the director’s knowledge of that fact. As currently drafted, that issue should be covered by the words “was likely [imminent] or unavoidable” at the end of the draft recommendation, since knowledge can only be imputed as to a fact or situation that has occurred. However, the Working Group may wish to consider whether further words are required by way of clarification.

8. The Working Group may also wish to consider whether the question raised in paragraph 5 as to timing above needs to be addressed in recommendation 2 or whether the current formulation is sufficiently flexible to cover the various possibilities.

Recommendation 3 [previously rec. 2]

Persons that owe the obligation

3. The [insolvency law] [the law relating to insolvency] should specify [the person] who owes the obligation, which may include any person defined under national law as fulfilling the role of a director* [, such as a formally appointed director and any other person [exercising factual control] [[and performing the functions] [undertaking the responsibilities] of a director]].

* See the explanation of who may qualify as a director in paragraphs 20-22 above.

Remarks

9. At the forty-first session, various proposals were made with respect to this recommendation (A/CN.9/742, paras. 79-80). There is broad agreement that it should apply to persons defined under national law as fulfilling the role of a director. By way of example, it was proposed (para. 79) that the recommendation should apply to persons freely exercising management functions or making managerial decisions, including those who ought to be making such decisions, but do not necessarily do so. In order to provide more detail as to the types of person that should be included within that definition, the words in square brackets and a footnote referring to the relevant paragraphs of the commentary have been added.

Recommendation 4 [previously recs. 1, 5, 7]

Liability

4(1) The [insolvency law] [the law relating to insolvency] should specify that where [creditors' interests have been harmed] [creditors have suffered loss or damage] as a consequence of the breach of the obligation in recommendation 1 [committed in the period referred to in recommendation 2], the [person owing the obligation] [director] may be liable.

4(2) The [insolvency law] [law relating to insolvency] should provide that the liability for breach of the obligation in recommendation 1 is limited to the extent to which the breach caused loss or damage.

Remarks

10. Draft recommendation 4 combines ideas previously reflected in draft recommendations 1, 5 and the chapeau of recommendation 7, namely, that where the obligation in recommendation 1 is breached and creditors suffer loss or damage or their interests are harmed, the person to whom the obligation attaches may be liable. The remainder of the previous draft of recommendation 7 (i.e. paragraphs (a)-(d)) is now incorporated into draft recommendation 6. Paragraph (2) of draft recommendation 4 addresses a requirement previously included in the chapeau of draft recommendation 7 that the liability be proportionate to the damage caused or,

in other words, that the liability is limited to the extent that the breach causes damage.

11. At the forty-first session, it was suggested (A/CN.9/742, paras. 77) that the words “committed in the period before the commencement of insolvency proceedings” should be added to what was previously recommendation 1 to clarify that the breach of the obligation must take place in the period before insolvency proceedings commence. Since draft recommendation 1 refers to recommendation 2, it may be desirable to retain only the cross-reference to draft recommendation 1 and avoid the added complexity of repeating the condition as to the time of the breach in draft recommendation 4.

Recommendation 5 [new, replaces rec. 6]

Elements of liability and defences

5. The [insolvency law] [law relating to insolvency] should specify the elements to be proved in order to establish a breach of the obligation in recommendation 1 and that, as a consequence, [creditors have suffered loss or damage] [creditors’ interests have been harmed]; the party responsible for proving those elements; and specific defences to an allegation of breach of the obligation. Those defences may include that the [person owing the obligation] [director] took reasonable steps of the kind referred to in recommendation 1(2). The law may also establish presumptions and permit shifts in the burden of proof to facilitate the conduct of proceedings for breach of the obligation.

Remarks

12. At the forty-first session, concerns were expressed with respect to the manner in which draft recommendation 6 approached the question of proving a breach of the obligation in recommendation 1 and possible defences.

13. The draft recommendation now approaches the conduct of proceedings for failure to satisfy the obligations in recommendation 1 in the same manner that recommendation 97 of the Legislative Guide approaches the conduct of proceedings with respect to avoidance. That is, whilst pointing out the need for the law to address issues such as defences, elements to be proved, use of presumptions and burdens of proof, the draft recommendation leaves it to national law to determine and specify the exact requirements.

Recommendation 6 [previously rec. 7]

Remedies

6. The [insolvency law] [law relating to insolvency] should specify that the remedies for liability [may] [should] include payment in full to the insolvency estate of any damages assessed for breach of the obligation in recommendation 1. Failure to pay such damages in full should preclude the [person owing the obligation] [director] from exercising any right or claim against the insolvency estate [during the period in which the payment remains outstanding] [until payment in full is made].

Remarks

14. At its forty-first session, the Working Group decided that the draft recommendation should focus on the damage caused by the breach of the obligation in recommendation 1 and the provision of compensation for that damage. The revised recommendation makes it clear that damages accrue to the insolvency estate (draft recommendation 7 makes it clear that the ability or right to pursue a director is an asset of the insolvency estate). The second sentence is based upon paragraphs (c) and (d) of the previous draft of recommendation 7.

15. The requirement for payment in full before a director can claim against the estate is intended to resolve the question of whether set-off would be permissible. However, under some laws, a rule preventing the person owing the obligation from exercising any right or claim against the insolvency estate could create difficulties, since such a provision is closely linked with matters of property. It could be seen, for example, as cancelling creditors' property rights in claims. The intention of draft recommendation 6 is to encourage payment to be made and to prevent a director found liable for damages from benefitting from any distribution with respect to his or her claims against the estate while payment of the damages remains outstanding. The recommendation might clarify that what is intended is a postponement of the right to claim or exercise rights against the estate so long as payment in full is not made, not a cancellation of that right. See the footnote to paragraph 44 above concerning a director's ability to pay any damages assessed.

Recommendation 7 [previously rec. 8]**Conduct of proceedings for breach of the obligation**

7. The [insolvency law] [the law relating to insolvency] should specify that the cause of action for [harm caused by] [loss or damage suffered as a result of the] breach of the obligation in recommendation 1 belongs to the insolvency estate and the insolvency representative has the principal responsibility to commence proceedings for breach of that obligation. The [insolvency law][law relating to insolvency] may also permit a creditor or any other party in interest to commence such proceedings with the agreement of the insolvency representative and, where the insolvency representative does not agree, the creditor or other party in interest may seek leave of the court to commence such proceedings.

Remarks

16. Draft recommendation 7 has been revised in accordance with the Working Group's decision at its forty-first session (A/CN.9/742, para. 96) that it should provide for creditors or other parties in interest to commence proceedings for breach of the obligation in recommendation 1. Since the term "party in interest" is defined in the glossary of the Legislative Guide (introduction, para. 12 (dd)), it is used in the revised recommendation to ensure shareholders and other relevant parties are included.

17. Since different jurisdictions may allow creditors and others to file causes of actions, that possibility might be included in the recommendation as an option. That right to commence such an action should belong to or be a part of the insolvency estate to provide a clear principle and a clear destination for the payment of any damages assessed with respect to the breach (see draft recommendation 6).

18. Under some laws, the majority of creditors or the creditors' committee must renounce the claim to pursue a director for breach before it can be assigned to an individual creditor. While that possibility is noted in the commentary (paras. 49A-B), it would add a further layer of complexity to the draft recommendation to provide (a) that the cause of action belongs to the estate, (b) that the insolvency representative has the right to pursue it, (c) that creditors might pursue it with the approval of the insolvency representative (or the court), and (d) that an individual creditor might only do so where approved by the majority of creditors in addition to the insolvency representative.

Recommendations 8 and 9 [previously recs. 9 and 10]

Funding of proceedings for breach of the obligation

8. The [insolvency law] [the law relating to insolvency] should specify that the costs of proceedings against a director be paid as administrative expenses.

9. The [insolvency law] [the law relating to insolvency] may provide alternative approaches to address the pursuit and funding of such proceedings.

Remarks

19. The substance of what were previously draft recommendations 9 and 10 was adopted by the Working Group at its forty-first session (A/CN.9/742, para. 97).

Recommendation 10 [previously rec. 11]

Additional measures

10. The [insolvency law] [the law relating to insolvency] may include measures additional to the remedies set forth in recommendation 6 to deter behaviour of the kind leading to liability under recommendation 4. [Such measures may include restricting [the ability of the person owing the obligation] [a director's ability] to act as a director for a specified period of time.]

Remarks

20. At the forty-first session, concerns were expressed with respect to the second sentence of the draft recommendation on the basis that it might amount to a punitive measure and was therefore inappropriate (A/CN.9/742, para. 98). Since no agreement was ultimately reached on that point, it was agreed the second sentence should be retained in square brackets, pending further consideration.

II. Issues relating to directors of enterprise group members

A. General remarks

52. Part three of the Legislative Guide notes that enterprise groups are often characterized by varying degrees (from highly centralized to relatively independent) and types (vertical and horizontal) of integration and complex relationships between group members that may involve different levels of ownership and control. These factors, together with the manner in which such groups tend to be regulated under

applicable law (i.e. as separate entities as opposed to a single enterprise), raise a number of issues for directors of group members. The following discussion considers two issues in the context of director's obligations in a group context. The first concerns the prevalence of the single entity principle and its impact on directors when there is a tension between acting in the interests of the group member of which they are a director and the interests of the group as a whole. The second concerns the definition of who may be considered a director (see paras. 20-22 above) and the circumstances in which other group members might fall within that definition, particularly where parent and wholly-owned or controlled subsidiary relationships are involved.

(a) The impact of enterprise group structures on director obligations

53. Typically, directors have obligations to their company and must act for the benefit or in the interests of that company. In the group context, the separate entity principle is to be respected and, under most laws, those same obligations apply, irrespective of any consideration of the interests of the group and the position of the director's company in the group structure. This focus on the individual group member's interests is of particular importance when the solvency of that group member may be or becomes an issue after any transaction designed to benefit the group as a whole has been entered into. As a practical reality, however, the group structure may involve directors having to act for the overall group's benefit, requiring them to balance the interests of their own group member against the possibly competing economic goals or needs of the group collectively. Examples of where this potential conflict could arise include where one group member is providing a loan to another group member or acting as a guarantor for a loan provided by an external lender to another group member; where one group member enters into an agreement with another group member to transfer its business or assets or surrender a business opportunity to that other group member or to contract with that member on terms that could not be considered commercially viable; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations. These transactions may be problematic because of the relationship between the transacting parties (i.e. with respect to ownership and control) or their position within the group (i.e. parent or subsidiary) and because the nature of the transaction involves an allocation of benefit and detriment that differs from what might generally be considered commercially viable. It may be easier, for example, to identify the benefits accruing to a parent from lending to or entering into other transactions with a wholly-owned subsidiary (downstream transactions) than the reverse (upstream transactions), especially where the subsidiary is not wholly-owned, or the benefits accruing from intra-group transactions between subsidiaries (lateral transactions).

54. While it may seem commercially unrealistic to require directors of group members to ignore the organizational structure within which their group member operates, the difficulty that arises with the considerations noted above is how to assess the benefit to be derived by the individual group member from a transaction that appears only sensible when viewed from the overall group perspective. In some cases, the benefit might be direct and relatively easy to ascertain; in others it may not be immediately apparent and may even require some sacrifice, even if only in the short term, for individual members. Moreover, that assessment might involve

multiple factors similar to those outlined in recommendation 217 (part three), such as the relationship between the parties to the transaction and the degree of integration between them, the purpose of the transaction, whether the transaction granted advantages to group members or other related persons that would not normally be granted between unrelated parties and whether the transaction can be characterised as upstream, downstream or lateral.

55. Courts in different jurisdictions have accorded differing degrees of recognition to the practical reality of the manner in which enterprise groups operate. While the focus is still upon directors exercising their power for the benefit of their own group members, in some jurisdictions directors may nevertheless have regard to, for example, the direct or derivative commercial benefits accruing to that group member from a particular transaction with other group members and to the extent to which their group member's prosperity or continued existence depends on the well-being of the group as a whole. Typically, collective benefit is not a sufficient justification by itself. Moreover, directors might also be required to take into account any reasonably foreseeable detriments that might flow to their group member as a result of the transaction and consider the position of their group member's unsecured creditors, particularly where the transactions in question might affect that member's solvency. The latter consideration is of particular importance where the transaction is a guarantee or security for a loan to another group member.⁴

56. Other jurisdictions have allowed directors of group companies to act in the interests of the overall group where certain conditions are met, such as that the group has a balanced and firmly established structure; that the group member took part in the long-term and coherent group policy; and that the directors in good faith reasonably assumed that any detriment suffered by their group member would in due course be made good by other advantages. Another approach permits a director of a group member to act in the interests of the parent provided it does not prejudice the group member's ability to pay its own creditors and the directors are authorized, either by the constitution of the group member or by shareholders, depending on whether the group member is wholly or partly owned. The group member should not be insolvent at the time the director acts nor should it become insolvent by virtue of that action.

57. As noted in part three (paras. 75-80), some intra-group transactions might be found to be related person transactions and subject to avoidance in the context of insolvency. Under some laws, such transactions may also expose a director to personal liability if the group member was already insolvent or became insolvent as a result of the transaction. Other transactions or actions would not be covered by the related party provisions, such as decisions either not to act (e.g. not to compete with another group member for a particular opportunity) or to change the role of the company (e.g. by selling the member's assets externally either to run it down or to convert it into a "cashbox" for the group). Related party provisions do not require the interests of creditors to be considered.

⁴ These considerations are similar to those referred to in recommendation 212 concerning the provision of post-commencement finance in the group context.

(b) Definition of “director” in the group context

58. Paragraph 20 above discusses the second issue concerning the circumstances in which one group member or the director of a group member (e.g. of a holding company) might be considered a director, including a shadow director (footnote 6), of another group member. Some laws do not permit a group member to be appointed as a director of another group member, nevertheless, one group member might be regarded as a shadow director of another member. This may occur in numerous ways, such as where the boards of the two members consist of substantially the same persons, where the majority of the board of one group member is nominated by the other member, which is in a position of control, where one member controls the management and financial decision-making of the group and where one group member interferes in a sustained and pervasive manner in the management of another group member, typically in the situation of a parent and controlled group member.

59. Part three of the Legislative Guide discusses extending liability for external debts in the group context and notes (para. 99) that in a number of the examples where liability might be extended to the parent, that liability may include the personal liability of the members of the board of directors of the parent (who may be formally appointed, de facto or shadow directors). One of the principal difficulties with extending liability in such cases is proving the behaviour in question to show that the parent was acting as a de facto or shadow director of the other group member.

B. Issues for consideration

60. The Working Group may wish to consider whether additional recommendations are required to address the issues raised above. Is it desirable, for example, to enable a director of a company in the vicinity of insolvency to consider the interests of the group as a whole in addition to those of their own group member, or should the focus be upon their own group member exclusively? Secondly, the Working Group has agreed that a “director” for the purposes of this work should be determined in accordance with national law (see draft recommendation ...). Is that definition sufficiently broad to encompass considerations relevant to enterprise groups?

III. Cross-border issues

61. At its thirty-ninth and fortieth sessions, the Working Group agreed that cross-border issues should be considered at a future session (A/CN.9/715, para. 109 and A/CN.9/738, para. 52). The Working Group may wish to consider which of those issues should be further considered in the context of the current work and how they might be addressed.

D. Note by the Secretariat on insolvency of large and complex financial institutions, submitted to the Working Group on Insolvency Law at its forty-second session

(A/CN.9/WG.V/WP.109)

[Original: English]

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Background

1. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any of a number of issues.¹ Because of the continuing nature of the work being undertaken both internationally and nationally on bank and financial institution insolvency and

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 259. These issues included: (a) Identify the issues relevant for and particular to the winding down of large and complex financial institutions; (b) Establish a comparative study of selected legal orders in respect of mechanisms to ensure cooperation across borders in the course of a winding down of large and complex financial institutions; (c) Establish and summarize the work undertaken or being undertaken by other institutions, as well as the contents of any such work in this area; (d) Identify areas and legal issues where the principles established in the 2004 UNCITRAL Legislative Guide on Insolvency Law and the 1997 UNCITRAL Model Law on Cross-Border Insolvency could or should be applied directly or by analogy; (e) Identify possible alternative approaches for facilitating and ensuring cooperation across borders in the course of a winding down of large and complex financial institutions; (f) Issue recommendations in respect of possible future work by UNCITRAL or other bodies as well as national legislators or regulating authorities in the fields identified.

resolution regimes² and the volume of that work, it has been a challenge for the Secretariat to monitor all developments in detail. Accordingly, this paper focuses on paragraph (c) of that proposal and outlines the work that has been undertaken (and continues to be undertaken) by international organizations and regionally in the European Union. To some extent, paragraph (d) of the proposal has been addressed in some of the work of international organizations noted below. A second note by the Secretariat, providing details of selected national legal orders and analysing it in terms of the international standards promulgated by the organizations indicated below, particularly as they relate to cross-border issues, could be prepared, if requested by the Working Group, for consideration at its forty-third session in 2013 (see section IV below).

2. This paper considers work that has been undertaken (and is ongoing) by other international organizations, namely the Financial Stability Board, Basel Committee on Banking Supervision, the International Monetary Fund and the European Union. It also considers the relationship between that work and the completed work of UNCITRAL, both in the cross-border field and as it relates to enterprise groups.

I. Introduction

3. The insolvency of Barings bank in 1995 triggered a project conducted by the Group of Thirty, in cooperation with INSOL International, to examine issues that could arise in the cross-border insolvency of a financial institution. The final report, published in 1998, observed that there was no international framework for dealing with the supervisory, legal and financial problems that would arise in a cross-border insolvency of any kind, and a major cross-border insolvency in the financial sector would therefore pose a substantial risk to the international financial system. The report contained 14 recommendations addressing disaster preparedness; licensing approval and supervisory review; the need for a range of insolvency and resolution tools with legislative support; cross-border cooperation, including information sharing and access and recognition for foreign insolvency representatives; master agreements for netting and legal enforceability of financial contracts; and cooperation between insolvency professionals and supervisors. The report mentioned the recently adopted UNCITRAL Model Law on Cross-Border Insolvency and, whilst acknowledging that application of the Model Law to financial institutions was likely to be limited because of the separate supervisory regime that exists in many countries for dealing with troubled financial institutions, the report nevertheless suggested that many of the principles of the Model Law would be applicable to financial insolvency.

4. The fast-moving global financial crisis that started in August 2007 illustrated that many of the inadequacies of the frameworks and tools available to address the insolvency of banks and other financial institutions and particularly for managing cross-border impact that had been identified in the 1998 study still existed. Since many systemically important financial groups operate globally, an uncoordinated application of resolution systems by national authorities has made it much more

² Where “resolution” means the restructuring of an institution in order to ensure the continuity of its essential functions, preserve financial stability and restore the viability of all or part of that institution.

difficult to secure the continuity of essential functions and ensure that shareholders and creditors bear the financial burden of the resolution process, rather than the public sector.

5. The impact of the 2007 crisis led to calls by the G20³ and others for regulators and relevant authorities to strengthen, as a matter of priority, cooperation on crisis prevention, management and resolution and to review resolution regimes and insolvency laws in the light of the recent experience to ensure they permitted an orderly resolution of large, complex, cross-border financial institutions. These calls arose from two related considerations. First, the establishment of an effective framework for the resolution of financial institutions is essential to any strategy that seeks to both secure financial stability and limit moral hazard and secondly, a resolution framework will be ineffective unless it is accompanied by a robust cross-border coordination mechanism.⁴

6. These calls led to work being undertaken by, among others, the Financial Stability Board (FSB); the Cross-border Bank Resolution Group (CBRG), a subcommittee of the Basel Committee on Banking Supervision (BCBS), Bank for International Settlements; the International Monetary Fund (IMF) and the World Bank and, at the regional level, by the European Union, as well as to legislative reform in a number of jurisdictions. A significant number of documents and studies have been prepared by different international and regional institutions; some of those are referred to in this paper and listed in the annex for ease of reference.

7. The discussion below highlights a number of the findings of this work and the recommendations for improving cross-border resolution of banks and financial institutions.

Defining a “financial institution”

8. The IMF paper notes⁵ that for many international financial groups, a banking business will be their main activity. However, many cross-border banks exist within financial groups whose activities extend well beyond simple deposit-taking and lending to include a full range of non-bank financial activities. It notes that some of the most systemically risky international financial groups are, at their core, investment banks and broker-dealers that conduct little or no deposit-taking activity and that some financial groups are headed by large, internationally active insurance companies. Accordingly, such groups will comprise both regulated and non-regulated entities and the substantive elements of resolution mechanisms for bank and non-bank financial institutions will differ, even if the mechanisms for coordinating resolution action may be similar. In some jurisdictions, non-bank financial institutions may be subject to corporate insolvency law so that different parts of a financial group can be subject to different insolvency-related regimes.

9. The definition of what constitutes a financial institution is therefore an expansive one, depending on the jurisdiction, and many have defined the term to

³ Declaration on Strengthening the Financial System (London Summit, April 2009); Leader’s Statement of the Pittsburgh Summit (October 2009).

⁴ International Monetary Fund report, June 2010, p. 5.

⁵ Ibid., p. 6.

include a bank, an insurance company, an investment trust, a loan and finance company, and currency exchange firms.

II. Global initiatives: the work of international organizations

A. Financial Stability Board

10. In April 2009, the Financial Stability Forum⁶ developed principles for cross-border cooperation on crisis management, based in part on the recommendations in the work of other organizations,⁷ as well as lessons learned from the financial crisis, especially with respect to banks and other financial institutions. The FSF principles recommend that in preparing for financial crises, authorities should: develop support tools for managing cross-border financial crisis; hold annual meetings to consider issues and barriers to coordinated action that may arise in handling “severe stress at specific firms”; share information, particularly with respect to arrangements for crisis management, as permitted by the national legal frameworks of resolution authorities and by confidentiality constraints; encourage firms to maintain contingency plans and procedures for use in wind-down situations and funding plans; and work to remove practical barriers to internationally coordinated resolutions that might be identified, for example, when developing contingency plans. In managing financial crisis, authorities were recommended to: strive to find internationally coordinated solutions that took account of the impact of the crisis on the financial systems and real economies of other countries; share national assessment of systemic implications; share information as freely as practicable with relevant authorities from an early stage; discuss national measures as promptly as possible with other authorities when a coordinated solution could be found; and share plans for public communication with authorities from other affected jurisdictions.

11. It was noted that although the effects of the crisis had been managed at individual country level, it was paramount that international cooperation among home authorities be developed in order to control the systematic disruptions caused by the financial distress of highly interconnected and integrated firms. It was also stressed that authorities managing financial crisis should be mindful of the need to promote private sector solutions, using public sector interventions only when necessary to preserve financial stability and of the need to maintain a competitive international level playing field in the spirit of the Basel Accords.

12. In its 2009 call for action, the G20 had requested the FSB to explore the feasibility of common standards and principles as guidance for acceptable practices or cross-border resolution schemes, thereby helping to reduce the negative effects of uncoordinated national responses, including ring fencing.

⁶ The FSF was succeeded by the Financial Stability Board, established by the G20 in 2009 to coordinate, at the international level, the work of national financial authorities and international standard setting bodies and to develop and promote the implementation of effective regulatory, supervisory and other financial sector policies.

⁷ The FSF, BCBS, International Organization of Securities Commissions (IOSCO) and G10's Joint Task Force Report (2001) on Winding Down an LCFI (large and complex financial institution).

13. In 2010, the FSB developed a set of recommendations on reducing the moral hazard posed by systemically important financial institutions (SIFIs) i.e. institutions whose distress or disorderly failure, because of size, complexity and systemic interconnectedness, would cause significant disruption to the wider financial system and economic activity.⁸ The recommendations were that: all jurisdictions should undertake legal reforms to ensure an effective resolution regime is in place; each country should have a resolution authority responsible for exercising resolution powers; national authorities should consider recapitalization mechanisms (bail-ins) and write down tools; resolution authorities should be obliged to seek cooperation with foreign resolution authorities; for specific institutions, cooperation agreements between relevant home and host authorities should be prepared; recovery and resolution plans that assess resolvability should be mandatory; planning should be a continuing exercise; authorities should have the powers to require a financial institution to make changes to its legal and operational structure and business practices to facilitate implementation of resolution and recovery measures; resolvability under existing regimes and cooperation agreements should be an important consideration when host authorities determined changes to be made to a hosted institution's operations; relevant information should be maintained on a legal-entity basis; and use of intragroup guarantees should be minimized, while ensuring that global payment and settlement services are legally separable with continued operability.

14. In 2011, the FSB developed "Key Attributes of effective resolution regimes for financial institutions" (the Key Attributes), which were endorsed by the G20 in November 2011. The Key Attributes seek to establish international standards for effective resolution regimes and encourage international convergence and legislative changes will be required in many jurisdictions to implement them; implementation is to be the subject of ongoing assessment.⁹ The standards relate to resolution powers, measures, and authorities and seek to cover any financial institution that could be systemically significant or critical if it failed, including holding firms, non-regulated operational entities within a financial group that are significant to the business of the group, and local branches of foreign firms. Domestically incorporated global systemically important financial institutions (G-SIFIs), which are defined as financial institutions whose distress or disorderly failure, because of their size, complexity and systematic connectedness, would cause significant disruption to the wider financial system and economy, should be subject to certain aspects of the resolution regime, including requirements for recovery and resolution plans, resolvability assessments and institution-specific cross-border cooperation agreements.

⁸ FSB, Policy Measures to Address Systematically Important Financial Institutions, November 2011, para. 3.

⁹ Ibid., para. 11. In October 2011, the FSB set up a framework to monitor implementation of these reforms, the Coordinated Framework for Implementation Monitoring, and to intensify public reporting on implementation. See Overview of Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability, Report of the Financial Stability Board to G20 Leaders, 19 June 2012.

1. Resolution authority

15. The FSB proposed that each jurisdiction should have a designated resolution authority with legal and institutional capacities to implement resolution powers and measures. These authorities should have clear statutory roles, operate with transparency and independence and be able to enter into institution-specific agreements with resolution authorities from other jurisdictions. They should also be empowered to act to achieve a cooperative solution with foreign resolution authorities whenever possible. The host authority should have the powers to support a resolution carried out by a home authority, but also to take measures on its own initiative where the home authority fails to act or has acted without taking sufficient account of the need to preserve the host jurisdiction's financial stability. The legal framework should give effect to foreign resolution measures, either by way of mutual recognition or by taking measures that support and are consistent with the measures taken by the foreign home resolution authority.

2. Resolution powers

16. The FSB stressed the importance of granting resolution authorities wide-ranging resolution powers that will enable them to manage the financial entity in distress. Examples of such powers include transfer of assets, removal/replacement of management, suspension of payments, winding down a firm, and imposition of stays on the exercise of set-off, contractual netting and early termination rights. Resolution authorities should be ready to exercise their powers as early as possible when a firm is no longer viable or likely to be no longer viable, and has no reasonable prospect of becoming so. This intervention should occur before a firm is balance-sheet insolvent and its equity has been wiped out. Clear standards or suitable indicators of non-viability should be implemented to provide guidance on when firms satisfy the conditions for entry into resolution.

3. Set-off, netting, segregation of client assets

17. The Key Attributes recommend that the legal framework for set-off, netting, collateralization and the separation of client assets should be clear, transparent and enforceable. Resolution authorities should have the power to temporarily stay the exercise of early termination or acceleration arising solely by reason of entry into resolution.¹⁰ A stay should apply to unsecured creditors and customers, preventing, among other things, actions to attach assets or otherwise collect money or property from the financial institution, subject to certain safeguards such as protecting the enforcement of eligible set-off and netting rights.

4. Safeguards

18. The FSB proposed that resolution powers should be exercised in a way that respects the hierarchy of claims, while providing flexibility to depart from the general principle of *pari passu* where necessary to contain systemic impact and maximize value for creditors as a whole. However, there should be no discrimination against creditors on the basis of nationality, location of claims or the jurisdiction in which claims are payable and no creditor should be worse off than they would have been in a liquidation under the applicable insolvency regime.

¹⁰ The stay is discussed in annex IV to the Key Attributes.

Directors should be protected for actions taken when complying with decisions of the resolution authority.

5. Funding of financial institutions in resolution

19. It was recommended that each jurisdiction should establish a resolution fund so that authorities are not forced to rely on public ownership or bail-out funds. Where public funds are required, strict conditions should apply to minimize moral hazard and allocate losses to equity holders, unsecured and uninsured creditors and the industry.

6. Legal framework conditions for cross-border cooperation

20. The document stresses the need for a statutory mandate to empower and encourage resolution authorities, wherever possible, to act to achieve a cooperative solution with foreign resolution authorities. National laws should not contain provisions that mandate national action as a response to foreign intervention or the initiation of resolution in another jurisdiction, unless effective cooperation and information sharing is in place. In exercising their powers, as noted above, resolution authorities should consider the impact on the financial institutions in other jurisdictions. They should have powers over local branches of foreign firms and be able to support resolutions by foreign home authorities, or in exceptional cases, be able to take the initiative where the home authority fails to take action or where that action takes insufficient account of local financial stability. Processes should be established to give effect to foreign resolution measures, such as by way of mutual recognition, and mechanisms to protect the confidentiality of shared information should be developed.

7. Crisis management groups

21. At the international level, it is recommended that all G-SIFIs should maintain crisis management groups (CMGs) to enhance their preparedness for, and facilitate the management and resolution of, a cross-border financial crisis affecting the institution.¹¹ CMGs are to include representatives of supervisory authorities, central banks, resolution authorities, finance ministries and public authorities responsible for guarantee schemes and should cooperate closely with authorities in other jurisdictions where financial institutions have a systemic presence.

8. Institution-specific cross-border cooperation agreements

22. Use of institution-specific cooperation agreements between resolution authorities for all G-SIFIs is seen as key for monitoring those institutions. The agreements should, among other things, establish the objectives and procedures for cooperation through CMGs, define the roles and responsibilities of authorities in the recovery and resolution phase and during a crisis and set out processes for

¹¹ In November 2011, the FSB released an initial list of G-SIFIs (see the annex to Policy Measures). The G-SIFIs are to meet resolution planning requirements by the end of 2012. The list will be updated annually and published by the FSB every November.

information sharing, development of recovery and resolution plans, conduct of resolvability assessments and provide for regular meetings and reviews.¹²

9. Resolvability assessments and recovery and resolution planning

23. Resolvability assessments¹³ are seen as important for developing strategies to manage crisis financial systems. Group resolvability assessments should be carried out by home authorities and coordinated with the host authorities. These assessments should be complemented with recovery and resolution plans (RRPs), the essential elements of which are set out in the Key Attributes document.¹⁴ RRP are to be updated at least annually or where there are material changes to a financial institution's business or structure and should be regularly reviewed by the institution's CMG. They should also, particularly in the case of G-SIFIs, take into account the nature, complexity, interconnectedness, level of substitutability and size of the institution.

10. Access to information and information sharing

24. The last key attribute relates to access to information and its sharing. It is recommended that all legal barriers hindering access to, and exchange of, information by national resolution authorities, national central banks and supervisory authorities should be removed. To this end, it is proposed that systems should be put in place to enable (a) sharing of the information relevant for recovery and resolution planning, (b) sharing of information related to G-SIFIs, and (c) handling of sensitive information.

25. In responses to public consultation on the Key Attributes, the FSB expressed the view that while the legal framework for cross-border cooperation, the CMGs and the institution-specific cross-border cooperation agreements fell short of a binding framework for mutual recognition and international cooperation, they represented a significant step. It was acknowledged that the development of more binding mechanisms will not be feasible without first putting in place the convergent regimes and incentives to cooperation that should be delivered by implementation of the Key Attributes.

B. Basel Committee on Banking Supervision, Bank for International Settlements

26. In August 2003, the Basel Committee on Banking Supervision (BCBS) of the Bank for International Settlements put in place the High-Level Principles for Cross-Border Implementation of the New Accord. The New Accord¹⁵ was a set of guidelines aimed at establishing a framework for measuring capital adequacy and a minimum standard to be achieved by national supervisory authorities. Noting that coordination and cooperation was a major feature of the New Accord, the six high-level principles were developed to elaborate on this aspect. These high-level principles emphasized: the importance of recognizing and implementing

¹² The essential elements of these agreements are included in annex I to the Key Attributes.

¹³ These assessments are discussed in some detail in annex II to the Key Attributes.

¹⁴ See annex III.

¹⁵ Available at www.bis.org/publ/bcbsca.htm.

national regulatory requirements for banks; the role of home country supervisors in overseeing a banking group on a consolidated basis; the need for requirements established by host country supervisors to be understood and recognized by banks operating through subsidiaries; and the need for coordinated approval and validation work and information sharing as an aspect of cooperation among home and host country supervisors.

27. From December 2007 to September 2009, the Cross-border Bank Resolution Group (CBRG) of the BCBS carried out an audit of legal and policy frameworks for cross-border crisis resolution. The objective of the exercise was to identify the lessons learned from the financial crisis which began in August 2007. Realizing that most of the measures responding to the financial crisis were taken on an ad hoc basis, in March 2010 the Committee prepared a report and a set of 10 recommendations — “Report and Recommendations of the Cross-border Bank Resolution Group” — for national authorities and policymakers to consider when developing legislation and policy on managing cross-border bank resolutions.

28. The report found that: many crisis management regimes are domestically focused and there is no multinational framework, creating tensions between the cross-border nature of financial groups and the national frameworks and responsibilities for crisis management, as well as between national assessments of how a cross-border situation ought to be addressed; the unmanaged growth, particularly cross-border expansion, of complex financial institutions has created problems in the absence of effective supervision of home authorities and where home authorities do not have the resources to respond to such crises; the fast-moving nature of the crisis and resulting time constraints has limited the use of formal supervisory crisis management tools and made cooperation between jurisdictions very difficult, if not impossible; there is a tension between the need for rapid resolution in the public interest and the position of shareholders — in some jurisdictions, special measures cannot be taken without shareholder approval; tension may be caused by the centralization of liquidity management within a cross-border group; group structures create interdependencies within groups that regulators and others need to understand and monitor; cross-border financial institutions may be subject to consolidated supervision by the home authority, as well as to supervision and resolution of individual subsidiaries by the host authority; failure of cross-border institutions is likely to lead to insolvency proceedings for the component entities under different regimes in different jurisdictions serving different policies, priorities and objectives; primacy of national interests leads to a focus on the national part of a group for the benefit of local stakeholders and to potential ring-fencing of assets — while this may allow greater controls on capital, liquidity and risk management to ensure protection of host country creditors, at the same time it may create inefficiencies in the allocation of capital and liquidity within a group.

29. The recommendations developed by the CBRG emphasize the need for appropriate national resolution frameworks to be developed in order to maintain financial stability, protect consumers, limit moral hazard, promote market efficiency and minimize systemic risk. Those frameworks need to coordinate the disparate crisis management and resolution processes that apply to different business lines of financial groups, promote the continuity of systemically important functions and include appropriate tools such as powers to create bridge financial institutions,

transfer assets, liabilities, and business operations to other institutions, and resolve claims. Convergence of national resolution tools and measures is recommended.

30. Resolution frameworks should address financial groups and conglomerates within national jurisdictions and promote cooperation among national authorities by developing procedures for mutual recognition of crisis management and resolution proceedings and measures, particularly those involving large interconnected financial groups. Recognition could be developed bilaterally or at regional or international levels.

31. Since the complexity of financial institutions can create problems for orderly and cost-effective resolution, the CBRG recommends that supervisors work closely with relevant home and host resolution authorities in order to understand how group structures and their individual components could be resolved in a crisis and, where those structures are too complex to permit resolution, to develop regulatory incentives to encourage simplification of group structures.

32. The recommendations also address advance planning for orderly resolution as a regular component of supervisory oversight that takes into account cross-border dependencies and the implications of legal separateness; cross-border cooperation and information sharing, both during normal times and for crisis management in times of stress; and strengthening of risk mitigation mechanisms, such as enforceable netting agreements, collateralization and segregation of client positions. In order to complete the transfer of certain financial market contracts to sound financial institutions, it is recommended that the operation of contractual termination clauses be delayed for a short period of time and that contractual rights to terminate, net and apply pledged collateral are preserved. Finally, the recommendations stress the need to provide clear options for the financial institution's exit from public intervention.

33. While UNCITRAL's work on enterprise groups is noted in the report as possibly informing work to improve the coordination of resolution proceedings of financial groups, at the same time it is acknowledged that it does not address the many unique issues implicated in the resolution of financial groups. Nevertheless, national authorities and policymakers are advised to consider whether recommendations made by UNCITRAL in part three of the Legislative Guide on improving the efficiency of insolvency proceedings for corporate groups are applicable to insolvency proceedings of financial groups. National entities are also advised to provide for recognition of foreign insolvency measures, and access of foreign representatives to courts and assets of the debtor in the national entity's jurisdiction.¹⁶

34. The report also notes that one approach would be to take the steps necessary to establish a comprehensive universal framework for the resolution of cross-border financial groups, in which primacy could be accorded to the jurisdiction in which the institution is headquartered. The report notes that such a framework would need to address a number of complex issues, including some that have been addressed in the Legislative Guide — avoidance powers, treatment of intragroup claims, ranking

¹⁶ This recommendation is consistent with UNCITRAL's recommendations on recognition of foreign proceedings and foreign representatives, and cooperation involving foreign representatives, Legislative Guide, part three, chapter III, recommendations 239-254.

of claims, rights to set-off and netting, the treatment of certain financial contracts, submission and admission of claims and distribution to creditors.

C. International Monetary Fund

35. In April 2009, the IMF and the World Bank prepared a study entitled “An Overview of the Legal, Institutional and Regulatory Frameworks for Bank Insolvency”, which discusses the principal features of the legal, institutional and regulatory frameworks required to deal effectively with bank insolvency (i.e. only deposit-taking institutions) at the domestic level (cross-border bank insolvency issues fall outside its scope) in periods of financial stability and systemic crisis. The paper addresses types of bank insolvency proceedings available in times of financial stability, the powers and responsibilities of all agencies involved in those proceedings and the steps involved, as well as general considerations, institutional arrangements and regulatory and legal arrangements for systemic crisis management. The underlying rationale for the paper is that recent turmoil in the financial markets highlighted the importance of countries putting in place effective legal, institutional and regulatory frameworks for the resolution of insolvent banks. The paper notes that “while there is no firm consensus on a single standard or model that countries should employ in designing a bank insolvency framework, there is a growing recognition of many of the practices that should be observed for that purpose.”¹⁷

36. In June 2011, the IMF published a paper entitled “Resolution of Cross-Border Banks — a proposed framework for enhanced coordination” in which it discussed the need for a framework for enhanced coordination to mitigate the effects of the uncoordinated application of resolution systems for international financial groups (which might include or be based upon a banking business, but whose activities frequently extend beyond deposit-taking to include a full range of non-bank financial activities, many of which are conducted across borders) by national authorities. The paper responds to the call by the G20 leadership noted above (para. 5) and builds on the work of the CBRG. It also makes reference to the coordination and cooperation framework recommended in part three of the UNCITRAL Legislative Guide and to the UNCITRAL Model Law on Cross-Border Insolvency.

37. Against the background of the effects of the lack of coordination apparent in the handling of a number of financially distressed cross-border financial institutions¹⁸ following the global financial crisis and the existing impediments to the development of a coordinated framework, the paper sets out four major elements aimed at achieving enhanced coordination. These are:

(a) Amendment of laws at national level to require national authorities to coordinate resolution efforts with their counterparts in other jurisdictions to the maximum extent possible, consistent with the interests of creditors and domestic financial stability. It is noted that countries with legislation that bars information

¹⁷ IMF and World Bank study, 2009, p. 13.

¹⁸ These include increase in moral hazard, destruction of value in the financial institutions, financial instability etc., see IMF, “Enhanced Coordination”, p. 12.

sharing with foreign resolution authorities and encourages ring fencing may not be able to implement enhanced coordination without first amending their national laws;

(b) Adoption of core coordination standards relating to the design and application of resolution systems to facilitate use of an enhanced coordination framework, which are agreed upon and implemented by coordinating countries. This proposal is based on the argument that national authorities would only be willing to coordinate their activities if they had adequate confidence in their counterparts. Such coordination standards would include: (i) a minimum level of harmonization of national resolution rules, including non-discrimination against foreign creditors, effective intervention tools, and appropriate safeguards; (ii) robust supervision that would enable host supervisors to accept the leadership of home supervisors and be confident they could implement an international solution and to collaborate with other host supervisors; and (iii) institutional capacity to enable swift action across borders to implement an international solution;

(c) Minimizing the use of public funds and the specification of principles that would guide the burden-sharing process among cooperating authorities where such funds are required. One of the key objectives of the framework is that the final costs of resolution should be assumed by private stakeholders and that public bailouts are to be avoided. However, it is noted that the availability of private stakeholder financing may be limited and thus a combination of public and private sector funding may be required in some cases. Furthermore, it is pointed out that home countries may be unwilling or in some cases unable to provide support for an international financial group that is going through a crisis. Accordingly, host countries should be ready to provide funds to stabilize those financial institutions;

(d) The development, among countries subscribing to the enhanced coordination framework, of coordination procedures designed to enable resolution action with cross-border effect in a crisis. A clear understanding of who will play the lead role in the initiation and conduct of the resolution proceedings is required; it is proposed that that role be taken by the home country authorities and that a host country should accept the leadership of a home country that has similar coordination standards. However, the host country would also reserve the right to act independently, if to do so was required to ensure domestic financial stability. Consistent with part three of the UNCITRAL Legislative Guide¹⁹ it is recommended that communication and sharing of information as early as possible is key to successful coordination. To achieve this, it is suggested that institution-specific and case-specific cooperation agreements, similar to those proposed in UNCITRAL's work,²⁰ would go a long way towards streamlining the modalities of communication.

38. The approach of a multilateral framework for enhanced coordination draws support from the CBRG report of 2010 that proposed a middle-ground approach to crisis management of cross-border resolution of financial institutions, as opposed to territorial (de-globalization of financial institutions) or universal approaches (a binding international treaty). The paper notes that, notwithstanding that specific

¹⁹ UNCITRAL Legislative Guide, part three, chapter I, para. 17.

²⁰ UNCITRAL Model Law on Cross-Border Insolvency, article 27; UNCITRAL Legislative Guide, chapter III, paras. 48-54 and recommendations 253-254; UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation.

features of corporate insolvency are not applicable to the financial services industry, such a multilateral approach could draw on the work of UNCITRAL in corporate insolvency (the Model Law and the Legislative Guide) as it deals with recognition of insolvency proceedings in foreign jurisdictions, cooperation among courts, insolvency representatives and use cross-border agreements when handling multiple cross-border insolvency proceedings in an enterprise group.

III. Regional approaches: the European Union

39. Over the course of the financial crisis, it became apparent that neither banks nor authorities in the European Union were prepared to address the issues that arose. Contingency planning was insufficient; not all Member States had the power to intervene, stabilize and reorganize ailing banks at an early stage; tools and powers to handle bank failure were inadequate; and the significant systemic damage caused by the failure of large, independent banks required authorities to use taxpayers' money for rescue. Most significantly, while the cross-border operation of banks has become highly integrated to the point where business lines and internal services are deeply interconnected across EU borders, the authorities' powers to intervene has remained national, leading to inefficient and potentially competing approaches to bank resolution.²¹

40. In 2009, the Commission announced plans for an EU framework for crisis management in the financial sector, together with a timetable for action (COM (2009) 561 final). The first stage was to adopt a legislative proposal on bank recovery and resolution (by mid-2011). The second step was to examine the need for further harmonization of bank insolvency regimes, with the aim of resolving and liquidating them under the same substantive and procedural rules (by end 2012). The third step would include the creation of an integrated resolution regime, possibly based on a single European resolution authority, which would depend on the adoption of a single set of substantive rules with respect to resolution and insolvency (by 2014). The process has involved several rounds of public consultation, close collaboration with the FSB and the G20 and monitoring of other international developments.

41. In June 2010, the European Parliament adopted an own-initiative report containing recommendations on cross-border crisis management in the banking sector (A7-0213/2010), which stressed the need for a Union-wide framework to manage banks in financial distress. In December 2010, the Council (ECOFIN) adopted conclusions calling for a Union framework for crisis prevention, management and resolution (17006/1/10), that should apply to banks of all sizes, improve cross-border cooperation and consist of three pillars — preparatory and preventive measures, early intervention and resolution tools and powers. At the end of May 2012, the Commission indicated that it will initiate a process to map out the main steps towards a full economic and monetary union (including), among other things, moving towards a banking union that includes integrated financial supervision and a single deposit guarantee scheme (COM (2012) 299).

²¹ SWD (2012) 167 final, p. 2.

42. On 6 June 2012, the Commission issued a legislative proposal for the recovery and resolution of credit institutions and investment firms (COM (2012) 280/3), which includes a draft directive. The proposal sets out the steps and powers, resources, operational capacity and expertise necessary to enable relevant authorities to address banking crises pre-emptively and ensure bank failures across the EU are managed in a way that avoids financial instability and minimizes costs for taxpayers.

43. The proposal consists of the three elements noted in the ECOFIN report: (a) preparatory steps and plans to minimize the risks of potential problems, checking the resilience of the financial institutions ability to handle “adverse economic developments,” (preparation and prevention), (b) in the event of incipient problems, powers to arrest a bank’s deteriorating situation at an early stage so as to avoid insolvency (early intervention), and (c) if insolvency of an institution presents a concern as regards the general public interest, a clear means to reorganize or wind down the bank in an orderly fashion while preserving its critical functions and limiting, to the maximum extent possible, any exposure of taxpayers to losses in insolvency (resolution). Resolution is intended to provide an alternative to normal insolvency procedures that will respond appropriately to the need to avoid disruption to financial stability, maintain essential services and protect depositors. It is also intended to remove the implicit certainty that has existed with respect to publicly funded bail outs for financial institutions. The second and third stages emphasize the need to enhance cross-border coordination and cooperation as a key part of the framework. The powers discussed are to be available to relevant authorities in relation to any bank, regardless of its size or the scope of its activities.

44. The framework acknowledges the importance of cross-border groups as a driver for the integration of financial markets in the EU and establishes special rules for those groups in each of the above three phases, as well as for the transfer of assets between entities affiliated to a group in times of financial distress.

1. Scope

45. The proposal covers crisis management in relation to all credit institutions and certain investment firms in the EU. It will apply to holding companies where one or more subsidiary credit institutions or investment firms meet the conditions for resolution and where the application of the resolution tools and powers in relation to the parent entity is necessary for resolution of one or more of its subsidiaries or of the group as a whole.²²

2. Resolution authorities

46. Member States are required to confer resolution powers on appropriate authorities with adequate expertise and resources to manage bank resolution at national and cross-border levels.

²² Explanatory memo, COM (2012) 280/3, p. 9.

3. The three elements

(a) Preparatory and preventive stage

47. Each institution will be required to draw up a recovery plan setting out the arrangements and measures that will enable it to take early action to restore long-term viability in the event of a material deterioration of its financial situation; financial groups will be required to develop both a group plan and a plan for each group member. These plans are to form the basis of a “resolvability” assessment by resolution authorities; if significant impediments are identified, the institution or group may be required to take measures to address those impediments such as reducing complexity by changing its legal or operational structures, limiting maximum individual and aggregate exposures, and restricting or preventing the development of new business lines or products. Group resolvability is to be jointly assessed by all relevant resolution authorities and thus will require effective coordination and cooperation.

48. The proposed directive (recital 22) notes that the provision of financial support from one entity of a cross-border group to another entity of the same group is currently restricted under many national laws. Although those laws are designed to protect the creditors and shareholders of each entity, they do not take into account the interdependency of the entities of the same group or the group interest. Accordingly, the proposal makes provision for group members to extend financial support to other members in the form of loans, guarantees or provision of assets as security to a third party, based upon agreements drawn up and approved (in accordance with national laws) in advance of financial difficulties occurring. Such agreements are voluntary, allowing groups to assess whether such arrangements would be in the group interest and to identify the group members that should be party to the agreement. Where the liquidity or solvency of the group member providing the finance is threatened, the supervisor of that group member will have the power to prohibit or restrict the provision of that finance.

(b) Early intervention stage

49. The proposal expands the powers of the supervisors to intervene at an early stage where the financial situation or solvency of an institution is deteriorating, which may include powers to request an institution to implement the arrangements and measures set out in the recovery plan, to draw up an action plan with a timetable for implementation, and to appoint a special manager to replace management of the institution.

(c) Resolution stage

(i) Triggering application of resolution

50. Common parameters for triggering the application of resolution tools are established. These allow action to be taken when an institution is already insolvent or very close to insolvency and if no action is taken, will become insolvent in the near future, provided there is no other solution that would restore the institution within an appropriate time frame and the resolution measures can be justified in the public interest.

(ii) *Governing principles*

51. The following principles are to be respected when implementing resolution powers. Shareholders must bear the loss first, with unsecured creditors bearing the residual losses. Creditors of the same class might be treated differently only if justified in the public interest and in order to underpin financial stability. Where creditors receive less than they would have received had the institution been liquidated under normal insolvency proceedings, they should be compensated for the difference from the resolution fund.

(iii) *Resolution tools*

52. A number of resolution tools are suggested, including sale of the business (sale of the whole or part of the assets of a credit institution on commercial terms without the consent of the shareholders or compliance with procedural requirements otherwise applicable); use of a bridge institution (temporary transfer of a part or the whole of the business of the financial institution to a publicly controlled entity, with a view to its ultimate sale); asset separation (transfer of the impaired or problem assets of a financial institution to an asset management vehicle for the purposes of ensuring their use and effective management); and bail-in (the writing down of the claims of some or all unsecured creditors of a failing institution and conversion of debt claims to equity).

53. The tools are to be used individually or in combination and may be supplemented by specific national tools and powers, provided they are compatible with the Union resolution framework and the Treaty and do not pose obstacles to effective group resolution (e.g. ring fencing of an institution would not be compatible with the framework).

(iv) *Restrictions and safeguards*

54. To ensure these tools can be applied effectively, a temporary stay on the exercise by creditors and counterparties of rights to enforce claims and close-out, accelerate or otherwise terminate contracts against a failing institution can be imposed. The intention is to provide a very short period (no longer than until the close of business on the day following its imposition) in which to allow the identification and valuation of contracts that need to be transferred to a solvent third party, without the risk that financial contracts would change in value and scope as counterparties exercised termination rights. Transfer to a performing third party should not qualify as an event of default triggering termination rights. Authorities are prevented from cherry-picking (splitting linked liabilities, rights and contracts): either all linked arrangements (including netting and set-off arrangements, title transfer financial collateral arrangements, security arrangements, structured finance arrangements) must be transferred or none of them.

55. While concerned parties have a right to due process and the decisions taken by resolution authorities should be subject to judicial review, that review should not affect any administrative act or transaction concluded on the basis of a decision that might subsequently be annulled. Remedies should be limited to compensation for damages suffered.

(v) *Cross-border resolution*

56. Measures are included to require enhanced cooperation between national authorities, taking into account the division of responsibilities between home and host authorities, and the creation of incentives for applying a group approach in all phases of preparation, recovery and resolution. Resolution colleges with clearly designated leadership are to be established to develop group resolution plans, assess impediments to effective application of the resolution tools and powers, develop common approaches to the application of those tools, provide a framework for agreement on group resolution schemes, and coordinate decisions and actions by resolution authorities.

57. Where third countries are involved, Union authorities would have the necessary powers to support and recognize foreign resolution action with respect to a failed foreign bank and to apply resolution tools to national branches of third country institutions where separate resolution is necessary for reasons of financial stability or the protection of local depositors. Such support would only be provided if the foreign action ensured fair and equal treatment for depositors and creditors from a Member State and did not jeopardize financial stability in that Member State. Cooperation agreements with foreign resolution authorities will be required so that Union authorities can support those foreign authorities and ensure effective planning, decision-making and coordination in respect of international groups. Framework administrative arrangements should be concluded with third countries by the European Banking Authority and bilateral agreements in line with those framework arrangements should be concluded by national resolution authorities.

58. Lastly, it is proposed that a bank resolution fund be established by every Member State to cover costs incurred by resolution authorities in implementing resolution tools. The objective is to improve various aspects of cross-border cooperation and reduce the burden on taxpayers. Financial institutions and certain investment firms within each Member State are expected to contribute to this fund.

IV. The work of UNCITRAL and its relevance to bank and financial institution resolution

59. The level of activity focusing on bank resolution mechanisms that has been undertaken since the 2007 financial crisis recalls the activity on domestic insolvency regimes that occurred following the financial crises of the 1990s to identify the weaknesses in those regimes and the best practices that should form the basis for legislative reform. That activity led ultimately to the development of the UNCITRAL Legislative Guide on Insolvency Law.

60. The work summarized above touches upon many of the issues discussed at that time, not only in the context of UNCITRAL's work on the insolvency of enterprise groups, particularly across borders, but also on elements of the Legislative Guide as it relates to domestic commercial insolvency regimes, albeit that in both cases that work did not touch upon the issues unique to financial institutions. Although the definition of "enterprise" in part three of the Guide notes that specially regulated entities not covered by insolvency law are not intended to be included, it is also

noted that banks often form part of multinational enterprise groups.²³ Nevertheless, there are similarities, as noted in the IMF Report. Similarly, much of the discussion in the CBRG report on the difficulties of addressing financial groups echoes issues discussed by Working Group V in the preparation of part three of the Legislative Guide, particularly as they relate to the conceptual problems associated with corporate separateness and different legal approaches to the treatment of group interests, as well as to application of the concept of centre of main interests to enterprise groups and the need for extensive cross-border cooperation in insolvency.

61. Some of the common issues referred to in the work noted above include: the need for coordination and cooperation across borders and some form of recognition of foreign resolution activities that will accord legal effect; the usefulness of cross-border cooperation agreements, whether entity-specific or between supervising authorities; the need for funding and, in particular, for intragroup funding to be permitted under applicable laws; the need for the integrated treatment of groups and the challenges raised by the single entity principle; the need for effective standardized commencement criteria for bank resolution and for effective tools and powers to facilitate resolution; safeguards such as that no creditor should be worse off than in liquidation and that there should be no discrimination against creditors on basis of nationality or location; and the desirability of greater convergence of bank insolvency regimes or at least some specifics of those regimes, such as avoidance powers, treatment of ipso facto clauses, and application of the stay.

62. Although the IMF report identifies the need for a bank resolution framework to be included in an international treaty or binding legal instrument that could assure convergence of national resolution regimes thereby facilitating cross-border cooperation and coordination, the difficulties of developing such an instrument are noted — as they have been in UNCITRAL's work relating to treatment of cross-border groups. The possibility of developing such an instrument is part of the current mandate of Working Group V and remains to be addressed. In the absence of such an instrument, however, the approaches adopted in part three of the Legislative Guide and the Model Law on Cross-Border Insolvency indicate the best way forward, providing a source of inspiration for devising bank resolution mechanisms and addressing cross-border issues.

63. The work summarized above shows the emergence of a number of common principles that are to be reflected in the resolution mechanisms being developed, such as those contained in the CBRG report and recommendations and the FSB Key Attributes, implementation of which is being monitored by the FSB. Legislation is constantly being developed. These recommendations and attributes may be viewed as performing to some extent a function with respect to bank and financial institution resolution regimes similar to the function performed by the Legislative Guide on Insolvency Law with respect to commercial insolvency law, addressing key objectives, core principles and other elements that should be addressed in an effective and efficient insolvency regime, albeit in somewhat less detailed manner.

64. The question to be considered in the light of the work outlined in this paper is the extent to which aspects of the proposal noted in paragraph 1 above might be pursued by UNCITRAL and in what manner. As already noted in paragraph 1, a

²³ Legislative Guide, part three, para. 9.

second paper examining details of selected national legal orders addressing bank resolution regimes, particularly as they relate to cross-border issues, could be prepared for consideration at the forty-third session of the Working Group in 2013. Since that legislation should respond to the Key Attributes, information may be readily available from the FSB's implementation monitoring process and may indicate the progress that has been made, particularly with respect to cross-border aspects of the new regimes. A related issue for consideration might be the extent to which the work undertaken by the FSB and other organizations covers the field, particularly with respect to the establishment of cross-border recognition and cooperation mechanisms, whether applicable to individual financial institutions or to financial groups, and whether further study by UNCITRAL might be considered. Such a study could be relevant to further deliberations on the mandate of Working Group V, as noted above, insofar as it relates to the cross-border treatment of groups.

Annex

List of documents

G20

- 03/2009 Working Group on Reinforcing International Cooperation and Promoting Integrity in Financial Markets (WG 2)

Group of Thirty

- 1998 International Insolvencies in the Financial Sector, G30 Working Group, ISBN 1-56708-099-5, available from www.group30.org/rpt_22.shtml

Basel Committee on Banking Supervision (BCBS), Bank for International Settlements

Publications available from www.bis.org

- 08/2003 High-Level Principles for Cross-Border Implementation of the New Accord
- 09/2009 Report and recommendations of the Cross-border Bank Resolution Group — consultative document
- 03/2010 Report and Recommendations of the Cross-border Bank Resolution Group

Financial Stability Forum

- 04/2009 Principles for cross-border cooperation on crisis management available from www.financialstabilityboard.org/publications/r_0904c.pdf

Financial Stability Board (FSB)

Publications available from www.financialstabilityboard.org/publications

- 06/2010 Promoting global adherence to international cooperation and information exchange standards
- 07/2011 Effective resolution of systemically important financial institutions: recommendations and timelines — consultation document
- 10/2011 Key attributes of effective resolution regimes for financial institutions
- 11/2011 Effective resolution of systemically important financial institutions — overview of responses to the public consultation
- 11/2011 Policy Measures to Address Systematically Important Financial Institutions

International Monetary Fund (IMF)

- 04/09 (with the World Bank): An overview of the legal, institutional and regulatory framework for bank insolvency
- 06/2010 Resolution of Cross-border Banks — a proposed framework for enhanced coordination, available from www.imf.org/external/np/pp/eng/2010/061110.pdf

European Union

- 10/2009 European Commission: Communication on an EU framework for cross-border crisis management in the banking sector COM (2009) 561
- 2009 Commission Staff working document: An EU Framework for Cross-border Crisis Management in the Banking Sector (SEC 2009 (1407))
- 05/2010 European Commission: Communication on bank resolution funds COM (2010) 254
- 06/2010 European Parliament, Committee on Economic and Monetary Affairs: report with recommendations to the Commission on cross-border crisis management in the banking sector (A7-0213/2010), (Ferreira Report)
- 10/2010 European Commission, Communication on a new EU framework for crisis management in the financial sector COM (2010) 579 final
- 12/2010 European Council (ECOFIN): conclusions calling for a Union framework for crisis prevention, management and resolution 17006/1/10
- 01/2011 European Commission working paper (DG Internal Markets and Services): Technical Details of a Possible EU Framework for Bank Recovery and Resolution
- 05/2011 European Commission, Overview of the results of the public consultation on technical details of a possible EU framework for bank resolution and recovery
- 05/2012 Communication from the Commission to the European Parliament, the European Council, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank Action for Stability, Growth and Jobs, COM(2012) 299 final, available from http://ec.europa.eu/europe2020/pdf/nd/eccomm2012_en.pdf
- 06/2012 European Commission: Proposal for a directive of the European Parliament and of the Council establishing a framework for the recovery and resolution of credit institutions and investment firms COM (2012) 280/3 and Commission Staff Working Document Impact Assessment accompanying that document, SWD (2012) 166 final and summary of the impact assessment SWD (2012) 167 final

E. Note by the Secretariat on insolvency law: technical assistance and cooperation, submitted to the Working Group on Insolvency Law at its forty-second session

(A/CN.9/WG.V/WP.110)

[Original: English]

Introduction

1. At its forty-fourth session (2011), the Commission stressed the importance of technical cooperation and assistance provided by the UNCITRAL Secretariat, on the basis that legislative technical assistance, in particular to developing countries, was no less important than the formulation of uniform rules itself. It had been noted that, while UNCITRAL had prepared a number of legislative standards, their rate of adoption varied significantly and therefore the promotion of the adoption and use of those standards seemed to call for specific attention.¹

2. At its forty-fifth session (2012), the Commission noted that the continuing ability to respond to requests from States and regional organizations for technical cooperation and assistance activities was dependent upon the availability of funds to meet associated costs. The Commission further noted that, despite efforts by the Secretariat to solicit new donations, funds available in the UNCITRAL Trust Fund for Symposia were very limited. It was suggested that UNCITRAL delegates and experts might be in a position to further contribute to the mandate of UNCITRAL, for example, by assisting in identifying decision makers on trade law reform.²

3. Against that background, Working Groups have been requested to devote some time in each session to discussing possible ways to further the implementation of UNCITRAL texts. At its forty-first session in 2012, the Working Group had an informal discussion on recent activities undertaken by a number of States with respect to enactment and use of UNCITRAL insolvency texts. A brief summary of that discussion was included in the report of that session (A/CN.9/742, paras. 102-104).

4. To facilitate discussion at its forty-second session (November 2012), the Working Group may wish to consider, inter alia, the following issues and share its views. To the extent the discussion leads to suggestions for further activity or work to be undertaken by the Secretariat, it should be noted that it would have to be accommodated within existing resource constraints:

(a) UNCITRAL instruments on insolvency law are often referred to in the literature written about insolvency law and reform. In some cases, they are referred to as establishing international standards that it is recommended States should follow or have reference to in revising and modernizing their insolvency regimes. In other cases, they are listed as one of the many instruments available for reference by States; those lists often place them on a par with instruments developed by other

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No.17 (A/66/17)*, paras. 253-254.

² *Official Records of the General Assembly, Sixty-seventh Session, Supplement No.17 (A/67/17)*, para. 146.

international organizations and non-governmental organizations. The Working Group may wish to consider how it could assist the Secretariat in better promoting UNCITRAL insolvency texts and disseminating information on them more widely;

(b) General Assembly resolutions endorsing texts adopted by the Commission often ask the Secretariat to bring them to the attention of States to ensure they become generally known and available. While some texts, such as model laws and legislative guides, are directed primarily at States (Governments and legislators), other texts have been developed with judges and practitioners in mind. These might become more known if promoted differently, such as to national judicial colleges, judicial groups and other such institutions. The Working Group might wish to consider how it could assist the Secretariat in identifying appropriate means of promoting these texts;

(c) The discussion at the forty-first session of the Working Group brought to light information on technical assistance activities being conducted both by States and international organizations involving the use of UNCITRAL insolvency texts. The Working Group might wish to consider whether it would be useful to share more of that information and, if so, how that might be achieved.

F. Report of the Working Group on Insolvency Law on the work of its forty-third session (New York, 15-19 April 2013)

(A/CN.9/766)

[Original: English]

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I. Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (Insolvency Law) (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on three insolvency topics: (a) Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) Directors' responsibilities and

liabilities in insolvency and pre-insolvency cases, both of which were of current importance; and (c) Judicial materials on the UNCITRAL Model Law on Cross-Border Insolvency. At its forty-fourth session in 2011, the Commission finalized and adopted the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

3. At its thirty-ninth session in 2010, Working Group V commenced its discussion of those three topics on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.95 and Add.1 and A/CN.9/WG.V/WP.96). The decisions and conclusions of the Working Group are set forth in document A/CN.9/715. The Working Group continued its discussion of topics (a) and (b) at its fortieth session in 2011 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.99, 100 and 101), at its forty-first session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.103 and Add.1, 104 and 105), and at its forty-second session in 2012 on the basis of notes prepared by the Secretariat (A/CN.9/WG.V/WP.107 and 108).

4. At its forty-third session in June 2010, the Commission discussed a proposal to study the feasibility of developing an international instrument regarding the cross-border resolution of large and complex financial institutions (A/CN.9/WG.V/WP.93/Add.5 and A/CN.9/709, para. 5). It was agreed that the Secretariat should prepare a comprehensive report on all or any number of the issues set forth in the proposal. At its forty-second session in 2012, the Working Group first considered this topic on the basis of a note prepared by the Secretariat (A/CN.9/WG.V/WP.109). The deliberations and conclusions of the Working Group on this topic are included in the report of that session (A/CN.9/763, paras. 95-96).

II. Organization of the session

5. Working Group V, which was composed of all States members of the Commission, held its forty-third session in New York from 15-19 April 2013. The session was attended by representatives of the following States members of the Working Group: Argentina, Brazil, Canada, Chile, China, Colombia, Croatia, Czech Republic, El Salvador, France, Germany, India, Israel, Italy, Japan, Kenya, Mexico, Nigeria, Pakistan, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Uganda, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America.

6. The session was attended by observers from the following States: Denmark, Dominican Republic, Guatemala, Hungary, Indonesia, Kuwait, Lithuania, Nicaragua, Oman, Poland, Qatar and Switzerland.

7. The session was attended by the following non-member States: Holy See.

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

- (a) *Organizations of the United Nations system*: World Bank;
- (b) *Invited inter-governmental organizations*: Islamic Development Bank (IDB);

(c) *Invited international non-governmental organizations*: American Bar Association (ABA), Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN), European Law Students Association (ELSA), INSOL International (INSOL), Inter-American Bar Association (IABA), Inter-Pacific Bar Association (IPBA), International Bar Association (IBA), International Insolvency Institute (III), International Women's Insolvency and Restructuring Confederation (IWIRC), New York State Bar Association (NYSBA) and Union Internationale des Avocats (UIA).

9. The Working Group elected the following officers:

Chairman: Mr. Wisit Wisitsora-At (Thailand)

Rapporteur: Sra. Maria del Pilar Escobar Pacas (El Salvador)

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

(a) Annotated provisional agenda (A/CN.9/WG.V/WP.111);

(b) A note by the Secretariat on Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (A/CN.9/WG.V/WP.112);

(c) A note by the Secretariat on directors' obligations in the period approaching insolvency (A/CN.9/WG.V/WP.113);

(d) A note by the Secretariat on the centre of main interests in the context of an enterprise group (A/CN.9/WG.V/WP.114); and

(e) A note by the Secretariat on directors' obligations in the period approaching insolvency in the context of enterprise groups (A/CN.9/WG.V/WP.115).

11. The Working Group adopted the following agenda:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda, noting that there was no report on insolvency of large and complex financial institutions.
4. Consideration of (a) the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) the centre of main interests in the context of an enterprise group; and (d) directors' obligations in the period approaching insolvency in the context of enterprise groups.
5. Noting of the updates to the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.
6. Other business, including future work.
7. Adoption of the report.

III. Deliberations and decisions

12. The Working Group engaged in discussions on: (a) the provision of guidance on interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests; (b) directors' obligations in the period approaching insolvency; (c) the centre of main interests in the context of an enterprise group; and (d) directors' obligations in the period approaching insolvency in the context of enterprise groups, on the basis of documents A/CN.9/WG.V/WP.112, A/CN.9/WG.V/WP.113, A/CN.9/WG.V/WP.114 and A/CN.9/WG.V/WP.115. The deliberations and decisions of the Working Group on these topics are reflected below.

IV. Interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests

13. The Working Group started its discussion of the draft revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency as contained in document A/CN.9/WG.V/WP.112.

A. Purpose and origin of the Model Law

14. The Working Group agreed that the words “(‘enacting States’)” in the second sentence should be deleted on the basis that the footnote in paragraph 3(a) explained the use of the words “enacting State”. It was also agreed that the last sentence of paragraph 2 should be revised as follows: “By adopting legislation based upon the Model Law, States recognize that certain laws relating to insolvency may have to be or might have been amended in order to meet internationally recognized standards.”

15. It was further agreed that with respect to the closing words of the second sentence of the chapeau of paragraph 3, the phrase “a certain level of harmonization” should be replaced with the phrase “and promote a uniform approach to cross-border insolvency.”

16. With those amendments, the Working Group adopted the substance of paragraphs 1, 2, 3, 3A, 18, 4, 5, 6 and 7 as drafted.

B. Purpose of the Guide to Enactment and Interpretation

17. The Working Group adopted the substance of paragraphs 9 and 10 as drafted.

C. The Model Law as a vehicle for the harmonization of laws

18. The Working Group adopted the substance of paragraphs 20 and 21 as drafted.

D. Main features of the Model Law

19. It was suggested that under the heading “Cooperation and coordination”, reference should be made to cooperation in and coordination of insolvency proceedings in the context of enterprise groups. Noting paragraph 9 of the introduction to A/CN.9/WG.V/WP.112, the Working Group agreed to revert to this issue when it had completed its consideration of the draft text (see para. 52 below).

20. The Working Group adopted the substance of paragraphs 49A to 49D, 37A to 37H, 32, and 33A to 33G as drafted.

E. Article-by-article remarks

Preamble

21. The Working Group adopted the substance of paragraph 54 as drafted.

Use of the term “insolvency”

22. The Working Group considered a proposal to insert the following sentence at the end of paragraph 51: “Where a proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2, subparagraph (a), of the Model Law only if the debtor is insolvent or in severe financial distress.” In association with that proposal it was noted that the footnote to paragraph 23B provided an explanation of the term “winding up”. After discussion, the Working Group approved that proposal. In the course of its discussion, the Working Group noted the need to ensure consistent use of the phrase “insolvency or severe financial distress” throughout the text. With that amendment, the Working Group adopted the substance of paragraph 51.

23. A related proposal, which did not receive sufficient support, was to revise the last sentence of paragraph 24B to delete the words “that does not seek to restructure the financial affairs of the entity, but rather” to ensure consistency with paragraph 51 as revised.

24. The Working Group adopted the substance of paragraph 51A as drafted.

“State”

25. The Working Group adopted the substance of paragraph 56 as drafted.

Chapter I. General provisions — articles 1-8

Article 1. Scope of application

26. The Working Group adopted the substance of paragraphs 59 and 65 as drafted.

Article 2. Definitions

Subparagraphs (a) to (f)

27. The Working Group agreed that the phrase “or possessed” should be inserted after the phrase “a foreign proceeding possesses” in the final sentence of paragraph 23.

28. With that amendment, the Working Group adopted the substance of paragraphs 68, 68A, 71, 72, 23 to 23C, 24 to 24G, 70, 31 to 31C, and 73 to 75B as drafted.

Article 3

29. The Working Group adopted the substance of paragraph 78 as drafted.

Articles 5 and 8

30. The Working Group adopted the substance of paragraphs 84 and 91 as drafted.

Chapter II. Access of foreign representatives and creditors to court in this State

Articles 9 to 12

31. The Working Group adopted the substance of paragraphs 93, 96, 98, and 101 to 102 as drafted.

Chapter III. Recognition of a foreign proceeding and relief

Article 15

32. The Working Group agreed to replace the word “fast” in the second sentence of paragraph 112 with the word “expedited”. With that amendment, the Working Group adopted the substance of paragraphs 112, 119 and 120 as drafted.

Article 16. Presumptions concerning recognition

Paragraph 1

33. The Working Group adopted the substance of paragraphs 122 to 122B as drafted.

Paragraph 3

34. In respect of paragraph 123B, the Working Group agreed to replace the words “is likely to be” with the words “may be at” in the second sentence.

35. The Working Group considered several proposals to revise paragraph 123C to clarify that the court continued to have an obligation to determine independently the location of the debtor’s centre of main interests irrespective of whether or not there was a challenge to it being located at the place of registration. After discussion, there was insufficient support in the Working Group to adopt any of the proposals.

36. The Working Group adopted the substance of paragraph 123A to 123C as drafted.

Centre of main interests

37. The Working Group agreed to delete the word “always” in the fifth sentence of paragraph 123D. It was further agreed to delete in the penultimate sentence the words “Where it is uncertain that the debtor’s place of registration is its centre of main interests” and replace them with the words “In those circumstances”. With those amendments, the Working Group adopted the substance of paragraph 123D.

Factors relevant to the determination of centre of main interests

38. The Working Group agreed that the second sentence of paragraph 123F should be redrafted as follows: “The factors are the location: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors.” It was also agreed to add the words “as readily ascertainable by creditors” to the end of the final sentence of paragraph 123G.

39. With those amendments, the Working Group adopted the substance of paragraphs 123F, 123G and 123I as drafted.

Movement of centre of main interests

40. Having considered a proposal to delete paragraphs 123K and M, the Working Group agreed that they should be retained and adopted the substance of those paragraphs as drafted. The Working Group further considered footnote 22 to paragraph 123K and agreed that the second sentence should end after the words “third parties”, deleting both the words “or undertaken as the result of insider exploitation or biased motivation” and the square brackets around the footnote.

*Article 17. Decision to recognize a foreign proceeding**Paragraph 1*

41. The Working Group adopted the substance of paragraphs 124 to 124C as drafted.

*Paragraph 2**Date at which to determine centre of main interests and establishment*

42. The Working Group adopted the substance of paragraphs 128A to D as drafted.

Abuse of process

43. The Working Group adopted the substance of paragraphs 123J and 123L as drafted.

Paragraphs 3 to 4

44. The Working Group adopted the substance of paragraphs 125 to 131 as drafted.

*Article 18. Subsequent information**Subparagraphs (a) and (b)*

45. The Working Group adopted the substance of paragraphs 133 and 134 as drafted.

*Article 19. Relief that may be granted upon application for recognition of a foreign proceeding**Paragraphs 1 to 4*

46. The substance of paragraphs 135 to 140 was adopted as drafted.

Article 20. Effects of recognition of a foreign main proceeding

47. The Working Group adopted the substance of paragraphs 141, 143, 144 to 146, 149, and 151 to 153 as drafted.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

48. The Working Group adopted the substance of paragraphs 154, 156, 158 and 160 was adopted as drafted.

Article 22. Protection of creditors and other interested persons

49. The Working Group adopted the substance of paragraphs 162 to 164 as drafted.

Article 23. Actions to avoid acts detrimental to creditors

50. The substance of paragraphs 165 to 167 was adopted as drafted.

Article 24. Intervention by a foreign representative in the proceedings in this State

51. The Working Group adopted the substance of paragraph 170 as drafted.

Chapter IV. Cooperation with foreign courts and foreign representatives

52. The Working Group adopted the substance of paragraphs 173A, 181, 183 and 183A as drafted, with the addition of the following text to the footnote to paragraph 183A: “The Model Law applies to individual debtors whether corporate or natural. Part three of the Legislative Guide on Insolvency Law, however, addresses the treatment of enterprise groups in insolvency and recommendations 240 to 254 focus on cooperation and communication to facilitate the conduct of cross-border insolvency proceedings where they concern members of an enterprise group.” In support of that addition, it was noted that notwithstanding that the Model Law does not specifically apply to enterprise groups, the footnote should be included to draw attention to UNCITRAL’s work on enterprise groups (see para. 19 above).

Chapter V. Concurrent proceedings

53. The Working Group adopted the substance of paragraphs 184 to 186, 187A, 188 and 197 as drafted.

F. Assistance from the UNCITRAL Secretariat

54. The Working Group adopted the substance of paragraphs 201 and 202 as drafted.

V. Directors’ obligations in the period approaching insolvency

55. The Working Group resumed its consideration of the topic of directors’ obligations in the period approaching insolvency on the basis of document A/CN.9/WG.V/WP.113, focusing in the first instance on the draft recommendations.

A. Draft recommendations

Recommendations 1 and 2 — The obligations

Purpose of legislative provisions

56. The Working Group adopted the substance of the purpose clause for draft recommendations 1 and 2 as drafted.

Contents of legislative provisions

57. It was proposed that the sequence of the recommendations be adjusted by placing recommendation 1 after recommendations 3 and 4 in order to avoid the need for the cross-references in recommendation 1, but that proposal was not taken up. The Working Group adopted the substance of draft recommendation 1 as drafted, with the deletion of the square brackets around the phrase “[accordance with]” and retention of the text.

58. The Working Group agreed to revise the phrase “not committing the company to enter into the types of transaction” to “not committing the company to the types of transaction” in subparagraph (a) of draft recommendation 2.

59. The Working Group agreed to revise the opening words of subparagraph (b) of draft recommendation 2 as follows: “Commencing or requesting the commencement of” in place of “Commencing” and to delete the words “where it is appropriate to do so or where it is required by national law” at the end of the sentence.

60. With those amendments, the Working Group adopted the substance of draft recommendations 1 and 2 as drafted.

Recommendation 3 — The time at which the obligation arises

Purpose of legislative provisions

61. The Working Group agreed to revise “the obligations should arise” to “the obligations arise” at the end of purpose clause and to remove the square brackets. With those amendments, the Working Group adopted the substance of the purpose clause as drafted.

Contents of legislative provisions

62. The Working Group adopted the substance of draft recommendation 3 as drafted.

Recommendation 4 — Persons that owe the obligations

Purpose of legislative provisions

63. The Working Group agreed to revise the phrase “identify the persons to whom the obligations should apply” to “identify the persons owing the obligations in recommendation 1” at the end of the purpose clause and to remove the square brackets. With those amendments, the Working Group adopted the substance of the purpose clause as drafted.

Contents of legislative provisions

64. The Working Group agreed to revise the phrase “the persons who owes the obligations” to “the persons owing the obligations in recommendation 1”. With that amendment, the Working Group adopted the substance of draft recommendation 4 as drafted.

Recommendation 5 and 6 — Liability**Purpose of legislative provisions**

65. The Working Group adopted the substance of the purpose clause as drafted, deleting the square brackets around the text.

Contents of legislative provisions

66. The Working Group adopted the substance of draft recommendation 5 as drafted.

67. A proposal to merge draft recommendations 5 and 6 by adding the words “but only to the extent to which the breach caused loss or damage” to the end of draft recommendation 5 and deleting draft recommendation 6 did not receive sufficient support. The Working Group was of the view that the current drafting was clearer and that it was more appropriate to deal with the two issues addressed by the draft recommendations separately. The Working Group agreed to delete the square brackets and the word “for” and to retain the words “arising from” without the square brackets. With those amendments, the Working Group adopted draft recommendation 6 as drafted.

Recommendations 7 to 11

68. A proposal to relocate draft recommendation 7 (together with paragraphs 31 to 47 of the commentary) to section D on liability was supported on the basis that it addressed liability as opposed to the enforcement of the directors’ liabilities. As a consequence, it was further agreed that the purpose clause for recommendations 5 and 6 should be adjusted to add a new subparagraph (b) along the following lines: “to identify defences to an allegation of breach of the obligations” and to renumber the current subparagraph (b) as subparagraph (c). It was also agreed that the heading to section E of the commentary should be renamed “Enforcement of directors’ liabilities”.

Purpose of legislative provisions

69. The Working Group agreed to revise the opening phrase of the purpose clause from “enforcement of the obligations” to “enforcement of directors’ liabilities” and to delete the square brackets. With that amendment, the Working Group adopted the substance of the purpose clause as drafted.

Recommendation 7 — Elements of liability and defences**Contents of legislative provisions**

70. The Working Group adopted the substance of draft recommendation 7 as drafted.

Recommendation 8 — Remedies**Contents of legislative provisions**

71. The Working Group agreed to delete the phrase “[as compensation for that breach]”. Reservations were expressed with respect to the second sentence, particularly as to its potential operation as a disincentive to directors to make loans to companies in the period approaching insolvency in order to stave off insolvency and after commencement of insolvency proceedings to facilitate reorganization and in terms of its relationship to recommendation 100 of the Legislative Guide. After considerable discussion, the Working Group approved draft recommendation 8 with the deletion of the second sentence.

Recommendation 9 — Conduct of actions for breach of the obligation**Contents of legislative provisions**

72. The Working Group adopted the substance of draft recommendation 9 as drafted.

Recommendation 10 and 11 — Funding of actions for the breach of obligation**Contents of legislative provisions**

73. The Working Group adopted the substance of draft recommendations 10 and 11 as drafted.

Recommendation 12 — Additional measures**Contents of legislative provisions**

74. The Working Group recalled its discussion of the draft recommendation at its previous session. Various concerns were expressed as to the appropriateness of including the draft recommendation on the basis that it could not properly be considered part of the law relating to insolvency, but belonged instead in corporate or criminal laws, and that it could operate as a disincentive for directors to remain on the boards of financially distressed companies to assist with their reorganization. A different view was that draft recommendation 12 sought to extend to the corporate bankruptcy context the sorts of measures that were available in a number of jurisdictions in the context of natural person insolvency regimes and that, in any event, the draft recommendation was merely permissive and intended not to punish but rather to encourage appropriate behaviour. After discussion, the Working Group agreed to retain the word “compensation”, deleting the square brackets, and to delete “[damages]”. With that amendment, the Working Group adopted the substance of draft recommendation 12 as drafted.

Proposal for an additional recommendation

75. The Working Group heard a proposal concerning the specification of prerequisites for commencing an action against a director for breach of the obligations in draft recommendation 1. The proposal was designed to address the issue arising in some States where actions against directors unnecessarily delayed the closure of insolvency proceedings. The prerequisites proposed were to require the person seeking to commence an action against a director to demonstrate that the

director in question possessed sufficient assets to satisfy any eventual judgement and that there be a reasonable probability of success on the merits in order to justify provisional measures to ensure preservation of the director's assets. The Working Group noted that while this was an important issue in some States, in many States the commencement of such actions did not delay the closure of insolvency proceedings and the duty of care of the insolvency representative would in any event require an analysis of the likelihood of success of such an action for the benefit of the estate. Whilst there was insufficient support for including a new recommendation along the lines proposed, the Working Group agreed that the issue could be addressed in the commentary (see para. 99 below).

B. Draft commentary

Introduction and purpose of this [part]

76. The Working Group adopted the following revision of paragraph 1:

“This [part] focuses on the obligations that might be imposed upon those responsible for making decisions with respect to management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which are enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and provide incentives for timely action to minimize the effects of financial distress experienced by the enterprise. The constitution of a board of directors is an important factor in addressing these issues. Where a company has independent directors, who do not own a significant proportion of the equity and who do not represent equity-owners, such directors may not have access to information to the same extent that it is known or available to inside directors. Liability may vary between independent and inside directors depending on the factual situation.”

77. The Working Group agreed to move the final three sentences of the text of paragraph 1 as adopted above to the end of paragraph 35.

78. The Working Group agreed to delete the square brackets around paragraph 2 and adopted the text as drafted.

1. Background

79. The Working Group adopted paragraphs 1 to 15 as drafted, including removing the square brackets around the text in paragraph 2 and retaining the text.

2. Elements of directors' obligations in the period approaching insolvency

The nature of the obligations

80. The Working Group adopted paragraphs 16 to 18 as drafted.

81. With the deletion of the opening phrase, “Except under those laws that require directors to report or make formal declarations,” the Working Group adopted paragraph 19 as drafted.

82. The Working Group adopted paragraph 20 with the following changes:

(a) Retention of the text and deletion of the square brackets in subparagraphs (d), (f) and (j);

(b) Replacement of the words “also taking” with “take” in the second sentence of subparagraph (g); and

(c) Replacement of the words “One example” with “Examples” in the second sentence of the footnote to subparagraph (h).

83. The Working Group agreed to delete the square brackets in paragraphs 21 and 21A and to adopt both paragraphs as drafted.

When the obligations arise: the period approaching insolvency

84. The Working Group adopted paragraphs 22, 23 and 24 as drafted.

85. The Working Group agreed to retain the second sentence of paragraph 25, deleting the square brackets, and to revise the fifth sentence as follows: “Essentially, the standard requires a director’s judgement to be assessed against the knowledge that a reasonably competent director should or ought to have had in the circumstances.” With those amendments, the Working Group adopted paragraphs 25 as drafted.

86. The Working Group adopted a new paragraph 25A as follows: “The recommendations do not preclude States from imposing liabilities on directors that might be enforceable outside insolvency proceedings when, due to the lack of assets to cover the costs of proceedings, the commencement of insolvency proceedings is denied.”

Identifying the parties who owe the obligations

87. The Working Group agreed to delete the footnote to paragraph 26. With that amendment, the Working Group adopted the substance of paragraphs 26 to 29 as drafted.

Liability

88. The Working Group adopted the substance of paragraphs 30 and 31 as drafted.

89. The Working Group agreed to delete the last sentence of paragraph 32, and adopted the remainder of paragraph 32 as drafted.

90. The Working Group agreed to retain the second and third sentences, deleting the square brackets, and adopted the substance of paragraph 33 as drafted.

91. The Working Group agreed to delete the first sentence of paragraph 34 and to replace the phrase “Laws adopting this approach” at the beginning of the second sentence with “Other laws”. The Working Group further agreed to add the phrase “where directors fail to obtain or to study management accounts;” before the phrase “where directors neglect the proper financial administration of the company”, and to revise the following phrases to read “where they neglect to take preventative measures against clearly foreseeable risks; or where bad personnel management by the directors leads to unrest and strikes.” With those amendments, the Working Group adopted the substance of paragraph 34 as drafted.

92. The Working Group agreed to remove the square brackets around paragraph 35 and to replace the first sentence with the following: “Determining whether a particular director has breached their obligations involves consideration of the facts regarding the conduct of that director leading up to the commencement of insolvency proceedings with respect to the debtor.” The Working Group noted that it had agreed earlier in the session (see para. 77 above) to move the final three sentences of the text of paragraph 1 to the end of paragraph 35.

93. With those amendments, the Working Group adopted the substance of paragraph 35.

94. The Working Group removed the square brackets from paragraph 36 and adopted its substance as drafted.

Enforcement of the directors’ liabilities

95. The Working Group agreed to retain the text and delete the square brackets in paragraph 41, and with that amendment adopted the substance of paragraphs 37 to 41 as drafted.

96. The Working Group agreed to retain the words “A number of” without the square brackets and to delete “[Many]” in paragraphs 42 and 47; to delete the last sentence of paragraph 43; and to delete the square brackets around the second sentence of paragraph 48. With those amendments the Working Group adopted the substance of paragraphs 42 to 48.

97. The Working Group agreed to delete the words “in some circumstances” in the second sentence of paragraph 51 and to delete the square brackets around the third sentence in the same paragraph. With those amendments, the Working Group adopted the substance of paragraphs 49 to 51.

98. The Working Group agreed to replace the second sentence of paragraph 52 with: “Depending upon the applicable law relating to insolvency, an action against a director, if authorized, may be brought by the insolvency representative for the benefit of the insolvency estate. If permitted by the law relating to insolvency, an action against a director may be brought by a creditor for the benefit of the insolvency estate if the action is not brought by the insolvency representative. In some States and subject to the law relating to insolvency, an action against a director may be brought by a creditor for its own benefit. All such actions will be on the basis that the conduct being examined occurred in the vicinity of insolvency.” With that amendment, the Working Group adopted the substance of paragraphs 52 to 54.

99. The Working Group agreed to replace paragraph 55 with the following: “An action against the directors for breach of their obligations can be a significant asset of the insolvency estate and increase returns to creditors. However, in many jurisdictions, the pendency of such an action prevents the closure of an insolvency proceeding and the final distribution of proceeds. Therefore, it is desirable that the insolvency representative, before commencing an action against a director, considers the likelihood of success of that proceeding as well as other circumstances such as the ability of the director to respond to an award of damages, the scope of insurance coverage available to the director, and the effect of the litigation on the duration of the insolvency proceedings.”

100. The Working Group agreed to delete the brackets around the second sentence of paragraph 57 and to revise the fourth sentence as follows: “Where the cause of action is pursued by a party other than the insolvency representative in the collective interests of creditors, the costs of commencing such a proceeding might be recovered from any compensation paid.” With those amendments, the Working Group adopted the substance of paragraphs 56 and 57.

VI. Finalization of the work on centre of main interests and directors’ obligations

101. After five sessions (between December 2010 and April 2013) of extensive study, analysis and deliberation, the Working Group advises the Commission that it has completed the substance of its work on those parts of its current mandate relating to: (a) revision of the Guide to Enactment of the Model Law on Cross-Border Insolvency with respect to selected aspects of the centre of main interests and (b) directors’ obligations in the period approaching insolvency (as set forth in documents A/CN.9/WG.V/WP.112 and 113, respectively). With respect to the work on topic (b), the Working Group recommends that this text be adopted as Part four of the Legislative Guide on Insolvency Law.

102. The Working Group requested the Secretariat to circulate the two draft texts to States and international organizations for information and comment, noting that, although desirable, it may not be possible to translate for the information of the Commission any comments received.

VII. The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective

103. The Working Group noted the updates prepared by the Secretariat in consultation with experts on The UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective in conformance with the decision of the Commission in 2011 adopting that text. The Working Group expressed its appreciation and support for the work updating the Judicial Perspective to ensure its continuing currency and noted the usefulness of the text to judges, as well as for the dissemination of information on best practices beyond States that have enacted the Model Law.

VIII. Implementing remaining aspects of the Working Group’s current mandate

104. The Working Group recalled the discussion at its forty-second session of two issues raised by the Commission at its forty-fifth session relating to whether the Working Group’s mandate on centre of main interests covered issues relating to enterprise groups and if so when the Working Group should handle this topic. In relation to the scope of the mandate on centre of main interests, the Working Group had noted that it was necessary to look at issues of centre of main interests as it related to enterprise groups because most commercial activity was currently

conducted through enterprise groups. The Working Group had also noted the description of the mandate contained in paragraph 10 of document A/CN.9/WG.V/WP.107 and that, as originally worded, it was intended to cover centre of main interests in the context of enterprise groups.

105. The Working Group further recalled that it had agreed that that topic should be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests of individual debtors. With respect to issues relating to directors of enterprise group members, the Working Group recalled it had agreed that although the topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration. The Working Group had agreed that once it had completed its consideration of the recommendations and related commentary on directors' liabilities, it could consider whether to address the issues that might be relevant in the context of enterprise groups. To facilitate those deliberations, the Secretariat had been requested to provide further information, particularly as to different national approaches and solutions that might inform the discussion in the Working Group.

106. Having completed its work on those two topics, the Working Group turned its attention to enterprise groups and documents A/CN.9/WG.V/WP.114 and 115, together with the part of its mandate relating to the possible development of a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.¹

107. The Working Group had a general discussion of the issues raised with respect to enterprise groups and of the issues relating to the remaining part of the mandate granted by the Commission.

108. After discussion, the Working Group agreed that it had not yet completed its work on implementing the mandate received from the Commission and that there were pending issues to be addressed before the mandate was exhausted. The Working Group also acknowledged that it was not yet clear how that part of the mandate could best be pursued. The Working Group heard a proposal to hold a colloquium to examine how and by what type of instrument that remaining part of the mandate might be addressed, as well as to identify possible topics for future work. The Working Group agreed that such a colloquium could be useful; however, the suggestion that it should take the place of the Working Group sessions necessary to complete the mandate granted by the Commission did not attract sufficient support. Several delegations suggested that Commission approval should be sought for any future projects but that view did not attract sufficient support.

109. In addition to the topics relating to the remainder of the mandate, the following topics for possible future work were mentioned, acknowledging that a further mandate for such topics would have to be sought from the Commission: private international law rules applicable in insolvency proceedings, especially as they relate to enterprise groups; the effectiveness of current instruments in the light of the global financial crisis, in particular, the provisions of the legislative guide

¹ See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

relating to financial contracts; the relevance of the model law on cross-border insolvency to the resolution of financial institutions; and enforcement of substantive rights and claims in a cross-border insolvency context.

IX. Other business

110. The following additions were made with respect to paragraphs 17 and 18 of document A/CN.9/WG.V/WP.115:

- (a) At the end of footnote 23, the phrase “which regulates corporations”; and
- (b) At the end of paragraph 18, the sentence: “However, different provisions may apply to other companies under civil law.”

**G. Note by the Secretariat on the interpretation and application of
selected concepts of the UNCITRAL Model Law on Cross-Border
Insolvency relating to centre of main interests (COMI), submitted to
the Working Group on Insolvency Law at its forty-third session**

(A/CN.9/WG.V/WP.112)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V that activity be initiated on two insolvency topics, both of which were of current importance, where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the first of those two topics, concerning a proposal by the United States of America, as described in A/CN.9/WG.V/WP.93/Add.1, paragraph 8, to provide guidance on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency (the Model Law) relating to centre of main interests (COMI) and possibly to develop a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not

preclude the development of a convention.¹ The second topic concerning the obligations of directors in the period approaching insolvency is addressed in A/CN.9/WG.V/WP.113.

4. Pursuant to a decision taken by the Working Group at its fortieth session that, as a working assumption, the Guide to Enactment of the Model Law should be revised and enriched (A/CN.9/738, para. 13), proposals to revise the Guide to Enactment are set forth in documents A/CN.9/WG.V/WP.95 and Add.1, A/CN.9/WG.V/WP.99, A/CN.9/WG.V/WP.103 and Add.1, A/CN.9/WG.V/WP.105 and A/CN.9/WG.V/WP.107, as well as the reports of the Working Group of its thirty-ninth, fortieth, forty-first and forty-second sessions (A/CN.9/715, 738, 742 and 763, respectively).

5. This note builds upon those documents and sets forth further draft revisions based upon the deliberations and decisions of the Working Group at its forty-second session. The reader will be assisted in understanding the changes proposed for the Guide to Enactment by consulting both the published version of that document (available at www.uncitral.org/uncitral/uncitral_texts/insolvency.html) and document A/CN.9/WG.V/WP.107.

6. Paragraphs of the published version of the Guide to Enactment that have not been revised or that do not include revised text are not set out in this note; this is indicated by “[...]”. Where only minor editorial changes are suggested, the paragraph is not set out in full, but a reference to the relevant paragraph of the document containing those changes is included (i.e. A/CN.9/WG.V/WP.107). For ease of reference, the paragraph numbers from the published version of the Guide to Enactment have been retained to indicate the reordering of the text and the additional paragraphs proposed. The numbering of the paragraphs in this note is therefore not necessarily sequential. Where a new paragraph has been added, it takes the number of the immediately preceding paragraph with the addition of an alpha character. All headings from the published text have been included to indicate content and facilitate comparison with the published text.

7. Footnotes to be retained from the published version of the Guide without revision are not repeated (although the footnote markers remain in the text), but since the placement of some of the original footnotes has been changed, their location is indicated by a note in square brackets. The text of new or revised footnotes has been included. The sections of the Guide entitled “Discussion in UNCITRAL and in the Working Group”, which list relevant document references, have also been omitted, but will be included in the final version, updated to reflect both the original and current deliberations, together with the text of each article.

8. The Working Group may wish to note several issues outstanding from the discussion at its forty-second session:

(a) Footnote 22 to paragraph 123K was placed in square brackets at the request of the Working Group (A/CN.9/763, para. 47);

¹ See the related proposal of the Union Internationale des Avocats (UIA), concerning the possible development of a convention, as referred to in A/CN.9/686, paras. 127-130.

(b) Since paragraph 123F now refers to only two principal factors, the words “considered as a whole” appear inappropriate and might be revised to “considered together”;

(c) Paragraphs 128D and 128L are new text. Paragraph 128D concerns the date for determining the existence of an establishment and was prepared by the Secretariat at the request of the Working Group (A/CN.9/763, para. 52). Material from the previous draft of paragraph 128L, which concerned abuse of process, has been moved to follow 123J (A/CN.9/763, para. 54).

9. The Working Group may also wish to note the conclusion from its fortieth session (A/CN.9/738, paras. 36-37) with respect to adding material on enterprise groups to the Guide to Enactment, that while some reservations were expressed as to the appropriateness of that course of action, it was agreed that reference should be made, in the Guide to Enactment, to part three of the Legislative Guide and the solutions adopted with respect to the treatment of groups in insolvency, particularly in the international context. The Working Group may wish to consider that conclusion and indicate its views on whether material should be added and if so, what that material should be.

Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency

I. Purpose and origin of the Model Law

A. Purpose 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 proceedings concerning debtors experiencing severe financial distress or insolvency. Those instances include cases where the 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. In principle, the proceeding pending in the debtor’s centre of main interests is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs.

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 (“enacting States”) would be introducing useful additions and improvements in national insolvency regimes designed to resolve problems arising in cross-border insolvency cases. By enacting the Model Law, States acknowledge that certain insolvency laws may have to be modified in order to meet internationally recognized standards.

3. The Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather, it provides a framework for cooperation between jurisdictions, offering solutions that help in

several modest but significant ways and facilitate a certain level of harmonization. Those solutions include the following:

(a) The following footnote has been inserted after “enacting State”: “The “enacting State” refers to a State that has enacted legislation based on the Model Law. Unless otherwise provided, that term is used in the Guide to Enactment and Interpretation to refer to the State receiving an application under the Model Law.”;

(b)-(f) [...];

(g) The words “in favour of” have been replaced with the words “to assist”.

3A. For jurisdictions that currently have to deal with numerous cases of cross-border insolvency, as well as jurisdictions that wish to be well prepared for the increasing likelihood of cases of cross-border insolvency, the Model Law is an essential reference for developing an effective cross-border cooperation framework.

B. Origin of the Model Law

13. [...]

18 For minor revisions, see A/CN.9/WG.V/WP.103, para. 18.²

19. [...]

C. Preparatory work and adoption

4. The project was initiated by the United Nations Commission on International Trade Law (UNCITRAL), in close cooperation with INSOL International. The project benefited from the expert advice of INSOL during all stages of the preparatory work. In addition, during the formulation of the Law, consultative assistance was provided by the former Committee J (Insolvency) of the Section on Business Law of the International Bar Association.

5-7. The footnotes have been updated, see A/CN.9/WG.V/WP.107, paras. 5-7.

8. [...]

II. Purpose of the Guide to Enactment and Interpretation

9. UNCITRAL considered that the Model Law would be a more effective tool 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 those charged with interpretation and application of the Model Law, such

² *For information only:* paragraphs 18, 19, 31, 72, 74 and 75 of the original Guide to Enactment were updated in 2004 to take account of the entry into force of European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (see A/59/17, para. 51) and are included in the version of the text published as annex III of the Legislative Guide on Insolvency Law (United Nations Publication No. E.05.V.10).

as judges,³ and other users of the text such as practitioners and academics. Such information might also assist States in considering which, if any, of the provisions should be adapted to address particular national circumstances.

10. The present Guide was prepared by the Secretariat pursuant to the request of UNCITRAL made at the close of its thirtieth session, in 1997. It is based on the deliberations and decisions of the Commission at that thirtieth session,⁴ when the Model Law was adopted, as well as on considerations of the Working Group on Insolvency Law, which conducted the preparatory work. The Guide has been revised in accordance with the request of UNCITRAL at its forty-third session (2010)⁵ in order to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to “centre of main interests”. The revisions are based on the deliberations of the Working Group at its thirty-ninth (2010), fortieth (2011), forty-first (2012), forty-second (2012) and forty-third (2013) sessions, as well as of the Commission at its forty-sixth session (2013) and were adopted as the Guide to Enactment and Interpretation of the Model Law on ... July 2013.

III. The Model Law as a vehicle for the harmonization of laws

11. [...]

A. Flexibility of a model law

12. [...]

B. Fitting the Model Law into existing national law

20. [...]

(a), (d)-(f) [...];

(b) Add the reference “(article 20)” at the end of the paragraph;

(c) The word “maintaining” has been replaced with “continuing”.

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 (see paras. 91-92) and for the benefits to the enacting State of adopting modern, generally acceptable international practices in insolvency matters. Thus it is advisable to limit deviations from the uniform text to a minimum. This will assist in making the national law as transparent as possible for foreign users (see also paras. 11 and 12 above). The advantage of uniformity and transparency is

³ Where “judges” would include a judicial officer or other person appointed to exercise the powers of the court or other competent authority having jurisdiction under domestic insolvency laws [enacting the Model Law].

⁴ [footnote 8] *Official Records of the General Assembly, Fifty-second Session, Supplement No. 17* (A/52/17), para. 220.

⁵ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 259.

that it will make it easier for enacting States to demonstrate the basis of their national law on cross-border insolvency and obtain cooperation from other States in insolvency matters.

49. [...]

IV. Main features of the Model Law

49A. The text of the Model Law focuses on four key elements identified, through the studies and consultations conducted in the early 1990s prior to the negotiation of the Model Law, as being the areas upon which international agreement might be possible:

- (a) Access to local courts for representatives of foreign insolvency proceedings and for creditors and authorization for representatives of local proceedings to seek assistance elsewhere;
- (b) Recognition of certain orders issued by foreign courts;
- (c) Relief to assist foreign proceedings;
- (d) Cooperation among the courts of States where the debtor's assets are located and coordination of concurrent proceedings.

A. Access

49B. The provisions on access address both inbound and outbound aspects of cross-border insolvency. In terms of outbound aspects, article 5 authorises the person or body administering a reorganization or liquidation under the law of the enacting State (referred to as the insolvency representative)⁶ to act in a foreign State (article 5) on behalf of local proceedings. In terms of inbound requests, a foreign representative applying in the enacting State has the following rights: of direct access to courts in the enacting State (article 9); to apply to commence a local proceeding in the enacting State on the conditions applicable in that State (article 11); and to apply for recognition of the foreign proceedings in which they have been appointed (article 15). Upon recognition, a foreign representative is entitled to participate in insolvency-related proceedings conducted in the enacting State under the law of that State (article 12); to initiate in the enacting State an action to avoid or otherwise render ineffective acts detrimental to creditors (article 23); and to intervene in any local proceedings in which the debtor is a party (article 24).

49C. The fact that a foreign representative has the right to apply to the courts of the enacting State does not subject the foreign representative or the foreign assets and affairs of the debtor to the jurisdiction of the enacting State for any purpose other than that application (article 10).

⁶ This terminology reflects the language used in article 5 of the Model Law and is used for consistency with the Legislative Guide on Insolvency Law, which explains that an "insolvency representative" is "a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or liquidation of the insolvency estate": Introduction, para. 12 (v).

49D. Importantly, foreign creditors have the same right as local creditors to commence and participate in proceedings in the enacting State (article 13).

37. [...]

B. Recognition

37A. One of the key objectives of the Model Law is to establish simplified procedures for recognition of qualifying foreign proceedings that would avoid time-consuming legalization or other processes and provide certainty with respect to the decision to recognize. The Model Law is not intended to accord recognition to all foreign insolvency proceedings. Article 17 provides that, subject to article 6, when the specified requirements of article 2 concerning the nature of the foreign proceeding (i.e. that the foreign proceeding is, as a matter of course, a collective proceeding⁷ for the purposes of liquidation or reorganization under the control or supervision of the court) and the foreign representative are met and the evidence required by article 15 has been provided, the court should recognize the foreign proceeding without further requirement. The process of application and recognition is aided by the presumptions provided in article 16 that enable the court in the enacting State to presume the authenticity and validity of the certificates and documents, originating in the foreign State, that are required by article 15.

37B. Article 6 allows recognition to be refused where it would be “manifestly contrary to the public policy” of the State in which recognition is sought. This may be a preliminary question to be considered on an application for recognition. No definition of what constitutes public policy is attempted as notions vary from State to State. However, the intention is that the exception be interpreted restrictively and that article 6 be used only in exceptional and limited circumstances (see paras. 86-89). Differences in insolvency schemes do not themselves justify a finding that enforcing one State’s laws would violate the public policy of another State.

37C. A foreign proceeding should be recognized as either a main proceeding or a non-main proceeding (article 17, paragraph 2). A main proceeding is one taking place where the debtor had its centre of main interests (COMI) at the date of commencement of the foreign proceeding (see paras. on timing). In principle, a main proceeding is expected to have principal responsibility for managing the insolvency of the debtor regardless of the number of States in which the debtor has assets and creditors, subject to appropriate coordination procedures to accommodate local needs. Centre of main interests is not defined in the Model Law, but is based on a presumption that it is the registered office or habitual residence of the debtor (article 16, paragraph 3).

37D. A non-main proceeding is one taking place where the debtor has an establishment. This is defined as “any place of operation where the debtor carries out non-transitory economic activity with human means and goods or services” (article 2, subparagraph (f)). Proceedings commenced on a different basis, such as presence of assets, without a centre of main interests or establishment, would not

⁷ On what constitutes a collective proceeding see paras. [...] below.

qualify for recognition under the Model Law scheme. Main and non-main proceedings are discussed in more detail below in paras. [...].

37E. Acknowledging that it might subsequently be discovered that the grounds for granting recognition were lacking at the time of recognition, have changed or ceased to exist, the Model Law provides for modification or termination of the order for recognition (article 17, paragraph 4).

37F. Recognition of foreign proceedings under the Model Law has several effects. Principal amongst them is the relief accorded to assist the foreign proceeding (articles 20 and 21), but additionally, as noted above, the foreign representative is entitled to participate in any local insolvency proceeding regarding the debtor (article 13), has standing to initiate an action for avoidance of antecedent transactions (article 23) and may intervene in any proceeding in which the debtor is a party (article 24).

C. Relief

37G. A basic principle of the Model Law is that the relief considered necessary for the orderly and fair conduct of a cross-border insolvency should be available to assist foreign proceedings, whether on an interim basis or as a result of recognition. Accordingly, the Model Law specifies the relief that is available in both of those instances. As such, it neither necessarily imports the consequences of the foreign law into the insolvency system of the enacting State nor applies to the foreign proceeding the relief that would be available under the law of the enacting State. However, it is possible, as noted above, to align the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding commenced under the law of the enacting State (article 20).

37H. Interim relief is available at the discretion of the court between the making of an application for recognition and the decision on that application (article 19); specified forms of relief are available on recognition of main proceedings (article 20); and relief at the discretion of the court is available for both main and non-main proceedings following recognition (article 21). In the case of main proceedings, that discretionary relief would be in addition to the relief available on recognition. Additional assistance might be available under other laws of the enacting State (see article 7).

32. The words “the representative of a” in the first sentence and the word “fair” in the third sentence have been deleted.

33. [...]

33A. With respect to interim and discretionary relief, the court can impose conditions and modify or terminate the relief to protect the interests of creditors and other interested persons affected by the relief ordered (article 22).

D. Cooperation and coordination

Cooperation

33B. The Model Law expressly empowers courts to cooperate in the areas governed by the Model Law and to communicate directly with foreign counterparts. Cooperation between courts and foreign representatives and between foreign representatives is also authorized. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Cooperation is discussed in detail in paragraphs 173-183.

33C. Recognizing that the idea of cooperation might be unfamiliar to many judges and insolvency representatives, article 27 sets out some of the possible means of cooperation. These are further discussed and amplified in the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation,⁸ which also compiles practice and experience with respect to the use and negotiation of cross-border insolvency agreements.

Coordination of concurrent proceedings

33D. Several provisions of the Model Law address coordination of concurrent proceedings and aim to foster decisions that would best achieve the objectives of both proceedings.

33E. The recognition of foreign main proceedings does not prevent commencement of local proceedings in the enacting State (article 28), nor does the commencement of local proceedings in that State terminate recognition already accorded to foreign proceedings or prevent recognition of foreign proceedings.

33F. Article 29 addresses adjustment of the relief available where there are concurrent proceedings. The basic principle is that relief granted to a recognized foreign proceeding should be consistent with the relief granted in local proceedings, irrespective of whether the foreign proceeding was recognized before or after the commencement of the local proceeding. For example, where local proceedings have already commenced at the time the application for recognition is made, relief granted to the foreign proceeding must be consistent with the local proceeding. If the foreign proceeding is recognized as a main proceeding, the automatic relief available on recognition under article 20 will not apply.

33G. Articles 31 and 32 contain additional means of facilitating coordination. Article 31 establishes a presumption to the effect that recognition of a foreign proceeding is proof that the debtor is insolvent where insolvency is required for

⁸ The Practice Guide is available from www.uncitral.org/uncitral/en/uncitral_texts.html.

commencement of a local proceeding. Article 32 establishes the hotchpot rule to avoid situations in which a creditor might make claims and be paid in multiple insolvency proceedings in different jurisdictions, thereby potentially obtaining more favourable treatment than other creditors.

V. Article-by-article remarks

Preamble

54. The final words of the second sentence have been replaced with the words “and to assist in its interpretation.”

55. [...]

Use of the term “insolvency”

51. Acknowledging that different jurisdictions might have different notions of what falls within the term “insolvency proceedings”, the Model Law does not define the term “insolvency”.⁹ However, as used in the Model Law, the word “insolvency” refers to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. The reason is that the Model Law covers proceedings concerning different types of debtors and, among those proceedings, deals with proceedings aimed at liquidating or reorganizing the debtor. A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity and other foreign proceedings not falling within article 2, subparagraph (a) are not insolvency proceedings within the scope of the Model Law.

51A. Debtors covered by the Model Law would generally fall within the scope of the UNCITRAL Legislative Guide on Insolvency Law and would therefore be eligible for commencement of insolvency proceedings in accordance with recommendations 15 and 16 of the Legislative Guide,¹⁰ being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets.

52-53. [...]

⁹ The UNCITRAL Legislative Guide on Insolvency Law explains insolvency as being “when a debtor is generally unable to pay its debts as they mature or when its liabilities exceed the value of its assets” and insolvency proceedings as being “collective proceedings, subject to court supervision, either for reorganization or liquidation”.

¹⁰ Recommendations 15 and 16 provide:

15. The insolvency law should specify that insolvency proceedings can be commenced on the application of a debtor if the debtor can show either that:

- (a) It is or will be generally unable to pay its debts as they mature; or
- (b) Its liabilities exceed the value of its assets.

16. The insolvency law should specify that insolvency proceedings can be commenced on the application of a creditor if it can be shown that either:

- (a) The debtor is generally unable to pay its debts as they mature; or
- (b) The debtor’s liabilities exceed the value of its assets.

“State”

56. The sentence “The national statute may use another expression that is customarily used for this purpose.” has been added at the end of the paragraph.

Chapter I. General provisions*Article 1. Scope of application**Paragraph 1*

57. [...]

58. [*Incorporated into paragraph 56*]

59. “Assistance” in paragraph 1, subparagraphs (a) and (b), is intended to cover various situations dealt with in the Model Law, in which a court or an insolvency representative in one State may make a request to a court or an insolvency representative in another State for assistance within the scope of the Model Law. The Law specifies some of those measures (e.g. article 19, subparagraphs 1 (a) and (b); article 21, subparagraphs 1 (a)-(f) and paragraph 2; and article 27, subparagraphs (a)-(e)), while other possible measures are covered by a broader formulation (such as the one in article 21, subparagraph 1 (g)).

Paragraph 2 (Specially regulated insolvency proceedings)

60-64. [...]

65. The words “the law” in the parentheses have been replaced with the words “a law”.

Non-traders or natural persons

66. [...]

*Article 2. Definitions**Subparagraphs (a)-(d)*

67. [...]

68. The word “of” in the last line of the paragraph has been replaced with the words “specified in”.

68A. Proceedings and foreign representatives that do not have those attributes would not be eligible for recognition under the Model Law.

Subparagraph (a) — Foreign proceeding

71. The words “or insolvent” have been added at the end of the paragraph.

72. This paragraph has been deleted and the issue discussed in detail in paragraphs 31 and following.

23. The attributes required for a foreign proceeding to fall within the scope of the Model Law include the following: basis in insolvency-related law of the originating State; involvement of creditors collectively; control or supervision of the assets and affairs of the debtor by a court or another official body; and

reorganization or liquidation of the debtor as the purpose of the proceeding (article 2, subparagraph (a)). Whether a foreign proceeding possesses those elements would be determined at the time the application for recognition is considered.

23A. As noted in subparagraph (e) of the preamble, the focus of the Model Law is upon severely financially distressed and insolvent debtors and the laws that prevent or address the financial distress of those debtors. As noted above (para. 51A), these are debtors that would generally fall within the commencement criteria discussed in the Legislative Guide, being debtors that are or will be generally unable to pay their debts as they mature or whose liabilities exceed the value of their assets (recommendations 15 and 16).

23A bis. The following paragraphs discuss the various characteristics required of a “foreign proceeding” under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph (a) should be considered as a whole.

(i) *Collective proceeding*

23B. For a proceeding to qualify for relief under the Model Law, it must be a collective proceeding because the Model Law is intended to provide a tool for achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State. Nor is it intended that the Model Law serve as a tool for gathering up assets in a winding up¹¹ or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purposes of liquidation or reorganization (see below, paras. 24F and G).

23C. In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. A proceeding should not be considered to fail the test of collectivity purely because a class of creditors’ rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law (see Legislative Guide on Insolvency Law, part two, chap. II, paras. 7-9). Examples of the manner in which a collective proceeding for the purposes of article 2 might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the obligation): to submit claims for determination and to receive an equitable distribution or satisfaction of their claims, to participate in the proceedings, and to receive notice of the proceedings in order to

¹¹ “Winding up” is a procedure in which the existence of a corporation and its business are brought to an end.

facilitate their participation. The Legislative Guide deals extensively with the rights of creditors, including the right to participate in proceedings (part two, chapter III, paras. 75-112).

24. Within the parameters of the definition of a foreign proceeding, a variety of collective proceedings would be eligible for recognition, be they compulsory or voluntary, corporate or individual, winding-up or reorganization. The definition would also include those proceedings in which the debtor retains some measure of control over its assets, albeit under court supervision (e.g. suspension of payments, “debtor in possession”).

24A. The Model Law recognizes that, for certain purposes, insolvency proceedings may be commenced under specific circumstances defined by law that do not necessarily mean the debtor is in fact insolvent. Paragraph 194 below notes that those circumstances might include cessation of payments by the debtor or certain actions of the debtor such as a corporate decision, dissipation of its assets or abandonment of its establishment. Paragraph 195 below notes that for use in jurisdictions where insolvency is a condition for commencing insolvency proceedings, article 31 establishes, upon recognition of foreign main proceedings, a rebuttable presumption of insolvency of the debtor for the purposes of commencing a local insolvency proceeding.

(ii) *Pursuant to a law relating to insolvency*

24B. This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained¹² and irrespective of whether the law that contained the rules related exclusively to insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress.

(iii) *Control or supervision by a foreign court*

24C. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. As noted in paragraph 24, a proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession would satisfy this requirement. Control or supervision may be exercised not only directly by the court but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

¹² A/CN.9/422, para. 49.

24D. Expedited proceedings of the type referred to in the Legislative Guide (see part two, chap IV, paras. 76-94 and recommendations 160-168) should not be excluded. These are proceedings in which the court exercises control or supervision at a late stage of the insolvency process. Proceedings in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so should also not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed.

24E. Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it is not sufficient if only one or the other are covered by the foreign proceeding.

(iv) *For the purpose of reorganization or liquidation*

24F. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding in article 2, subparagraph (a) may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

24G. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt where the negotiations do not lead to the commencement of an insolvency proceeding, conducted under the insolvency law.¹³ Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 24C-E). Because they could take a potentially large number of forms, those measures would be difficult to address in a general rule on recognition.¹⁴ Other procedures that do not require supervision or control by the court might also be ineligible.

Interim proceeding

69. [...]

70. The reference "(see paras. 133-134 below)" has been added at the end of the first sentence; the second sentence has been relocated to the remarks on article 18.

¹³ Such contractual arrangements would clearly remain enforceable outside the Model Law without the need for recognition; nothing in the Model Law or Guide to Enactment is intended to restrict such enforceability.

¹⁴ A/CN.9/419, paras. 19 and 29.

Subparagraph (b) — foreign main proceeding

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 article 3 of the EC Regulation (based upon the formulation previously adopted in the European Union Convention on Insolvency Proceedings (the European 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 under articles 20 and 21 and coordination of the foreign proceeding with proceedings that may be commenced in the enacting State under chapter IV and with other concurrent proceedings under chapter V.

31A. The Model Law does not define the concept “centre of main interests”. However, an explanatory report (the Virgos-Schmit Report),¹⁵ prepared with respect to the European Convention, provided guidance on the concept of “main insolvency proceedings” and notwithstanding the subsequent demise of the Convention, the Report has been accepted generally as an aid to interpretation of the term “centre of main interests” in the EC Regulation. Since the formulation “centre of main interests” in the EC Regulation corresponds to that of the Model Law, albeit for different purposes (see para. 123A), jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law.

31B. Recitals (12) and (13) of the EC Regulation state:

“(12) This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor’s assets. To protect the diversity of interests, this Regulation permits secondary proceedings¹⁶ to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community.

“(13) The ‘centre of main interests’ should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”

31C. The Virgos-Schmit Report explained the concept of “main insolvency proceedings” as follows:

“73. Main insolvency proceedings

“Article 3 (1) enables main insolvency universal proceedings to be opened in the Contracting State where the debtor has his centre of main interests. Main insolvency proceedings have universal scope. They aim at encompassing all the debtor’s assets on a world-wide basis and at affecting all creditors, wherever located.

¹⁵ M. Virgos and E. Schmit, Report on the Convention on Insolvency Proceedings, Brussels, 3 May 1996. The report was published in July 1996 and is available from <http://aei.pitt.edu/952>.

¹⁶ The EC Regulation refers to “secondary proceedings”, while the Model Law uses “non-main proceedings”.

“Only one set of main proceedings may be opened in the territory covered by the Convention.

“...

“75. The concept of ‘centre of main interests’ must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

“The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.

“By using the term ‘interests’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression ‘main’ serves as a criterion for the cases where these interests include activities of different types which are run from different centres.

“In principle, the centre of main interests will in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence.

“Where companies and legal persons are concerned, the Convention presumes, unless proved to the contrary, that the debtor’s centre of main interests is the place of his registered office. This place normally corresponds to the debtor’s head office.”

Centre of main interests is discussed further in the remarks on article 16.

Subparagraph (c) — foreign non-main proceeding

73. A cross-reference to paragraphs 75-75A has been added at the end of the first sentence.

Subparagraph (d) — foreign representative

73A. Subparagraph (d) recognizes that the foreign representative may be a person authorized in the foreign proceedings to administer those proceedings, which would include seeking recognition, relief and cooperation in another jurisdiction, or they may simply be a person authorized specifically for the purposes of representing those proceedings. The Model Law does not specify that the foreign representative must be authorized by the court (as defined in article 2, subparagraph (e)) and the definition is thus sufficiently broad to include appointments that might be made by a special agency other than the court. It also includes appointment made on an interim basis (see above paras. 69-70). The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court. The

definition in subparagraph (d) is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings.

Subparagraph (e)

74. The words: “as well as the Legislative Guide (Intro., para. 12(i)) and the UNCITRAL Practice Guide (Intro., paras. 7-8)” have been added at the end of the paragraph after the words “subparagraph (d)”.

Subparagraph (f)

75. The definition of the term “establishment” was inspired by article 2, subparagraph (h), of the EC Regulation. The term is used in the Model Law in the definition of “foreign non-main proceeding” (article 2, subparagraph (c)) and in the context of article 17, paragraph 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 para. 73 above).

75A. The Virgos-Schmit Report on that Convention provides some further explanation of “establishment”:

“Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.

“The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an ‘establishment’. A certain stability is required. The negative formula (‘non-transitory’) aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor.”¹⁷

75B. Since “establishment” is a defined term, the inquiry to be made by the court as to whether the debtor has an establishment is purely factual in nature. Unlike “foreign main proceeding” there is no presumption with respect to the determination of establishment. There is a legal issue as to whether the term “non-transitory” refers to the duration of a relevant economic activity or to the specific location at which the activity is carried on. The commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts or of property would not in principle satisfy the definition of establishment.

Article 3. International obligations of this State

76-77. [...]

78. The words “for them” in the first sentence have been replaced with the words “in order”.

¹⁷ Virgos-Schmit Report, para. 7.1.

*Article 4. [Competent court or authority]*¹⁸

79-83. [...]

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*

84. The last sentence has been revised to read: “An enacting State in which insolvency representatives are already equipped to act as foreign representatives may decide to forgo inclusion of article 5, although retaining that article would provide clear statutory evidence of that authority and assist foreign courts and other users of the law.”

85. [...]

Article 6. Public policy exception

86-89. [...]

Article 7. Additional assistance under other laws

90. [...]

Article 8. Interpretation

91. The second sentence has been revised as follows: “More recently, it has been recognized that such a provision would also be useful in a non-treaty text such as a model law on the basis that a State enacting a model law would have an interest in its harmonized interpretation.”

92. [...]

Chapter II. Access of foreign representatives and creditors to courts in this State

Article 9. Right of direct access

93. The following introductory sentence has been added: “An important objective of the Model Law is to provide expedited and direct access for foreign representatives to the courts of the enacting State.”

Article 10. Limited jurisdiction

94-95. [...]

96. The words “as it should” in the second sentence have been replaced with the word “to”.

¹⁸ [footnote 1] A State where certain functions relating to insolvency proceedings have been conferred upon government-appointed officials or bodies might wish to include in article 4 or elsewhere in chapter I the following provision:
Nothing in this Law affects the provisions in force in this State governing the authority of [insert the title of the government-appointed person or body].

Article 11. Application by a foreign representative to commence a proceeding under [identify laws of the enacting State relating to insolvency]

97. [...]

98. The first sentence has been revised as follows: “Article 11 is designed to ensure that the foreign representative (of a foreign main or non-main proceeding) has standing¹⁹ to request the commencement of an insolvency proceeding” and the footnote has been added.

99. [...]

Article 12. Participation of a foreign representative in a proceeding under [identify laws of the enacting State relating to insolvency]

100. The paragraph has been aligned with paragraph 98 and footnote 26.

101. The last words have been revised to read “any such motions”.

102. The words “(see below, paras. 169 and 172)” have been added at the end of the paragraph.

Article 13. Access of foreign creditors to a proceeding under [identify laws of the enacting State relating to insolvency]

103-105. [...]

Article 14. Notification to foreign creditors of a proceeding under [identify laws of the enacting State relating to insolvency]

106-111. [...]

Chapter III. Recognition of a foreign proceeding and relief

Article 15. Application for recognition of a foreign proceeding

112. The following two introductory sentences have been added: “The Model Law avoids the need to rely on cumbersome and time-consuming letters rogatory or other forms of diplomatic or consular communications that might otherwise have to be used. This facilitates a coordinated, cooperative approach to cross-border insolvency and makes fast action possible.”

113-118. [...]

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 that discretion is compatible with the procedures of the court, it may facilitate a decision being made on the application at the earliest possible time, as contemplated by article 17, paragraph 3, if the court is in a position to consider the application without the need for translation of the documents.

¹⁹ Also known as “procedural legitimation”, “active legitimation” or “legitimation”.

Notice

120. Different solutions exist 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 on the importance of the recognition of a foreign insolvency proceeding could only be made after hearing the affected parties. In other States, however, 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, accordingly, the issuance of notice prior to any court decision on recognition is not required. In these circumstances, imposing the requirement could cause undue delay and would be inconsistent with article 17, paragraph 3, which provides that an application for recognition of a foreign proceeding should be decided upon at the earliest possible time.

121. [...]

*Article 16. Presumptions concerning recognition**Paragraph 1*

122. Article 16 establishes presumptions that permit and encourage fast action in cases where speed may be essential. These presumptions allow the court to expedite the evidentiary process. At the same time, they do not prevent the court, in accordance with the applicable procedural law, from calling for or assessing other evidence if the conclusion suggested by the presumption is called into question.

122A. Article 16, paragraph 1 creates a presumption with respect to the definitions of “foreign proceeding” and “foreign representative” in article 2. If the decision commencing the foreign proceeding and appointing the foreign representative indicates that the foreign proceeding is a proceeding within the meaning of article 2, subparagraph (a) and that the foreign representative is a person or body within the meaning of article 2, subparagraph (d), the receiving court is entitled to so presume. That presumption has been relied upon in practice by various receiving courts when the court commencing the proceedings has included that information in its orders.²⁰

122B. Inclusion of information regarding the nature of the foreign proceeding and the foreign representative as defined in article 2 in the orders made by the court commencing the foreign proceeding can facilitate the task of recognition in relevant cases. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the requirements of article 2 are met (discussed further in paras. 124B-C below).

Paragraph 2

123. [...]

²⁰ For examples, see A/CN.9/WG.V/WP.95, paras. 15-16.

Paragraph 3

123A. Although the presumption contained in article 16, paragraph 3 corresponds to the presumption in the EC Regulation, it serves a different purpose. In the Model Law, the presumption is designed to facilitate the recognition of foreign insolvency proceedings and the provision of assistance to those proceedings. Under the EC Regulation, the presumption relates to the proper place for commencement of insolvency proceedings, thus determining the applicable law, and to the automatic recognition of those proceedings by other EU member States. Under the Regulation, the decision on centre of main interests is made by the court receiving an application for commencement of insolvency proceedings at the time of consideration of that application. Under the Model Law, a request for recognition of a foreign proceeding may be made at any time after the commencement of that proceeding; in some cases it has been made several years later. Accordingly, the court considering an application for recognition under the Model Law must determine whether the foreign proceeding for which recognition is sought is taking place in a forum that was the debtor's centre of main interests when the proceeding commenced (the issue of timing with respect to the determination of centre of main interests is discussed in paras. 128A-E below). Notwithstanding the different purpose of centre of main interests under the two instruments, the jurisprudence with respect to interpretation of that concept in the EC Regulation may be relevant to its interpretation in the Model Law.

123B. The presumption in article 16, paragraph 3 has given rise to considerable discussion, most commonly in the context of corporate rather than individual debtors, with the focus upon the proof required for the presumption to be rebutted. The debtor's centre of main interests is likely to be the same location as its place of registration and in that situation no issue concerning rebuttal of the presumption will arise.

123C. However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged centre of main interests, the party alleging the centre of main interests is not at the place of registration will be required to satisfy the court as to the location of the centre of main interests. The court of the enacting State will be required to consider independently where the debtor's centre of main interests is located.

Centre of main interests

123D. The concept of a debtor's centre of main interests is fundamental to the operation of the Model Law.²¹ The Model Law accords proceedings commenced in that location greater deference and, more immediate, automatic relief. The essential attributes of the debtor's centre of main interests correspond to those attributes that will enable those who deal with the debtor (especially creditors) to ascertain the place where an insolvency proceeding concerning the debtor is likely to commence. As has been noted, the Model Law establishes a presumption that the debtor's place of registration is the place that corresponds to those attributes. However, in reality, the debtor's centre of main interests may not always coincide with the place of its

²¹ As noted in paragraph 31A, the concept of centre of main interests also underlies the scheme set out in the EC Regulation.

registration and the Model Law provides for the rebuttal of the presumption where the centre of main interests is in a different location to the place of registration. Where it is uncertain that the debtor's place of registration is its centre of main interests, the centre of main interests will be identified by other factors which indicate to those who deal with the debtor (especially creditors) where the centre of main interests is. It is thus important to consider the factors that may independently indicate that a given State is the debtor's centre of main interests.

Factors relevant to the determination of centre of main interests

123F. In most cases, the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are: (a) the location is readily ascertainable by creditors, and (b) the location is where the central administration of the debtor takes place.

123G. When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests.

123I. The order in which the additional factors are set out below is not intended to indicate the priority or weight to be accorded to them, nor is it intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case. The additional factors may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

Movement of centre of main interests

123K. A debtor's centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings.^[22] Whenever there is evidence of such a

²² [In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the centre of main interests

move in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in paragraphs 123F and I above more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable by third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.

123M. It is unlikely that a debtor could move its place of registration (or habitual residence) after the commencement of insolvency proceedings, since many insolvency laws contain specific provisions preventing such a move. In any event, if this were to occur, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the time relevant to that determination is the date of commencement of the foreign proceeding (see paras. 128A-C below).

Article 17. Decision to recognize a foreign proceeding

Paragraph 1

124. A cross-reference "(see article 6)" has been added after the words "enacting State".

124A. In deciding whether a foreign proceeding should be recognized, the receiving court is limited to the jurisdictional pre-conditions set out in the definition. This requires a determination that the proceedings are foreign proceedings within article 2, subparagraph (a). The Model Law makes no provision for the receiving court to embark on a consideration of whether the foreign proceeding was correctly commenced under applicable law; provided the proceeding satisfies the requirements of article 15 and article 6 is not relevant, recognition should follow in accordance with article 17.

124B. In reaching its decision on recognition, the receiving court may have due regard to any decisions and orders made by the originating court and to any information that may have been presented to the originating court. Those orders or decisions are not binding on the receiving court in the enacting State, which is required to independently satisfy itself that the foreign proceeding meets the requirements of article 2. Nevertheless, the court is entitled to rely, pursuant to the presumptions in article 16, paragraphs 1 and 2 (see para. ...), on the information in the certificates and documents provided in support of an application for recognition. In appropriate circumstances that information would assist the receiving court in its deliberations.

124C. Accordingly, recognition of a foreign proceeding would be assisted if the originating court mentioned in its orders any information that would facilitate a finding by a receiving court that the proceeding is a foreign proceeding within the meaning of article 2. This would be particularly helpful when the originating court was aware of the international character either of the debtor or its business and of the likelihood that recognition of the proceeding would be sought under the Model Law. The same considerations would apply to the appointment and recognition of the foreign representative.

may have been designed to thwart the legitimate expectations of creditors and third parties or undertaken as the result of insider exploitation or biased motivation.]

Paragraph 2

126-128. [...]

Date at which to determine centre of main interests and establishment

128A. The Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor.

128B. Article 17, subparagraph 2 (a) provides that the foreign proceeding is to be recognized as a main proceeding “if it is taking place in the State where the debtor has the centre of its main interests” [*emphasis added*]. The use of the present tense in article 17 does not address the question of the relevant date, but rather requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State at that time (i.e. it is no longer “taking place” having been terminated or closed), there is no proceeding that would be eligible for recognition under the Model Law.

128C. With respect to the date at which the centre of main interests of the debtor should to be determined, having regard to the evidence required to accompany an application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of that proceeding is the appropriate date.²³ Where the business activity of the debtor ceases after the commencement of the foreign proceeding, all that may exist at the time of the application for recognition to indicate the debtor’s centre of main interests is that foreign proceeding and the activity of the foreign representative in administering the insolvency estate. In such a case, determination of the centre of the debtor’s main interests by reference to the date of the commencement of those proceedings would produce a clear result. The same reasoning may also apply in the case of reorganization where, under some laws, it is not the debtor that continues to have a centre of main interests, but rather the reorganizing entity. In such a case, the requirement for a foreign proceeding that is taking place in accordance with article 17, subparagraph 2 (a) is clearly satisfied and the foreign proceeding should be entitled to recognition. Moreover, taking the date of commencement to determine centre of main interests provides a test that can be applied with certainty to all insolvency proceedings.

128D. The same considerations apply to the time at which any determination with respect to the existence of an establishment of the debtor should be made. Accordingly, the date of commencement of the foreign proceeding is the relevant date to be considered in making that determination.

Abuse of process

123J. One issue that has arisen is whether, on a recognition application, the court should be able to take account of abuse of its processes as a ground to decline

²³ Under some insolvency laws, the effects of commencement are backdated to the date of the application for commencement or the date of application becomes the date of commencement by virtue of automatic commencement. In both cases, it is appropriate to refer to the date of commencement for the purposes of the COMI determination, since the Model Law is concerned only with existing foreign proceedings and when they commenced.

recognition. There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Since what constitutes abuse of process depends on domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law or procedural rules to respond to a perceived abuse of process. However, the broader purpose of the Model Law, namely to foster international cooperation as a means of maximizing outcomes for all stakeholders, as set out in article 1, as well as the international origins of the Model Law, and the need to promote uniformity in its application, as set out in article 8, should be borne in mind. Courts considering the application of domestic laws and procedural rules might also recall that the public policy exception in article 6 (see paras. 86-89 above) is intended to be narrowly construed and invoked only when the taking of action under the Model Law would be manifestly contrary to a State’s public policy. As a general rule, article 6 should rarely be the basis for refusing an application for recognition, even though it might be a basis for limiting the nature of relief accorded.

123L. If the applicant falsely claims the centre of main interests to be in a particular State, the receiving court may determine that there has been a deliberate abuse of the process. The Model Law does not prevent receiving courts from applying domestic law or procedural rules in response to such an abuse of process.

Paragraph 3

125. The foreign representative’s ability to obtain early recognition (and the consequential ability to invoke in particular articles 20, 21, 23 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”. The phrase “at the earliest possible time” has a degree of elasticity. Some cases may be so straightforward that the recognition process can be completed within a matter of days. In other cases, particularly if recognition is contested, “the earliest possible time” might be measured in months. Interim relief will be available in the event that some order is necessary while the recognition application is pending.

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 decision on recognition may be revisited if grounds for granting it were fully or partially lacking or have ceased to exist.

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 converted into a liquidation proceeding) or if the status of the foreign representative’s appointment has changed or the appointment has been terminated. Also, new facts might arise that 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. The court’s ability

to review the recognition decision is assisted by the obligation article 18 imposes on the foreign representative to inform the court of such changed circumstances.

131. The words “under national laws” in the second sentence have been deleted.

Notice of decision to recognize foreign proceedings

132. [...]

Article 18. Subsequent information

Subparagraph (a)

133. Article 18 obligates the foreign representative to inform the court promptly, after the time of filing the application for recognition of the foreign proceeding, of “any substantial change in the status of the recognized foreign proceeding or the status of the foreign representative’s appointment”. The purpose of the obligation is to allow the court to modify or terminate the consequences of recognition. As noted above, 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, such as termination of the foreign proceeding or conversion from one type of proceeding to another. Subparagraph (a) takes into account the fact that technical modifications in the status of the proceedings or the foreign representative’s appointment are frequent, but that only some of those modifications would affect the decision granting relief or the decision recognizing the proceeding; therefore, the provision only calls for information of “substantial” changes. It is of particular importance that the court be informed of such modifications when its decision on recognition concerns a foreign “interim proceeding” or a foreign representative has been “appointed on an interim basis” (see article 2, subparagraphs (a) and (d)).

Subparagraph (b)

134. The words “existence of the” and “have been” in the third sentence have been deleted and the words “and to facilitate cooperation under chapter IV” added at the end of the paragraph.

Paragraphs 1-4

135-140. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 135-140.

Article 20. Effects of recognition of a foreign main proceeding

141. The following sentence has been added at the end of the paragraph: “Additional effects of recognition are contained in articles 14, 23 and 24.”

142. [...]

143. The beginning of the second sentence should read: “In order to achieve those benefits, the imposition on the insolvent debtor of the consequences of article 20 in the enacting State (i.e. the country where it maintains a limited business presence) is justified...”. The last sentence should read: “If, in a given case, recognition should produce results that would be contrary to the legitimate interests of a party in interest, including the debtor, the law of the enacting State should include

appropriate protections, as indicated in article 20, paragraph 2 (and discussed in paragraph 149 below).”

144-146. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 144-146.

147-148. [...]

149. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 149.

150. [...]

151-153. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 151-153.

Article 21. Relief that may be granted upon recognition of a foreign proceeding

154. In addition to the mandatory stay and suspension under article 20, the Model Law authorizes the court, following recognition of a foreign proceeding, to grant relief for the benefit of that proceeding. This post-recognition relief under article 21 is discretionary, as is pre-recognition relief under article 19. The types of relief listed in article 21, paragraph 1, are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted 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. [...]

156. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 156.

157. [...]

158. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 158.

159. [...]

160. For minor editorial revisions see A/CN.9/WG.V/WP.107 para.160.

Article 22. Protection of creditors and other interested persons

161. [...]

162-164. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 162-164.

Article 23. Actions to avoid acts detrimental to creditors

165. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 165-166.

166. The Model Law expressly provides that, as an effect of recognition of the foreign proceeding under article 17, a foreign representative has standing¹⁹ to initiate actions under the law of the enacting State to avoid or otherwise render ineffective legal acts detrimental to creditors. The provision is drafted narrowly in that it neither creates any substantive right regarding such actions nor provides any solution involving conflict of laws; the Model Law does not address the right of a foreign representative to bring such an action in the enacting State under the law of the State in which the foreign proceeding is taking place. The effect of article 17 is that a foreign representative is not prevented from initiating such actions by the sole fact that the foreign representative is not the insolvency representative appointed in the enacting State.

166A. When the foreign proceeding has been recognized as a “non-main proceeding”, it is necessary for the court to consider specifically whether any action to be taken under the article 23 authority relates to assets that “should be administered in the foreign non-main proceeding” (article 23, paragraph (2)). Again, this distinguishes the nature of a “main” proceeding from that of a “non-main” proceeding and emphasizes that the relief in a “non-main” proceeding is likely to be more restrictive than for a “main” proceeding.

167. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 167.

Article 24. Intervention by a foreign representative in proceedings in this State

168-169. [...]

170. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 170.

171-172. [...]

Chapter IV. Cooperation with foreign courts and foreign representatives

38-39. [...]

173. [...]

173A. Cooperation is not dependent upon recognition and may thus occur at an early stage and before an application for recognition. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets. Such a provision may be useful when that proceeding is commenced in the enacting State and assistance is sought elsewhere. That provision may also be relevant when the enacting State, in addition to the Model Law, has other laws facilitating coordination and cooperation with foreign proceedings (see article 7).

174-178. [...]

Article 25. Cooperation and direct communication between a court of this State and foreign courts or foreign representatives

179-180. [...]

181. Article 27 is suggested for use 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 and, as an indicative list, leaves the legislator an opportunity to include other forms of cooperation. Any listing of forms of possible cooperation should be illustrative rather than exhaustive, to avoid inadvertently precluding certain forms of appropriate cooperation and limiting the ability of courts to fashion remedies in keeping with specific circumstances.

182. [...]

183. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 183.

183A. The UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation expands upon the forms of cooperation mentioned in article 27 and, in particular, compiles practice and experience with the use of cross-border insolvency agreements.²⁴

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*

184. The following introductory sentence has been added: “The Model Law imposes virtually no limitations on the jurisdiction of the courts in the enacting State to commence or continue insolvency proceedings.”

185. For minor editorial revisions see A/CN.9/WG.V/WP.107, para. 185.

186. The following has been added as a new second sentence: “The adoption of such a restriction would not be contrary to the policy underlying the Model Law.”

187. [...]

187A. Where under the law of the enacting State the debtor must be insolvent to commence an insolvency proceeding, the Model Law establishes a rebuttable presumption that recognition of a foreign main proceeding constitutes the requisite proof of insolvency of the debtor for that purpose (article 31) (see paras. 194-197).

Article 29. Coordination of a proceeding under [identify laws of the enacting State relating to insolvency] *and a foreign proceeding*

188. The following has been added as a new second sentence: “The objective of this article and article 30 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 reorganization of the enterprise).”

189-191. [...]

Article 30. Coordination of more than one foreign proceeding

192-193. [...]

Article 31. Presumption of insolvency based on recognition of a foreign main proceeding

194-196. [...]

197. The following introductory sentence has been added: “This rule, however, would be helpful in those legal systems in which commencement of an insolvency proceeding requires proof that the debtor is in fact insolvent.”

Article 32. Rule of payment in concurrent proceedings

198-200. [...]

²⁴ See footnote 8.

VI. Assistance from the UNCITRAL Secretariat

201-202. For minor editorial revisions see A/CN.9/WG.V/WP.107, paras. 201-202.

**H. Note by the Secretariat on directors' obligations in the period
approaching insolvency, submitted to the Working Group on
Insolvency Law at its forty-third session**

(A/CN.9/WG.V/WP.113)

[Original: English]

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Introduction

1. At its forty-third session in 2010, the Commission had before it a series of proposals for future work on insolvency law (A/CN.9/WG.V/WP.93 and Add.1-6 and A/CN.9/582/Add.6). Those proposals had been discussed at the thirty-eighth session of Working Group V (see A/CN.9/691, paras. 99-107) and a recommendation on potential topics made to the Commission (A/CN.9/691, para. 104). An additional document (A/CN.9/709), submitted after that session of Working Group V, set forth material additional to the proposal of Switzerland contained in A/CN.9/WG.V/WP.93/Add.5.

2. After discussion, the Commission endorsed the recommendation by Working Group V contained in document A/CN.9/691, paragraph 104, that activity be initiated on two insolvency topics, both of which were of current importance, and where a greater degree of harmonization of national approaches would be beneficial in delivering certainty and predictability.

3. The subject of this note is the second topic, proposed by the United Kingdom of Great Britain and Northern Ireland (A/CN.9/WG.V/WP.93/Add.4), INSOL International (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6), concerning the responsibility and liability of

directors and officers of an enterprise in insolvency and pre-insolvency cases.¹ In the light of concerns raised during extensive discussion, the Commission agreed that the focus of the work on that topic should only be upon those responsibilities and liabilities that arose in the context of insolvency, and that it was not intended to cover areas of criminal liability or to deal with core areas of company law.

4. Discussion of this topic commenced at the Working Group's thirty-ninth session (December 2010, Vienna) and continued at its fortieth, forty-first and forty-second sessions (31 October-4 November 2011, Vienna; 30 April-4 May 2012, New York and 26-30 November 2012, Vienna). The deliberations and conclusions of the Working Group are set forth in the reports of those sessions (A/CN.9/715, A/CN.9/738, A/CN.9/742 and A/CN.9/763, respectively).

5. The material set forth below builds upon documents A/CN.9/WG.V/WP.96, 100, 104 and 108, as well as decisions taken by the Working Group at its thirty-ninth, fortieth, forty-first and forty-second sessions. For ease of reference, this note retains in square brackets the paragraph and recommendation numbers used in previous drafts of the text (i.e. A/CN.9/WG.V/WP.104 and 108).

6. In accordance with the working assumption adopted by the Working Group at its forty-first session (A/CN.9/742, para. 74) that the work will form part of the Legislative Guide on Insolvency Law, the text below follows the format of the Legislative Guide. The Working Group may wish to consider whether it should be a new part of the Guide or whether it may be included as an additional section of an existing part, for example, part two, chapter III Participants. In accordance with a request made at the forty-second session, the order of the commentary now reflects the order of the recommendations and the recommendations no longer appear together at the end of the text but follow the related parts of the commentary. Each set of recommendations is introduced by a purpose clause, consistent with the parts one-three of the Guide.

7. The Working Group may also wish to consider whether any specific terms should be included in a glossary for this [part].

8. The Working Group may wish to note that the following paragraphs contain new text in square brackets for consideration: introduction and purpose, paragraphs 1 and 2; Background, paragraph 2; section II, paragraphs 20 (d), (f), (j), 21, 21A, 22, 25, 33, 35, 36, 47, 48, 51, 55 and 57. Purpose clauses for draft recommendations 3-12 are for consideration, as well as some words in draft recommendations 1, 3, 6, 8 and draft recommendation 12 and its associated footnote.

¹ The first topic, concerning centre of main interests and related issues is discussed in A/CN.9/WG.V/WP.112.

UNCITRAL Legislative Guide on Insolvency Law

Directors' obligations in the period approaching insolvency

Introduction and purpose of this [part]

[1. This [part] focuses on the obligations that might be imposed upon those responsible for making decisions with respect to management of an enterprise when that enterprise faces imminent insolvency or insolvency becomes unavoidable. The aim of imposing such obligations, which would become enforceable once insolvency proceedings commence, is to protect the legitimate interests of creditors and other stakeholders and encourage timely action to minimize the effects of financial distress experienced by the enterprise. The constitution of a board of directors is an important factor in addressing these issues. Generally, it is comprised of individuals who have an ownership interest in the enterprise and individuals who work for the company, such as managing its business operations, or are connected to its shareholders ("inside directors"), along with individuals who are independent and are often chosen as a result of their experience and business acumen ("independent directors"). Independent directors may not have access to information to the same extent that it is known or available to inside directors or to creditors or third parties. Liability may vary between inside and independent directors depending on the factual situation.]

[2. The key elements of provisions imposing such obligations are addressed, including (a) the nature and extent of the obligations, (b) the time at which the obligations should arise, (c) the persons to whom the obligations would attach, (d) liability for breach of the obligations, (e) enforcement of those obligations, (f) applicable defences, (g) remedies, (h) the persons who may bring an action to enforce the obligations and (i) how those actions might be funded.]

I. Background

1. [6] Corporate governance frameworks regulate a set of relationships between a company's management, its board, its shareholders and other stakeholders and provide not only the structure through which the objectives of the company are established and attained, but also the standards against which performance can be monitored. Good corporate governance should provide incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders, as well as fostering the confidence necessary for promoting business investment and development. Much has been done at the international level to develop widely adopted principles of corporate governance² that include the obligations of those persons responsible for making decisions concerning the management of an enterprise (in this [part] referred to as "directors")³ when it is solvent.

² See for example the OECD Principles of Corporate Governance, 2004.

³ The question of who may be considered a director for the purposes of this [part] is discussed below in paras. Although there is no universally accepted definition of the term, this part refers generally to "directors" for ease of reference.

2. [7] Once insolvency proceedings commence, many insolvency laws recognize that the obligations of directors will differ both in substance and focus from those applicable prior to the commencement of those proceedings, with the emphasis on prioritizing maximization of value and preservation of the estate for distribution to creditors. Often directors will be displaced from ongoing involvement in the company's affairs by an insolvency representative, although under some insolvency laws they may still have an ongoing role, particularly in reorganization. [Recommendation 112 addresses several possibilities for the role the debtor may play in the continuing operation of the business, including retention of full control, limited displacement and total displacement.] The obligations of the directors once insolvency proceedings commence are addressed above in recommendations 108-114 and in the commentary, part two, chapter III, paragraphs 22-34. Recommendation 110 specifies in some detail the obligations that should arise under the insolvency law on commencement of insolvency proceedings and continue throughout those proceedings, including obligations to cooperate with and assist the insolvency representative to perform its duties; to provide accurate, reliable and complete information relating to the financial position of the company and its business affairs; and to cooperate with and assist the insolvency representative in taking effective control of the estate and facilitating recovery of assets and business records. The imposition of sanctions where the debtor fails to comply with those obligations is also addressed (recommendation 114 and paragraphs 32-34 of the commentary).

3. [8] Effective insolvency laws, in addition to providing a predictable legal process for addressing the financial difficulties of troubled enterprises and the necessary framework for their efficient reorganization or orderly liquidation, should also permit an examination to be made of the circumstances giving rise to insolvency and in particular the conduct of directors of such an enterprise in the period before insolvency proceedings commence. However, little has been done internationally to harmonize the various approaches of national law that might facilitate examination of that conduct and significant divergences remain. The nature and extent of the obligations directors might have in that period when the business might be experiencing financial distress but is not yet insolvent or subject to insolvency proceedings are not well established, but they are increasingly the subject of extensive debate, particularly in view of widespread failures following the global financial crisis of 2008.

4. [9] A business facing an actual or imminent inability to meet its financial and contractual obligations as they fall due needs robust management, as often there are difficult decisions and judgements to be made that will be critical to the company's survival, with corresponding benefits to its owners, creditors, customers, employees and others. Competent directors should understand the company's financial situation and possess all reasonably available information necessary to enable them to take appropriate steps to address financial distress and avoid further decline. At such times, they are faced with choosing the course of action that best serves the interests of the enterprise as a whole, having weighed the interests of the relevant stakeholders in the circumstances of the specific case. Under some laws, those stakeholders will be the corporation itself and its shareholders. Under other laws, it may involve a broader community of interests that includes creditors. Directors concerned with personal liability and the possible financial repercussions of making difficult decisions in those circumstances may prematurely close down a

business rather than seek to trade out of the problems, they may engage in inappropriate behaviour, including unfairly disposing of assets or property or they may also be tempted to resign, often adding to the difficulties that the company is facing.

5. [9A] The different interests and motivations of stakeholders are not easy for directors and managers to balance and provide a potential source of conflict. For example, shareholders of an enterprise, who typically are unlikely to share in any distribution in insolvency proceedings, are interested in maximizing their own position by seeking to trade out of insolvency or to hold out on any potential sale in the hope of a better return, especially where the sale price would cover only creditor claims and leave nothing for shareholders. Such courses of action may involve adopting high-risk strategies to save or increase value for shareholders, at the same time putting creditors' interests at risk. Those actions may also reflect limited concern for the chances of success because of the protection of limited liability or director liability insurance if the course of action adopted fails.

6. [10] Despite the potential difficulties associated with taking appropriate business decisions, when a company faces financial difficulties it is essential that early action be taken. Financial decline typically occurs more rapidly than many parties would believe and as the financial position of an enterprise worsens, the options available for achieving a viable solution also rapidly diminish. That early action must be facilitated by ease of access to relevant procedures; there is little to be gained by urging directors to take early action if that action cannot be directed towards relevant and effective procedures.⁴ Moreover, those laws that expose directors to liability for trading during the conduct of informal procedures such as restructuring negotiations (discussed in part one, chap. II, paras. 2-18) may operate to deter early action. While there has been an appropriate refocusing of insolvency laws in many countries to increase the options for early action to facilitate rescue and reorganization of enterprises, there has been little focus on creating appropriate incentives for directors to use those options. Often, it is left to creditors to pursue those options or commence formal insolvency proceedings because the directors have failed to act in a timely manner.

7. [11] A number of jurisdictions address the issue of encouraging early action by imposing an obligation on a debtor to apply for commencement of formal insolvency proceedings within a specified period of time after insolvency occurs in order to avoid trading whilst insolvent. Other laws address the issue by focusing on the obligations of directors in the period before the commencement of insolvency proceedings and imposing liability for the harm caused by continuing to trade when it was clear or should have been foreseen that insolvency could not be avoided. The rationale of such provisions is to create appropriate incentives for early action through the use of restructuring negotiations or reorganization and to stop directors from externalizing the costs of the company's financial difficulties and placing all the risks of further trading on creditors.

⁴ It has been suggested that the dearth of cases under insolvent trading legislation in one State is because of the relative ease of access to voluntary procedures and only those companies that are hopelessly insolvent are ultimately liquidated.

8. [12] The imposition of such obligations has been the subject of continuing debate. Those who acknowledge that such an approach has advantages⁵ point out that the obligations may operate to encourage directors to act prudently and take early steps to stop the company's decline with a view to protecting existing creditors from even greater losses and incoming creditors from becoming entangled in the company's financial difficulties. Put another way, the obligations may also have the effect of controlling and disciplining directors, dissuading them from embracing excessively risky courses of action or passively acquiescing to excessively risky actions proposed by other directors because of the sanctions attached to the failure to perform the obligations. An associated advantage may be that they provide an incentive to directors to obtain competent professional advice when financial difficulties loom.

9. [13] Those commentators who suggest that there are significant disadvantages cite the following examples. A rule that presumes mismanagement based solely on the fact of financial distress often causes otherwise knowledgeable and competent directors to leave a company, and the opportunity to reorganize that company and return it to profitability is missed. There is a possibility that directors seeking to avoid liability will prematurely close a viable business that otherwise could have survived, instead of attempting to trade out of the company's difficulties. Properly drafted provisions would discourage overly hasty closure of businesses and encourage directors to continue trading where that is the most appropriate way of minimizing loss to creditors and are more likely to balance the rights and legitimate expectations of all stakeholders, distinguishing cases of bad conduct from those involving market conditions or other exogenous factors. A further disadvantage cited is that the obligations may be regarded as an erosion of the legal status brought by incorporation, although it can be argued that limited liability should be seen as a privilege and courts have been alive to the potential for abuse of limited liability where it is to the detriment of creditors. Such obligations might also be regarded as a weakening of enterprise incentives on the basis that too much risk may discourage directors. Properly drafted provisions, however, would focus not so much on the causes of distress, but rather on the directors' acts (or omissions) subsequent to that point. Examples from jurisdictions that include such obligations in their laws suggest that only the most clearly irresponsible directors are found liable.

10. [14] It is also said that such obligations may increase unpredictability, because liability depends on the particular circumstances of each case and also on the future attitudes of the courts. It is suggested that many courts lack the experience to examine commercial behaviour after the event and may be inclined to second guess the decisions that directors took in the period in question. However, in jurisdictions with experience of enforcing such obligations, courts have tended to defer to directors' actions, especially when those directors have acted on independent advice. A further suggestion is that there is an increased risk of unexpected liabilities for banks and others who might be deemed to be directors by reason of their involvement with the company, particularly at the time of the insolvency. It is desirable that relevant legislation provide due protection for such parties when they are acting in good faith, at arm's length to the debtor and in a commercially reasonable manner.⁶ It is also argued that imposing such obligations

⁵ E.g. *Directors in the Twilight Zone III* (2009), INSOL International, Overview, p. 5.

⁶ See para. 27 [21].

overcompensates creditors who are able to protect themselves through their contracts, making regulation superfluous. However, this approach presupposes that, for example, all creditors have a contract with the debtor, that they are able to negotiate appropriate protections to cover a wide range of contingencies and that they have the resources, and are willing and able, to monitor the affairs of the company. Not all creditors are in this position.

11. [15] Director obligations and liabilities are specified in different laws in different States, including company law, civil law, criminal law and insolvency law and in some instances, they may be included in more than one of those laws or be split between those laws. In common law systems, the obligations may apply by virtue of common law, as well as pursuant to relevant legislation. Moreover, different views exist as to whether the obligations and liabilities of directors are properly the subject of insolvency law or company law. These views revolve around the status of the company as either solvent, which is typically covered by laws such as company law, or subject to insolvency proceedings, which is addressed by insolvency law (although there are examples where no such clear distinction can be drawn).⁷ A period before the commencement of insolvency proceedings, when a debtor may be factually insolvent, raises concerns that currently may not be adequately addressed by either company law or insolvency law. However, the imposition of obligations enforceable retroactively after commencement of insolvency proceedings may lead to an overlap between the obligations applicable under different laws and it is desirable that, in order to ensure transparency and clarity and avoid potential conflicts, they be reconciled.

12. [16] Not only do the laws in which the obligations are to be found vary, but the obligations themselves vary: as noted above, those applicable before the commencement of insolvency proceedings typically differ from those applicable once those proceedings commence (see part two, chapter III, paras. 22-33). The standards to be observed by directors in performing their functions also tend to vary according to the nature and type of the business entity e.g. a public company as distinct from a limited, closely held or private company or family business, and the jurisdiction(s) in which the entity operates and may also depend upon whether the director is an independent outsider or an inside director.

13. [17] The application of laws addressing director obligations and liabilities are closely related to and interact with other legal rules and statutory provisions on corporate governance. In some jurisdictions, they form a key part of policy frameworks, such as those protecting depositors in financial institutions, facilitating revenue collection, addressing priorities for certain categories of creditors over others (such as employees), as well as relevant legal, business and cultural frameworks in the local context.

14. [18] Effective regulation in this area should seek to balance the often competing goals and interests of different stakeholders: preserving the freedom of directors to discharge their obligations and exercise their judgement appropriately, encouraging responsible behaviour, discouraging wrongful conduct and excessive risk-taking, promoting entrepreneurial activity, and encouraging, at an early stage, the refinancing or reorganization of enterprises facing financial distress or

⁷ Recognizing this issue, the recommendations in this [part] adopt the flexible approach of referring to “the law relating to insolvency”.

insolvency. Such regulation could enhance both creditors' confidence and their willingness to do business with companies, encourage the participation of more experienced managers, who otherwise may be reluctant due to the risks related to failure, promote good corporate governance, leading to a more predictable legal position for directors and limiting the risks that insolvency practitioners will litigate against them once insolvency proceedings commence. Inefficient, unclear, antiquated and inconsistent guidelines on the obligations of those responsible for making decisions with respect to management of an enterprise as it approaches insolvency have the potential to undermine the benefits that an effective and efficient insolvency law is intended to produce and exacerbate the financial difficulty they are intended to address.

15. [19] The purpose of this [part] is to identify basic principles to be reflected in the law concerning directors' obligations when the company faces imminent insolvency or insolvency becomes unavoidable. Those principles may serve as a reference point and can be used by policymakers as they examine and develop appropriate legal and regulatory frameworks. Whilst recognizing the desirability of achieving the goals of the insolvency law (outlined above in part one, chap. I, paras. 1-14 and recommendation 1) through early action and appropriate behaviour by directors, it is also acknowledged that there are threats and pitfalls to entrepreneurship that may result from overly draconian rules. This [part] does not deal with the obligations of directors that may apply under criminal law, company law or tort law, focussing only on those obligations that may be included in the relevant law and become enforceable once insolvency proceedings commence.

II. Elements of directors' obligations in the period approaching insolvency

A. The nature of the obligations

16. [28] While the underlying rationale for considering directors' obligations in the vicinity of insolvency may be similar in different jurisdictions, different approaches are taken to formulating those obligations and determining the standard to be met. In general, however, laws tend to focus upon two aspects — first, imposing civil liability on directors for causing insolvency or failing to take appropriate action in the vicinity of insolvency (which under some laws might include commencing insolvency proceedings pursuant to an obligation under national law to do so — see para. 17 [29]) and second, once insolvency proceedings have commenced, avoiding actions taken by directors, including transactions that may have been entered into, in the vicinity of insolvency.

1. Obligation to commence insolvency proceedings

17. [29] As noted above, some national laws impose on directors an obligation to apply for commencement of insolvency proceedings, which would include reorganization or liquidation, within a specified period of time, usually fairly short such as three weeks, after the date on which the company became factually insolvent. Failure to do so may lead to personal liability, in full or in part, for any resulting losses incurred by the company and its creditors, and in some cases

criminal liability, if the company continues to trade. This obligation is discussed in more detail in part two, chapter I, paragraphs 35-36.

2. Civil liability

18. [30] Civil liability imposed on a director in the vicinity of insolvency is typically based on responsibility for causing insolvency or failing to take appropriate action to monitor the financial situation of the company, avoid or ameliorate financial difficulty, minimize potential losses to creditors and avoid insolvency. Liability may arise when directors enter into transactions with a purpose other than ameliorating financial difficulty and preserving the value of the company (such as high-risk transactions or transactions that dispose of assets from the company's estate that may result in a material increase in the creditors' exposure without justification). It may also arise when the directors knew that insolvency could not be avoided or that the company could not meet its obligations as they fell due, but nonetheless continued to carry on business that involved, for example, obtaining goods and services on credit, without any prospect of payment and without disclosing the company's financial situation to those creditors. Under some laws, liability may arise when directors fail to meet various obligations, for example reporting inability to make certain payments, such as tax and social security premiums, or making a formal declaration of insolvency.

19. [31] Except under those laws that require directors to report or make formal declarations, directors generally might be expected in the circumstances outlined above to act reasonably and take adequate and appropriate steps to monitor the situation so as to remain informed and thus be able to act to minimize losses to creditors and to the company (including to its shareholders), to avoid actions that would aggravate the situation, and to take appropriate action to avoid the company sliding into insolvency.

20. [32] Adequate and appropriate steps might include, depending on the factual situation, some or all of the following:

(a) Directors could ensure proper accounts are being maintained and that they are up to date. If not, they should ensure the situation is remedied;

(b) Directors could ensure that they obtain accurate, relevant and timely information, in particular by informing themselves independently (and not relying solely on management advice) of the financial situation of the company, the extent of creditor pressure and any court or recovery actions taken by creditors or disputes with creditors. Directors may need to devote more time and attention to the company's affairs at such a time than is required when the company is healthy;

(c) Regular board meetings could be convened to monitor the situation, with comprehensive minutes being kept of commercial decisions (including dissent) and the reasons for them, including, when relevant, the reasons for permitting the company to continue trading and why it is considered there is a reasonable prospect of avoiding insolvent liquidation. The steps to be taken might involve continuing to trade, as there may be circumstances in which it will be appropriate to do so even after the conclusion has been formed that liquidation cannot be avoided because, for example, the company owns assets that will achieve a much higher value if sold on a going concern basis. When the continuation of trading requires further or new borrowing (when permitted under the law), the justification for obtaining it and thus

incurring further liabilities should be recorded to ensure there is a paper trail justifying directors' actions if later required;

(d) Specialist advice or assistance, including specialist insolvency advice could be sought. While legal advice may be important for directors at this time, key questions relating to the financial position of the company are typically commercial rather than legal in nature. It is desirable that directors examine the company's financial position and assess the likely outcomes themselves, but also seek advice to ensure that any decisions taken could withstand objective and independent scrutiny. [In this instance, the directors, either collectively, as inside directors or as independent directors, may retain independent accountants, restructuring experts, or counsel to provide separate advice as to the options available to the board to determine the viability of any proposals made by management];

(e) Early discussions with auditors could be held and, if necessary, an external audit prepared;

(f) Directors could consider the structure and functions of the business with a view to examining viability and reducing expenditure. The possibility of holding restructuring negotiations or commencing reorganization could be examined and a report prepared. [Directors may also consider the capacity of current management, with a view to determining whether it should be retained or replaced];

(g) Directors could ensure that they modify management practices to focus on a range of interested parties, which might include creditors, employees, suppliers, customers, governments, shareholders, as well as, in some circumstances, environmental concerns, in order to determine the appropriate action to take. In the period when insolvency becomes imminent or unavoidable, shifting the focus from maximizing value for shareholders to also taking account of the interests of creditors provides an incentive for directors to minimize the harm to creditors (who will be the key stakeholders once insolvency proceedings commence), that might be the result of excessively risky, reckless or grossly negligent conduct. Holding meetings with relevant groups of creditors might be an appropriate mechanism for assessing those interests;

(h) Directors could ensure that the assets of the company are protected⁸ and that the company does not take actions that would result in the loss of key employees or enter into transactions of the kind referred to in recommendation 87 that might later be avoided, such as transferring assets out of the company at an undervalue. Not all payments or transactions entered into at this time are necessarily suspect; payments to ensure the continuance of key supplies or services, for example, may not constitute a preference if the objective of the payment was the survival of the business. It is desirable that the reasons for making the payment be clearly recorded in case the transaction should later be questioned. Directors with substantial stockholdings or who represent major shareholders may not be considered disinterested or objective and might need to take especial care when voting on transactions in the vicinity of insolvency;

⁸ Not all assets will necessarily require protection in all circumstances. One example of the types of asset that might not require protection in all circumstances might be those that are worth less than the amount for which they are secured, are burdensome, of no value or hard to realize (this is discussed in more detail in part two, chap. II, para. 88).

(i) A shareholders' meeting could be called, in the best interests of the company and without undue delay, if it appears from the balance sheet that a stipulated proportion of the share capital has eroded (generally applicable where the law includes capital maintenance requirements);

[(j) The composition of the board could be reviewed to determine whether an adequate number of independent directors are included.]

3. Avoidance of transactions

21. [33] Recommendations 87 through 99 deal with the avoidance of transactions at an undervalue, transactions conferring a preference and transactions intended to defeat, delay or hinder creditors (see part two, chapter II, paras. 170-185). Those recommendations would apply to the avoidance of transactions entered into by a company in the vicinity of insolvency. [The avoidability of a transaction does not, on its own, serve as the basis for imposing personal liability on directors.]

21A. [33] [However, certain avoidable transactions may also have other consequences.] Some laws render certain actions of directors unlawful under, for example, wrongful or fraudulent trading provisions, or as acts having worsened the economic situation of the company or having led to insolvency, such as entering into new borrowing or providing new guarantees without sufficient business justification. In addition to avoidance of such transactions, under some laws a director may be found personally liable for permitting the company to enter into such [fraudulent or otherwise improper] transactions. Liability under those provisions would typically apply only in relation to directors who agreed to the transaction; those who expressly dissented and whose dissent was duly noted are likely to avoid responsibility.

Recommendations 1 and 2

Purpose of legislative provisions

The purpose of provisions addressing the obligations of those responsible for making decisions concerning the management of a company that arise when insolvency is imminent or unavoidable is:

- (a) To protect the legitimate interests of creditors and other stakeholders;
- (b) To ensure that those responsible for making decisions concerning the management of a company are informed of their roles and responsibilities in those circumstances;
- (c) To provide appropriate remedies for breach of those obligations, which may be enforced after insolvency proceedings have commenced.

Paragraphs (a)-(c) should be implemented in a way that does not:

- (a) Adversely affect successful business reorganization;
- (b) Discourage participation in the management of companies, particularly those experiencing financial difficulties;
- (c) Prevent the exercise of reasonable business judgement or the taking of reasonable commercial risk.

Contents of legislative provisions

The obligations

1. The law relating to insolvency should specify that from the point in time referred to in recommendation 3, the persons specified in [accordance with] recommendation 4 will have the obligations to have due regard to the interests of creditors and other stakeholders and to take reasonable steps:

- (a) To avoid insolvency; and
- (b) Where it is unavoidable, to minimize the extent of insolvency.

2. [1] For the purposes of recommendation 1, reasonable steps might include:

(a) Evaluating the current financial situation of the company and ensuring proper accounts are being maintained and that they are up-to-date; being independently informed as to the current and ongoing financial situation of the company; holding regular board meetings to monitor the situation; seeking professional advice, including insolvency or legal advice; holding discussions with auditors; calling a shareholder meeting; modifying management practices to take account of the interests of creditors and other stakeholders; protecting the assets of the company so as to maximize value and avoid loss of key assets; considering the structure and functions of the business to examine viability and reduce expenditure; not committing the company to enter into the types of transaction that might be subject to avoidance unless there is an appropriate business justification; continuing to trade in circumstances where it is appropriate to do so to maximize going concern value; holding negotiations with creditors or commencing other informal procedures, such as voluntary restructuring negotiations;⁹

(b) Commencing formal reorganization or liquidation proceedings where it is appropriate to do so or where it is required by national law.

B. When the obligations arise: the period approaching insolvency

22. [24] The point at which the obligations discussed above might arise has been variously described as the “twilight zone”, the “zone of insolvency” or the “vicinity of insolvency”. Although a potentially imprecise concept, it is intended to describe a period in which there is a deterioration of the company’s financial stability to the extent that insolvency has become imminent (i.e. where the company will generally be unable to pay its debts as they mature (recommendation 15 (a) of the Legislative Guide) or unavoidable. Determining exactly when these obligations arise is a critical issue for directors seeking to make decisions in a timely manner consistent with those obligations. Moreover, without a clear reference point, it would be difficult for directors to predict with confidence the point in time [in the period before insolvency proceedings commence] to which a court would have reference in considering an action for breach of those obligations.

23. [25] There are various possibilities for determining the time at which directors’ obligations might arise in the period before commencement of insolvency proceedings and different approaches are taken. One possibility may be the point at

⁹ See UNCITRAL Legislative Guide on Insolvency Law, part one, chapter II, paras. 2-18.

which an application for commencement of insolvency proceedings is made, arguably the possibility that delivers the most certainty. If, however, the insolvency law provides for automatic commencement of proceedings following an application or the gap between application and commencement is very short (see recommendation 18), this option will have little effect in terms of encouraging directors to take early action.

24. [26] Another possibility focuses on the obligations arising when a company is factually insolvent, which under some laws may occur well before an application for commencement of insolvency proceedings is made. Taking the general approach of the Legislative Guide, insolvency might be said to have occurred in fact when a company becomes unable to pay its debts as and when they fall due, or when a company's liabilities exceed the value of its assets (recommendation 15). A further possibility is when insolvency is imminent, i.e. where the company will generally be unable to pay its debts as they mature (recommendation 15 (a)). These tests, however, are increasingly used in insolvency laws as commencement standards and in some States form the basis for imposing an obligation on directors to apply for commencement of insolvency proceedings within a specified period of time, usually rather short, after a company becomes insolvent. Accordingly, these tests are also unlikely to encourage appropriate steps to be taken at a sufficiently early time.

25. [27] A somewhat different approach examines the knowledge of a director at a point before commencement of insolvency proceedings when, for example, the director knew, or ought to have known, that the company was insolvent or that insolvency was imminent and there was no reasonable prospect that the company could avoid having to commence insolvency proceedings or that the continuity of the business was threatened. [The rationale of this approach is to catch directors who are unreasonable in their running of a company that is experiencing financial difficulty and to provide incentives to take appropriate action at an optimal time.] Although a concern with that type of standard might be the difficulty of determining with certainty the exact point at which the requisite knowledge could be imputed, provided a company's accounts have been properly kept and are accurate, a director should be able to deduce when the company is in difficulty and when it might be in danger of satisfying these insolvency tests. Alternatively, the director can be assumed to have known the information that would have been revealed had the company complied with its obligations to maintain proper books of account and to prepare annual accounts. Essentially, the standard requires a director's judgement to be assessed against the knowledge that a reasonable director should or ought to have had in the circumstances. Such a standard would require a wider consideration of circumstances and context, including, for example, examining the books of the company and its financial position in its entirety. It could involve looking at revenue flows and debts incurred and contingencies, including the ability to raise funds. Generally speaking, evidence of a temporary lack of liquidity would not be sufficient.

Recommendation 3

Purpose of legislative provisions

[The purpose of provisions relating to timing is to identify when, in the period before the commencement of insolvency proceedings, the obligations should arise.]

Contents of legislative provisions

The time at which the obligation arises

3. [2] The law relating to insolvency should specify that the obligations in recommendation 1 arise at the point in time when the person specified in [accordance with] recommendation 4 knew, or ought reasonably to have known, that insolvency was imminent or unavoidable.

C Identifying the parties who owe the obligations

26. [20] In most States, a number of different persons associated with a company have obligations with respect to management and oversight of the company's operations. They may be the owners of a company, formally appointed directors, (who may be independent outsiders or officers or managers of a company serving as executive directors, referred to as "inside directors") and non-appointed individuals and entities, including third parties acting as *de facto*¹⁰ or "shadow" directors,¹¹ as well as persons to whom the powers or duties of a director may have been delegated by the directors.¹²

¹⁰ A *de facto* director is generally considered to be a person who acts as a director, but is not formally appointed as such or there is a technical defect in their appointment. A person may be found to be a *de facto* director irrespective of the formal title assigned to them if they perform the relevant functions. It may include anyone who at some stage takes part in the formation, promotion or management of the company. In small family-owned companies, that might include family members, former directors, consultants and even senior employees. Typically, to be considered a *de facto* director would require more than simply involvement in the management of the company and may be determined by a combination of acts, such as the signing of cheques; signing of company correspondence as "director"; allowing customers, creditors, suppliers and employees to perceive a person as a director or "decision maker"; and making financial decisions about the company's future with the company's bankers and accountants.

¹¹ A shadow director may be a person, although not formally appointed as a director, in accordance with whose instructions the directors of a company are accustomed to act. Generally, shadow directors would not include professional advisors acting in that capacity. To be considered a shadow director may require the capacity to influence the whole or a majority of the board, to make financial and commercial decisions which bind the company and, in some cases, that the company have ceded to the shadow director some or all of its management authority. In an enterprise group context, one group member may be a shadow director of another group member. In considering the conduct that might qualify a person to be a shadow director, it may be necessary to take into account the frequency of the conduct and whether or not the influence was actually exercised.

¹² Note to the Working Group: The following text may be included in any material to prepared with respect to enterprise groups or otherwise deleted. — Although some laws may provide that an enterprise group member cannot be appointed as a director of another group member, nevertheless, a group member may be considered, under a broad definition of "director", to be a director of other group members. This would typically occur where a group member (or its directors) performs functions concerning the management and oversight of other group members. The issue may be most relevant in the context of controlled and parent group members, where the parent interferes in a sustained and pervasive manner in the management of the controlled group member. However, a decision by a controlled group member to support the parent in circumstances where it was in the controlled group member's interests to do so and not the result of interference from the parent would not render the parent a director of the other group member.

27. [21] A broad definition may also include special advisors and in some circumstances, banks and other lenders, when they are advising a company on how to address its financial difficulties. In some cases, that “advice” may amount to determining the exact course of action to be taken by the company and making the adoption of a particular course of action a condition of extending credit. Nevertheless, provided the directors of the company retain their discretion to refuse that course of action, even if in reality they may be regarded as having little option because it will result in liquidation, and provided the outside advisors are acting at arm’s length, in good faith and in a commercially appropriate manner, it is desirable that such advisors not be considered as falling within the class of person subject to the obligations.

28. [22] There is no universally accepted definition of what constitutes a “director”. As a general guide, however, a person might be regarded as a director when they are charged with making or do in fact make or ought to make key decisions with respect to the management of a company, including functions such as the following:¹³ determining corporate strategy, risk policy, annual budgets and business plans; monitoring corporate performance; overseeing major capital expenditure; monitoring corporate governance practices; selecting, appointing, and supporting the performance of the chief executive; ensuring the availability of adequate financial resources; addressing potential conflicts of interest; ensuring integrity of accounting and financial reporting systems; and accounting to the stakeholders for the organization’s performance.

29. [22] The obligations discussed above would attach to any person who was a director at the time the business was facing actual or imminent insolvency, and may include directors who subsequently resigned (see para. 40 below). It would not include a director appointed after the commencement of insolvency proceedings.

Recommendation 4 [3]

Purpose of legislative provisions

[The purpose of the provisions is to identify the persons to whom the obligations should apply.]

Contents of legislative provisions

Persons that owe the obligations

4. [3] The law relating to insolvency should specify the person who owes the obligations, which may include any person formally appointed as a director and any other person exercising factual control and performing the functions of a director.

D. Liability

1. The standard to be met

30. [34] Laws dealing with the obligations of directors in the vicinity of insolvency judge the behaviour of directors in that period against a variety of

¹³ These examples are provided for information and are not listed in any particular order of importance.

standards to determine whether or not they have failed to meet these obligations. [24] Typically those obligations only become enforceable once insolvency proceedings commence and as a consequence of that commencement, apply retroactively in much the same way as avoidance provisions (see discussion at part two, chap. II, paras. 148-150, 152).

31. [35] Under some laws, the question of when a director or officer knew, or ought to have known, that the company was insolvent or was likely to become insolvent is judged against the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as are carried out by that director in relation to the company. More may be expected of a director of a large company with sophisticated accounting systems and procedures. If the director's skills and experience exceed those required for the job, the judgement may be made against the skills and experience actually possessed, instead of against those required for the job. In contrast, inadequate skill and experience for the job may not excuse a director and they could be judged against the skill and experience required for the job.

32. [36] Another approach requires there to be reasonable grounds for suspecting the company was insolvent or would become insolvent at the time of incurring the debt or entering into the transaction leading to insolvency. Reasonable grounds for suspecting insolvency would require more than mere speculation and the director must have an actual apprehension that the company is insolvent. This is a lower threshold than expecting or knowing the company is insolvent. Under this approach, the standard is that of a director of ordinary competence who is capable of having a basic understanding of the company's financial status and the assessment is made on the basis of knowledge such a director could have had and not on information that might later become apparent. Empirical evidence from jurisdictions with such provisions suggests that when reviewing what occurred, often some time before the review takes place, courts have demonstrated a good deal of understanding of the position in which directors find themselves, carefully analysing the situation they confronted and demonstrating appreciation for the business issues encountered. Courts have been reluctant to second guess directors in their commercial dealings, indicating that it is not appropriate to assume that what in fact happened was always bound to happen or was necessarily apparent at the time.

33. [38] Some laws provide a safe harbour for directors, such as by way of a business judgement rule, that establishes a presumption that directors have, for example, acted in good faith and had a rational belief that they acted in the best interests of the company, that they have had no material personal interest, and that they have properly informed themselves. [Provided the actions of the director were taken in good faith, with due care and within the director's authority, they will be shielded from liability. To rely upon the rule, directors must inform themselves with respect to the matters to be decided by acquiring, studying and relying upon information that a reasonable person in similar circumstances would find persuasive and be free from any conflict of interest with respect to those matters.]

34. [37] A further approach focuses on mismanagement. Laws adopting this approach may require a causal link between the act of mismanagement and the debts arising from it or that the mismanagement is an important cause of the company's insolvency. This approach requires that a director be guilty of a fault in management when judged against the standards of a normally well-advised director. Examples of

behaviour or actions that might give rise to liability under those laws include imprudence, incompetence, lack of attention, failure to act, engaging in transactions that were not at arm's length or of a commercial nature and improperly extending credit beyond the company's means, while the most common failures have involved directors permitting the company to trade while manifestly insolvent and to have embarked on projects beyond its financial capacity and which were not in its best interests. Other examples of mismanagement include where directors have failed to undertake sufficient research into the financial soundness of business partners or other important factors before entering into contracts; where directors fail to provide sufficient information to enable a supervisory board to exercise supervision over management; where directors neglect the proper financial administration of the company; where they also neglect to take preventative measures against clearly foreseeable risks; and where bad personnel management by the directors leads to unrest and strikes. Under some laws that adopt this approach, a finding of mismanagement does not require that a director have actively engaged in the management of the company; passive acquiescence may be sufficient.

2. The nature of the liability

35. [32A] [Whether a particular director has breached their obligations involves consideration of the personal circumstances of that director. Once a breach of the obligations has been determined under the relevant standard of proof, liability can be apportioned in several ways. Under one approach, liability will be apportioned to individual directors in proportion to their specific involvement in the decisions or behaviour under examination, requiring consideration of that involvement in the totality of the circumstances.]

36. [32A] [A number of other laws establish the general rule that directors will be held jointly and severally liable for their failure to meet such obligations. This may be the case even if each director is not responsible for the performance of all relevant obligations. Some of these laws provide, however, that the court may still have the discretion to allocate contributions as between directors taking into account the facts of the case, including different levels of culpability. The court may, for example, order one of a number of directors to bear the whole burden of liability (where, for example, that director had been personally assigned specific obligations that relate to the damage under examination) or order one director to contribute more when, for example, it is found that culpability for the damage caused is not equal. Under one law, directors may be jointly and severally liable only if it is established that they knowingly engaged in fraud or dishonesty; in all other cases, liability is proportionate to the extent a director's actions contributed to the loss to the company. Another law adopts a slightly different approach in which the court determines whether a person found liable must pay damages to the company, based upon the seriousness of the fault and the strength of the causal link, but the assessment of damages is not necessarily proportionate to the level of responsibility or fault. Under some laws, the issue of whether liability is joint or allocated specifically to those directors responsible for the conduct in question (which may include failure to act or to ensure that other directors meet their own obligations) depends upon the action giving rise to liability.]

Recommendations 5 and 6

Purpose of legislative provisions

[The purpose of provisions on liability is:

(a) To provide rules for the circumstances in which the actions of a person subject to the obligations in recommendation 1 that occur prior to the commencement of insolvency proceedings may be considered injurious and therefore a breach of those obligations; and

(b) To identify the consequences of that breach.]

Contents of legislative provisions

Liability

5. [4] The law relating to insolvency should specify that where creditors have suffered loss or damage as a consequence of the breach of the obligations in recommendation 1 the person owing the obligations may be liable.

6. [4] The law relating to insolvency should provide that the liability [for] [arising from] breach of the obligations in recommendation 1 is limited to the extent to which the breach caused loss or damage.

E. Enforcement of the directors' obligations on commencement of insolvency proceedings

1. Defences

37. [38] Under some laws, where directors do have obligations in the vicinity of insolvency, they may nevertheless rely on certain defences, such as the business judgement rule, to show that they have behaved reasonably. A slightly different approach gives directors the benefit of the doubt on the assumption that business risks are an unavoidable and incidental part of management. As noted above, courts are reluctant to second guess a director who has satisfied the duties of care and loyalty, or to make decisions with the benefit of hindsight. It may also be the case that the business judgement rule provides a defence to some, but not all, of the obligations specified under the law.

38. [39] Under some laws, directors would need to show that they had taken appropriate steps to minimize any potential loss to the company's creditors once they had concluded that the company would have difficulty avoiding liquidation. Provided they can show that they took reasonable and objective business decisions based on accurate financial information and appropriate professional advice, they are likely to be able to rely on this as a defence even if those decisions turn out to have been commercially wrong.

39. [32B] Some laws also provide for directors to take certain procedural or formal steps to avoid or reduce their liability for decisions or actions that are subsequently called into question, such as entering a dissent in the minutes of a meeting; delivering a written dissent to the secretary of a meeting before its adjournment; or delivering or sending a written dissent promptly after the adjournment of a meeting to the registered office of the corporation or other authority as provided under

national law. Directors who are absent from a meeting at which such decisions were taken may be deemed to have consented unless they follow applicable procedures, such as taking steps to record their dissent within certain specified periods of time after becoming aware of the relevant decision.

40. [40] The fact that a director has no knowledge of the company's affairs would generally not excuse failure to meet the obligations. Moreover, resignation in the vicinity of insolvency will not necessarily render a director immune from liability, as under some laws they may leave themselves open to the suggestion that the resignation was connected to the insolvency, that they had become aware or ought to have been aware of the impending insolvency and that they had failed to take reasonable steps to minimize losses to creditors and ameliorate the situation. Where a director has dissented to a decision that is subsequently being examined, that dissent typically would need to have been recorded in order for the director to rely on it. Where a director is at odds with fellow directors over the action to be taken, and despite taking reasonable steps to persuade them has failed to do so, it may be appropriate for the director to resign, provided his or her efforts and advice are recorded.

41. [32C] Liability may be minimized through specific insurance, which may be purchased by the company for its directors, or by the use of indemnities. [Where insurance is available, the principal limits are typically deliberate fraud and self-dealing, leaving directors generally covered for breach of the obligations discussed here unless the insurance coverage is inadequate, as may occur in insolvency.] Once a claim has been made against a director, it may be possible under some laws to reach a settlement through negotiation with the insolvency representative; in some jurisdictions that is the usual approach.

2. Remedies

42. [41] Different remedies and combinations of remedies for breach of a director's obligations are provided under civil law. The remedies focus on the provision of compensation for breach of the obligation and the damage caused, although the manner of measuring quantum varies. Typically, there is no punitive damages element. [A number of] [Many] laws also provide for disqualification of a director from acting as a director or taking part in the running and management of a company.

(a) *Damages and compensation*

43. [42] Where directors are found liable for actions or omissions in the vicinity of insolvency, the extent of the liability varies. Under some laws, directors may be liable for loss or damage suffered by individual creditors and employees, as well as the company itself, where the loss is a direct result of their acts or omissions. They may also be liable for payments that result in a reduction of the insolvency estate or that have resulted in the diminution of the company's assets. Some laws permit the court to adjust the level of liability to match the nature and seriousness of the mismanagement or other act leading to liability. Some laws provide that a director can be found liable for the difference between the value of the company's assets at the time it should have ceased trading and the time it actually ceased trading. An alternative formulation is the difference between the position of creditors and the company after the breach and their position if the breach had not taken place. A

slightly different approach may allow recovery from the directors of the difference between available assets and the sum necessary for the company to meet its debts.

44. [43] Some laws that include an obligation to apply for commencement of insolvency proceedings or to hold a shareholder meeting where there is a loss of capital also make provision for the award of damages.

45. [44] Where directors are found liable, the amount recovered may be specified as being for the benefit of the insolvency estate, on the basis that the principal justification for pursuing directors is to recover some of the value lost as a result of the directors' actions in the form of compensation for the estate. It is thus for the benefit of all, rather than individual, creditors. Some laws provide that where the company has an all-enterprise mortgage, any damages recovered are for the benefit of unsecured creditors. It may be argued in support of that approach that compensation should not go to secured creditors as the cause of action does not arise until the commencement of insolvency proceedings and thus cannot be subject to a security interest created by the company prior to that point. Moreover, what is being sought is not the recovery of assets of the company, in contrast to an avoidance proceeding, but rather a contribution from directors to remedy the damage suffered by creditors. Where, however, the insolvency law permits creditors to pursue directors (see below), there may be grounds for suggesting that any compensation to be paid might be applied, in the first instance, to cover the costs of the creditor or creditors commencing the action.

46. [45] In addition to the above remedies, debts or obligations due from the company to directors may be deferred or subordinated and directors may be required to account for any property acquired or appropriated from the company or for any benefit obtained in the breach of the obligations.

(b) *Disqualification*

47. [46] A consequence provided for under [a number of] [many] laws when insolvency proceedings commence is disqualification of a director from being a director or from taking part in the running and management of a company. Such measures are typically regarded as protective measures designed to remove those directors from a position where they can cause further harm by continuing to perform management and director functions in the same or a different company. Under one law, disqualifications of between two and 15 years may be ordered where the individual is found to be "unfit" to act as a director. Factors relevant to that determination include: breach of a fiduciary duty; misapplication of moneys; making misleading financial and non-financial statements; and failure to keep proper accounts and make returns. It may also include acts relevant to the company's insolvency, such as the person's responsibility for the company entering into transactions liable to avoidance on grounds similar to those in recommendation 87 or the company continuing to trade when the director knew or should have known that it was insolvent. The various factors are generally considered cumulatively in determining unfitness in a specific case. In jurisdictions providing for disqualification, those persons found to be unfit often, though not always, have displayed a lack of commercial probity, gross negligence or serious incompetence.

48. [47] Disqualification may sit alongside other remedies and sanctions as described above, or may be sought independently where the overall conduct of the individual as a director merits such a sanction. [Where disqualification is available, the persons who may seek it may be limited to specified agencies or officials, the insolvency representative and, in some cases, creditors.]

3. Persons who may bring an action

49. [48] A number of laws limit the right to bring an action against a director for breach of the obligations discussed above by reference to the nature of the action and the person with the power to pursue it. Considerations similar to those applicable to the exercise of avoidance powers, addressed under recommendation 87 (see part two, chap. II, paras. 192-195) may apply.

50. [49] A number of laws provide that when insolvency proceedings have commenced, it is only the insolvency representative who, having reviewed a director's actions prior to insolvency, has the right to proceed against the director to recover compensation for the benefit of creditors in respect of any loss caused to the company. Wrongful trading laws, for example, may permit the insolvency representative to pursue directors for contributions to the insolvency estate where their behaviour has contributed to their company's insolvency or constitutes an act of mismanagement. Some laws also permit such action to be brought by the public prosecutor or the court acting on its own motion.

51. [49A] Although a major justification for imposing obligations on directors in the vicinity of insolvency is the protection of creditor interests, not all laws permit creditors to pursue a director for breach of those obligations. Under some laws in some circumstances, such as where the insolvency representative takes no action, creditors, and sometimes shareholders, may have a derivative right to bring an action (see part two, chap. II, paras. 192-195). [Where the benefit of any damages assessed will accrue to the insolvency estate for the benefit of creditors, there may be little incentive for shareholders to pursue such an action. Other laws only allow creditors to pursue certain types of actions or transactions, such as misfeasance or transactions at an undervalue.] Under other laws, where creditors have no independent right to pursue a claim, a single creditor can pursue a director only with the consent of the majority of creditors or the creditor committee or creditors can request the creditors' representative or committee or the court to undertake any such action.

52. [49B] Where it is deemed appropriate for the law to permit creditors to pursue directors, a distinction might be drawn between creditors whose debt arose in the period approaching insolvency as a direct result of the conduct being examined and creditors whose debt predated that period. The former might have, in addition to a right to commence an action for the benefit of the insolvency estate, a personal right to claim damages against the director on the basis that the conduct being examined occurred in the vicinity of insolvency and exacerbated the financial difficulties of the debtor. Under some laws, that individual right is limited to situations where the egregious behaviour in question has been directed at a particular creditor. Should it be regarded as desirable to permit creditors to pursue a director, the insolvency law as it applies to avoidance proceedings might provide a useful example of the procedure to be followed (see part two, paras. 192-195). The law might require, for example, the prior consent of the insolvency representative to ensure that they are

informed as to what creditors propose and have the opportunity to refuse permission, thus avoiding any negative impact those actions may have on administration of the estate.

53. [49C] Where the consent of the insolvency representative or creditors is required, but not obtained or is refused, the insolvency law might permit a creditor to seek court approval to pursue a director. The insolvency representative should have a right to be heard in any resulting court hearing to explain why it believes the action should not go ahead. At such a hearing, the court might give leave for the action to be commenced or may decide to hear the case on its own merits. Such an approach may work to reduce the likelihood of any deal making between the various parties. Where creditor-initiated actions are permitted with respect to avoidance, some laws require creditors to pay the costs of those actions or allow sanctions to be imposed on creditors to discourage potential abuse of those actions; the same approach might be adopted with respect to actions brought by creditors against directors.

54. [50] Under those laws imposing an obligation on directors to commence insolvency proceedings, the company itself, its shareholders and creditors may have a claim for damages in the event of a breach of that obligation. Where payments have been made by directors contrary to a moratorium that accompanies the obligation to commence insolvency proceedings, the company itself may have a claim for damages. The company may also have a claim under laws that impose an obligation to hold a shareholder meeting if there is a loss of capital. It is desirable that the insolvency law ensure coordination of any actions that might potentially be commenced by these different parties.

55. [Litigation involving the obligations of directors of a company subject to insolvency proceedings is likely to be not only costly, but also time consuming and can operate to postpone the completion of the related insolvency proceedings. Although beyond the scope of this discussion, this is an issue that might merit consideration in order to reduce the effects of such litigation on those related actions.]

4. Funding of actions

56. [51] A potential difficulty arising in those jurisdictions that permit an insolvency representative to bring an action for breach of these obligations relates to payment of their costs in the event that it is unsuccessful. The lack of available funding is often cited as a key reason for the relative paucity of cases pursuing the breach of such obligations. While funding might be made available from the insolvency estate when there are sufficient assets to do so, as is often the case with avoidance proceedings, insolvency representatives may be unwilling to expend those assets to pursue litigation unless there is a very good chance of success (see part two, chap. II, para. 196). In many cases, however, there will be insufficient funds available in the insolvency estate to pursue a director, even if there is a strong likelihood that the litigation will be successful.

57. [51] Devising alternative approaches to funding in such circumstances may offer, in appropriate situations, an effective means of restoring to the estate value lost through the actions of directors, addressing abuse, investigating unfair conduct and furthering good governance. [Obtaining such alternative funding would be

assisted by including appropriate authorization in any law relating to insolvency in much the same way as is provided by recommendation 95 with respect to the funding of avoidance proceedings.] The right to commence such a proceeding, or the expected proceeds of the proceeding if successful, might be assigned for value to a third party, including creditors or a lender might be approached to provide funds. Where the cause of action is pursued by a party other than the insolvency representative, the costs of commencing such a proceeding might be recovered from any compensation paid. Under some laws, claims against directors might be settled through negotiation with insolvency representatives, avoiding the need to find funding. In some jurisdictions this occurs infrequently, while in others it is usual practice and insolvency representatives typically “invite” contributions from directors. As an additional issue, it may be appropriate to consider the court in which such proceedings could be commenced; this issue is discussed above in part two, chapter. I, paragraph 19.

Recommendations 7-11

Purpose of legislative provisions

[The purpose of provisions on enforcement of the obligations is to establish appropriate remedies for breach of the obligations and facilitate the commencement and conduct of actions to recover compensation for that breach.]

Contents of legislative provisions

Elements of liability and defences

7. [5] The law relating to insolvency should specify the elements to be proved in order to establish a breach of the obligations in recommendation 1 and that, as a consequence, creditors have suffered loss or damage; the party responsible for proving those elements; and specific defences to an allegation of breach of the obligations. Those defences may include that the person owing the obligations took reasonable steps of the kind referred to in recommendation 2.

Remedies

8. [6] The law relating to insolvency should specify that the remedies for liability found by the court to arise from a breach of the obligation in recommendation 1 should include payment in full to the insolvency estate of any damages assessed by the court [as compensation for that breach]. Failure to pay such damages in full should limit the person owing the obligation from exercising a set-off with respect to any debts owed by the company to such person until payment in full is made.

Conduct of actions for breach of the obligation

9. [7] The law relating to insolvency should specify that the cause of action for loss or damage suffered as a result of the breach of the obligations in recommendation 1 belongs to the insolvency estate and the insolvency representative has the principal responsibility for pursuing an action for breach of those obligations. The law relating to insolvency may also permit, with the agreement of the insolvency representative, a creditor or any other party in interest to commence such an action. When the insolvency representative does not agree, the

creditor or other party in interest may seek leave of the court to commence such an action.

Funding of actions for breach of the obligation

10. [8] The law relating to insolvency should specify that the costs of an action against the person owing the obligations be paid as administrative expenses.

11. [9] The law relating to insolvency may provide alternative approaches to address the pursuit and funding of such actions.

Additional measures

[12. [10] In order to deter behaviour of the kind leading to liability under recommendation 5, the law relating to insolvency may include remedies additional¹⁴ to the payment of [compensation] [damages] provided in recommendation 8.]

[¹⁴ The additional remedies that may be available will depend upon the types of remedies available in a particular jurisdiction and what, in addition to the payment of compensation, might be proportionate to the behaviour in question and appropriate in the circumstances of the particular case. Examples of such remedies are discussed in paras. ... [of the commentary].]

**I. Note by the Secretariat on centre of main interests in the context of
an enterprise group, submitted to the Working Group on Insolvency
Law at its forty-third session**

(A/CN.9/WG.V/WP.114)

[Original: English]

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I. Background

1. At its previous session (November 2012), the Working Group expressed the views that: it was necessary to look at the issue of centre of main interests as it related to enterprise groups because most commercial activity was currently conducted through such groups; the scope of its mandate with respect to centre of main interests as originally approved included centre of main interests in the context of enterprise groups; and that topic should be considered upon completion of the revisions proposed for the Guide to Enactment of the Model Law on Cross-Border Insolvency (A/CN.9/763, paras. 13-14).

2. The Working Group may wish to recall that the scope of its mandate with respect to centre of main interests as originally approved also referred to the possibility of “developing a model law or provisions on insolvency law addressing selected international issues, including jurisdiction, access and recognition, in a manner that would not preclude the development of a convention.”¹

II. Summary of previous discussion in the Working Group

3. The Working Group may also wish to recall the working papers prepared for previous sessions that discussed aspects of enterprise groups and centre of main interests in the context of part three of the Legislative Guide on Insolvency Law, namely A/CN.9/WG.V/WP.74/Add.2 (paras. 5-12); A/CN.9/WG.V/WP.76/Add.2 (paras. 2-17); A/CN.9/WG.V/WP.82/Add.4 (paras. 10-15); A/CN.9/WG.V/WP.85/Add.1 (paras. 3-13); A/CN.9/WG.V/WP.99, paras. 55-64; and A/CN.9/738, paras. 36-37.

4. While it is not possible to repeat the material provided in those papers, the Working Group may wish to recall the conclusions it reached as a result of discussing those materials at its thirty-first to thirty-sixth and fortieth sessions.

¹ See A/CN.9/WG.V/WP.93/Add.1, para. 8 and *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17*, A/65/17, para. 259 (a).

5. At its thirty-first session, the Working Group concluded (A/CN.9/618, para. 54) that the difficulties of achieving an agreed definition of the centre of main interests of an enterprise group suggested the need to focus on facilitating coordination and cooperation between the various courts in which insolvency proceedings against different members of an enterprise group might be commenced, whilst acknowledging the desirability of avoiding a multiplicity of proceedings in the enterprise group context.
6. At its thirty-second, thirty-third and thirty-fourth sessions, the Working Group had limited discussion of international issues, much of which was confined to attempting to identify a way forward and the manner in which the relevant issues might be discussed.
7. At its thirty-fifth session, the Working Group generally agreed (A/CN.9/666, paras. 26-27) that, although perhaps desirable, it would be difficult to reach a definition of the centre of main interests of an enterprise group that could be used, for example, to limit the commencement of parallel proceedings or simplify the number of laws that might apply to insolvency proceedings commenced in different States with respect to members of the same group. One key concern would be the extent to which such a definition would be widely accepted and adopted and voluntarily enforced by the courts affected by it. It also agreed that it would be difficult to use the centre of main interests of a group to apply the recognition regime of the Model Law to the enterprise group as a whole, as opposed to applying it to individual members of that group. The Working Group concluded (A/CN.9/666, para. 32) that: the presumption contained in article 16 (3) of the Model Law was not directly applicable in the context of enterprise groups; providing a rule on the centre of main interests of an enterprise group could be useful to facilitate coordination of multiple insolvency proceedings with respect to group members; and such a rule might establish a rebuttable presumption, along the lines of article 16 (3) of the Model Law, for determining the seat of the controlling group member, with the factors relevant to rebutting such a presumption (which should be considered as a whole) being based upon those set forth in paragraphs 6 and 13 of document A/CN.9/WG.V/WP.82/Add.4.
8. Paragraph 6 identified factors such as the extent of a subsidiary's independence with respect to financial, management and policy decision-making; financial arrangements between parent and subsidiary, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; and the location where design, marketing, pricing, delivery of products and office functions were conducted.
9. Paragraph 13 referred to factors that might be relevant to determining the degree of integration required to establish the seat of the controlling member of a closely integrated group. It was suggested that those factors might include: the extent of group members' independence with respect to financial, management and policy decision-making ("head of the office functions"); financial arrangements between group members, including capitalization, location of bank accounts and accountancy services; the division of responsibility with respect to provision of technical and legal documentation and signature of contracts; the location where design, marketing, pricing, delivery of products and office functions were conducted; and third-party perceptions, in particular those of creditors, concerning

that location. Paragraph 15 of the introduction to part three of the Legislative Guide also outlines factors that might be relevant to determining the degree of integration of an enterprise group.

10. At the Working Group's thirty-sixth session, after further consideration of the idea of a coordination centre, the view was expressed (A/CN.9/671, paras. 18-19) that identifying a coordination centre in an enterprise group brought with it a number of the difficulties associated with identifying the centre of main interests of an individual debtor. Those concerned, in particular, identifying the State that should make the decision with respect to the location of the coordination centre and whether that decision could be enforced or at least recognized in other States.

11. Additional concerns related to: ensuring that the function of that centre was procedural and not substantive; ensuring there was sufficient flexibility to take account of individual cases; the need for speed in identifying the coordination centre, which suggested the desirability of avoiding complex criteria; the need to avoid forum shopping; the desirability of identifying the role to be played by the coordinating entity; the desirability of identifying a coordination centre only when determined to be useful or necessary to achieve global reorganization of a group; and the need to distinguish between the role of courts in coordination and cooperation and that of the coordinating group member. It was noted with respect to the latter point, that the Working Group had not considered, at its previous session, whether coordination should be initiated and led by the court responsible for conduct of the proceedings with respect to the coordinating member or the relevant insolvency representative. It was widely agreed (A/CN.9/671, para. 20) that a decision by one court identifying a coordination centre should not be binding in other States.

12. Although there was some support for retaining a recommendation on establishing the coordination centre for an enterprise group, the Working Group was unable to identify a clear role for such a centre that would add to the more general recommendations on coordination and cooperation between the courts and insolvency representatives that had been agreed should be included in part three of the Legislative Guide on Insolvency Law. Having considered the other draft recommendations of part three, the Working Group returned to the topic of a coordination centre and agreed (A/CN.9/671, para. 23) to delete draft recommendations 1 and 2 (which provided a presumption for identifying the coordination centre), on the basis that the determination of such a centre did not imply any legal consequences because it was non-binding. The Working Group nevertheless recognized the value of one entity having the leading role in the cooperation and agreed to address the importance of having one entity acting as the coordinating member in the commentary.² That issue was subsequently addressed in

² The Working Group may wish to note the approach adopted in work to develop principles for coordination of multinational corporate group insolvencies by the International Insolvency Institute (available at www.iiiglobal.org/component/jdownloads/viewcategory/558.html). These principles are intended to apply to an enterprise group with members, operations, assets and employees located in more than one country and where there is unified corporate governance either through common or interlocking shareholding or by contract. The principles focus on determining a "group centre", being the jurisdiction from which the operations of an integrated multinational enterprise are directed, in order to identify the jurisdiction to which other jurisdictions should defer, to the extent permitted by law, on issues of global asset maximization.

the final version of recommendation 250, which provides that the means of cooperation between insolvency representatives may include one of them taking a coordinating role. The approach ultimately adopted by part three was to focus on fostering cooperation between, and coordination of, cross-border insolvency proceedings concerning two or more members of an enterprise group, building upon the cooperation and coordination provisions of the Model Law (articles 25-27).

13. At its fortieth session, the Working Group concluded (A/CN.9/738, paras. 36-37) that reference should be made, in the revisions relating to certain aspects of centre of main interests to the Guide to Enactment of the Model Law on Cross-Border Insolvency, to part three of the Legislative Guide and the solutions adopted with respect to the treatment of enterprise groups in insolvency, particularly in the international context. The Working Group has been requested to consider the question of what should be included in that reference in document A/CN.9/WG.V/112, paragraph 9. Beyond that reference, however, and particularly with respect to the concept of the centre of main interests of an enterprise group, it was suggested at the fortieth session that once the Working Group had reached agreement on the factors relevant to identifying the centre of main interests of an individual debtor, it might be possible to consider the group issue further and, in particular, the relevance of those factors in the group context (revisions to the Guide to Enactment of the Model Law on Cross-Border Insolvency, including the factors relevant to the determination of centre of main interests, are contained in document A/CN.9/WG.V/WP.112).

III. Developments in the treatment of enterprise groups in insolvency

14. The Working Group may wish to note that it is uncertain whether existing practice with respect to enterprise groups has developed in any new direction that indicates a solution to the issues already identified in connection with centre of main interests and enterprise groups. Recent practice does suggest, however, the increasing use of coordination and cooperation in ways largely consistent with the recommendations contained in part three of the Legislative Guide to address multiple cross-border proceedings involving members of an enterprise group. Several jurisdictions have enacted legislation based upon part three of the Legislative Guide³ and it has been referred to as a source of inspiration in the context of the insolvency of large and complex financial institutions (see generally, A/CN.9/WG.V/WP.109) for facilitating cross-border cooperation and communication.

Factors to be considered to determine whether the relevant degree of integration is present are those set out in the Legislative Guide and noted above. Guidelines 1-11 deal with notice and standing; communication; coordination and protocols; deferral of certain commencement decisions; and single insolvency representatives. Guidelines 12-22, which deal with identification of the enterprise group centre and its effects, are aspirational and it is noted that these would need to be implemented by legislation.

³ Colombia, Decree 1749 of 2011; in early January 2013, the German Ministry of Justice issued a discussion draft on enterprise group insolvency that appears to draw inspiration from part three.

15. The Working Group may also wish to note recent proposals for revision of the European Council (EC) Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings that are largely consistent with the recommendations of part three. These proposals provide for coordination of insolvency proceedings concerning different members of the same enterprise group by obliging the insolvency representatives and courts involved in the different main proceedings to cooperate and communicate with each other. In addition, the insolvency representatives involved in such proceedings will have the procedural tools to request a stay of the other proceedings and to propose a rescue plan for the group members subject to insolvency proceedings.

16. While a new recital clarifies the circumstances in which the presumption that the centre of main interests of a legal person is located at the place of its registered office can be rebutted (the language of this recital is taken from the *Interedil*⁴ decision of the Court of Justice of the European Union), the entity-by-entity approach to centre of main interests of members of an enterprise group has been maintained. However, several modifications are proposed with the aim of improving the efficient administration of the debtor's estate in situations where the debtor has an establishment in another Member State. The court seised with a request for opening secondary proceedings should be able, if so requested by the insolvency representative in the main proceedings, to refuse the opening or to postpone its decision on opening if those proceedings would not be necessary to protect the interests of local creditors. Moreover, that court is obliged to hear the insolvency representative of the main proceeding before opening the secondary proceeding. The power of the insolvency representative to request the opening of secondary proceedings where this would facilitate the administration of complex cases will not be affected.

IV. Next steps

17. The Working Group may wish to consider how it might approach the question of how to further facilitate the cross-border treatment of enterprise groups in light of the above remarks, taking into consideration the extended mandate of the Working Group as it relates to the development of a possible model law, provisions or a convention on issues of jurisdiction, access and recognition.

⁴ *Interedil Srl, in liquidation*, Case C_396/09, judgement of 20 October 2011.

**J. Note by the Secretariat on enterprise groups — Directors’
obligations in the period approaching insolvency, submitted to the
Working Group on Insolvency Law at its
forty-third session**

(A/CN.9/WG.V/WP.115)

[Original: English]

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I. Introduction

1. At its forty-second session (November 2012), the Working Group considered the obligations of directors in the period approaching insolvency (A/CN.9/763, paras. 66-91) based upon information contained in A/CN.0/WG.V/WP.108, which also contained information on issues relating to directors of group enterprise members in the period approaching insolvency (A/CN.0/WG.V/WP.108, paras. 52-60). The Working Group agreed that although the latter topic raised difficult and complex issues, particularly in the nexus of insolvency and corporate law, the possibility of further work should be given serious consideration once work on recommendations 1-10 and the related commentary had been completed. At the request of the Working Group, the Secretariat prepared this paper on different national approaches and solutions to the issue of directors’ obligations in a group context in the period approaching insolvency¹

¹ The Secretariat based this paper on available existing studies on the topic of the obligations of directors in the period approaching insolvency and on any additional information in the context

in order to provide further information and facilitate the Working Group's deliberations on the topic (A/CN.9/763, para. 92).

2. The Working Group will recall that in preparing Part three of the UNCITRAL Legislative Guide on Insolvency Law, it acknowledged that the business of corporations was increasingly being conducted through enterprise groups. Enterprise groups were described as covering different forms of economic organization based upon the single legal entity and composed of two or more legal entities that are linked together by some form of direct or indirect control or ownership. It was recognized that enterprise groups are ubiquitous in both emerging and developed markets, with a common characteristic of operations across a large number of sometimes unrelated industries, often with family ownership in combination with varying degrees of participation by outside investors. Further, it was stated that the largest economic entities in the world include not only States, but also a number of multinational enterprise groups, which may be responsible for significant percentages of gross national product worldwide and have annual growth rates and turnovers that exceed those of many States.²

3. At its previous session (November 2012), the Working Group acknowledged various issues that may arise with respect to directors' obligations in the period approaching insolvency in a group context (A/CN.9/WG.V/WP.108, para. 52). Two main issues were identified for particular consideration and discussion:

(i) what is the appropriate definition of a director and the circumstances in which other group members might fall within that definition, particularly where parent and wholly owned or controlled subsidiary relationships are involved (A/CN.9/WG.V/WP.108, paras. 58-59); and

(ii) whether the single entity principle and its impact should prevail when there is a tension between acting in the interests of the group member of which they are a director and the interests of the group as a whole (A/CN.9/WG.V/WP.108, paras. 53-57).

4. The Working Group may wish to recall the discussion in A/CN.9/WG.V/WP.113 with respect to the persons who owe obligations in the period approaching insolvency (paras. 26-29 and recommendation 4), in this paper referred to as "directors".

5. The Working Group may also wish to recall information prepared for its consideration at the previous session (A/CN.9/WG.V/WP.108, para. 53) indicating that while the individual group member's interests are of particular importance when the solvency of that enterprise group member may be or becomes an issue after any transaction designed to benefit the group as a whole has been entered into, the group structure may require directors to act for the benefit of the group. In such a context, the directors would have to balance the interests of their own group member against the possibly competing economic goals or needs of the group as a whole. Examples of such potential conflict could arise when one group member provides a loan to another group member or acts as a guarantor for a loan provided

of enterprise groups (in particular, INSOL, Directors in the Twilight Zone III, 2009), as well as on information submitted to the Secretariat by some Member States. Only States on which there was relevant information available from these sources were included in this paper.

² Part three of the UNCITRAL Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency), Section IA, paras. 2, 4 and 5, and in paras. 1-39 generally.

by an external lender to another group member; or when one group member enters into an agreement with another group member to transfer its business or assets or surrender a business opportunity to that other group member or to contract with that member on terms that could not be considered commercially viable; or where a group member enters into cross-guarantees with other group members to assist the group as a whole to use its assets more effectively in financing group operations. The problem that may arise in relation with these transactions results from the relationship between the transacting parties or their position within the group, and because the nature of the transaction involves an allocation of benefit and detriment that differs from what might generally be considered commercially viable.

6. The Working Group may also wish to recall that information provided at its previous session indicated that the treatment of these issues is quite different from one jurisdiction to the next, particularly in terms of the duties owed by the directors to the company in the period approaching insolvency, and how the interest of the company must be evaluated by such directors in a group context (A/CN.9/WG.V/WP.108, paras. 54-57).

7. The following analysis reviews the law of several jurisdictions insofar as it deals with:

- (i) the obligations of directors in the context of a group enterprise; and
- (ii) any particular consideration of such obligations in the context of insolvency or the period approaching insolvency.

II. Different national approaches to directors' obligations in the period approaching insolvency in the context of enterprise groups

A. Argentina

8. The Argentine Companies Law imposes a general fiduciary duty on directors of solvent companies, which obliges them to act in good faith and with the diligence of a good businessman.³ Directors are therefore responsible for their loyalty and diligence in administering the company. The Law does not contain any special regime for a group of companies, nor any definition of the term.

9. According to the Argentine Bankruptcy Law,⁴ the zone of insolvency is extended back to one year prior to the date of declaration of the cessation of payments.⁵ In terms of the liability of natural persons, the Bankruptcy Law covers any representative, director, proxy holder or manager of the company that may have produced, facilitated, permitted or aggravated the financial situation of the debtor or

³ Ley 19.550 de Sociedades Comerciales de 20 de Marzo de 1984, Boletín Oficial 30 de Marzo de 1984, Article 59.

⁴ Ley 24.522 de Concursos y Quiebras de 20 de Julio de 1995, Boletín Oficial 28.203 de 9 de Agosto de 1995.

⁵ Argentine Bankruptcy Law, Article 174.

its insolvency.⁶ The Law does not contain any special provision for groups of companies.

10. However, groups of companies are taken into account under the Bankruptcy Law in terms of the extension of insolvency proceedings. In fact, insolvency can be extended to any person controlling the insolvent company who has improperly subjected the interests of the controlled company to the unified management of the group giving priority to the interests of the controlling company or the whole group to which it belongs.⁷ The Bankruptcy Law provides for these purposes the following definition of a controlling person:⁸ (i) one who directly or through another company holds any kind of ownership in the company that entitled the person to the necessary votes to make decisions;⁹ or (ii) any group of persons who, acting together, hold the necessary ownership of the company entitling them to the necessary votes to make decisions.¹⁰ The obligations of directors during insolvency proceedings are not specified, but the general regime of duties owed when the company is solvent remains applicable.

11. The Argentine Bankruptcy Law also provides a special regime for the insolvency of a group of companies: insolvency proceedings may be commenced by two or more natural or legal persons forming a permanent economic union.¹¹ As the duties of directors remain the same, the question arises whether such duties could be assessed on the basis of the interests of the entire group.

B. Australia

12. When a company is in liquidation, as contrasted with the period approaching insolvency, directors in Australia have a duty to prevent insolvent trading by the company, and will be held personally liable for any breach of that obligation, provided that certain requirements are met.¹² A holding company may also be held liable for insolvent trading by its subsidiary, but that liability does not extend to the directors of the holding company.¹³

13. In terms of a group of companies, the interests to be taken into account by directors depend on whether the company is solvent or insolvent. A group of companies has been defined at common law as “a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control”.¹⁴ If the company is solvent, the directors are entitled to give consideration to the interests of the companies as a group in determining whether the best interests of the company of which they are a director would be met by a

⁶ Argentine Bankruptcy Law, Article 173.

⁷ Argentine Bankruptcy Law, Article 161(2).

⁸ Ibid.

⁹ Argentine Bankruptcy Law, Article 161(2)(a).

¹⁰ Argentine Bankruptcy Law, Article 161(2)(b).

¹¹ Argentine Bankruptcy Law, Article 65.

¹² Corporations Act 2001 (Cth), Section 588G.

¹³ Corporations Act 2001 (Cth), Section 588V.

¹⁴ *Walker v Wimborne & Ors* (1976) 3 ACLR 529 at 532 (Mason J).

proposed course of action,¹⁵ provided that the interests of the group remain compatible with the interests of the individual company.¹⁶ If the group as a whole is insolvent, the interests of the company as a result of any problematic transactions would diverge significantly from the interests of the group.¹⁷ If the directors cause the company to prejudice the interests of its creditors in a circumstance of insolvency, they would fail to discharge their duty to act in the best interests of that company.¹⁸

14. The Bell case provides a good summary of what is expected from directors in a group context when facing insolvency: directors do not have to ignore the interests of the wider group but are required to consider the interests of each individual company when one or more companies in a group enter into a transaction.¹⁹ In this case, it was held that the directors had exposed the companies to a probable prospect of loss and no probable prospect of gain when concentrating on the group and failing to look to the interests of individual companies.²⁰

C. Belgium

15. Belgian law imposes duties on directors to act in the corporate interest of the company and not of any particular shareholder or the company's creditors. The definition of "corporate interest" is interpreted by courts on a case by case basis.²¹ Even if the interests of a Belgian company usually coincide with the interests of the whole group, depending on the circumstances, the directors of the individual company may need to act more independently of the group.²²

16. When balancing the corporate interest of a company against the general interest of the group, Belgian law refers to principles set out in French case law to assess whether a particular transaction is well-balanced in terms of corporate interest (see France, paras. 22-24 below).

D. Brazil

17. Brazilian law has introduced the possibility of creating a contractual group of companies. The group of companies is a contract entered into by a controlling company and one or several controlled companies whereby they commit to combine

¹⁵ *Westpac Banking Corporation v Bell Group Ltd.* (in liquidation) (No. 3) [2012] WASCA 157 at 952 (Lee AJA); *Neat Domestic Trading Property Ltd. v AWB Ltd.* [2003] HCA 35 [47]; (2003) 216 CLR 277 (McHugh, Hayne, Callinan JJ).

¹⁶ *Ibid.*

¹⁷ *Westpac Banking Corporation v Bell Group Ltd.*, supra note 15 at 952.

¹⁸ *Ibid.*, and *Walker v Wimborne & Ors*, supra note 14 at 532.

¹⁹ *The Bell Group Ltd. v Westpac Banking Corporation* (No. 9) [2008] WASC 239 at [4621] (Owen J).

²⁰ *Ibid.* at [9746].

²¹ International Insolvency Institute, Committee on Corporate and Professional Responsibility, Survey on Director and Officer Duties, Responsibilities, and Accountability, Belgium (Nora Wouters), p. 2.

²² *Ibid.*, p.3.

resources or efforts to achieve mutual goals or participate in common activities or ventures.²³

18. Although each company retains its legal capacity and its own assets,²⁴ the group of companies can define a group direction and the powers, duties and liabilities of its directors.²⁵ The directors of the subsidiaries must act within the powers and duties determined by the articles of association and the group contract, and should follow the instructions established by the group directors that do not entail a breach of legal or contractual duties.²⁶ It appears that directors are required to take into account the interest of the whole group when assessing whether to enter into a particular transaction.

E. Colombia

19. Colombia has enacted a definition of a group of companies. A subordinated or controlled company is one whose power to make decisions is subject to the will of one or more companies, either directly or indirectly.²⁷ The Code of Commerce also defines an enterprise group as one where there is a unity of purpose and direction, i.e. where there is a common objective determined by the controlling company by virtue of the control and direction it exercises over the whole group, even though each company has a different activity or purpose.²⁸

20. There are no special obligations on directors in the context of a group of companies, but each director remains subject to a general duty of good faith and loyalty, and administering the company of which it is a director as a good businessman.²⁹

21. In the case of insolvency, the parent company will be liable for the subsidiary's commitments if the insolvency or liquidation has been produced by the transactions implemented in the interest of the controlling company or any other subsidiary, and against the interests of the insolvent company.³⁰ It is presumed that the company is in insolvency because of the actions derived from that control unless proved otherwise.³¹

F. France

22. In France, case law has defined a group of companies as the situation where certain companies are united by a dependency link and by unified control.³² The purposes of the different companies do not have to be identical, as long as there is a

²³ Lei 6404/76 of 15 December 1976, Article 265.

²⁴ Ibid.

²⁵ Ibid., Article 272.

²⁶ Ibid., Article 273.

²⁷ Code of Commerce of Colombia, Article 260.

²⁸ Ibid., Article 261.

²⁹ Ley 222 de 1995 (20 December 1995), Article 23.

³⁰ Ley 1116 de 2006 (27 December 2006), Article 61.

³¹ Ibid.

³² Cour de cassation [French Supreme Court] Chambre Criminelle, 4 February 1985, No. 84-91581.

certain subordination of each legal entity for the benefit of the single financial goal of the group.³³

23. For directors to be discharged of their duties, the intra-group transaction (i) must have a financial, economic or social mutual interest that is considered together with regard to a common policy elaborated for the whole group; and (ii) it should neither be effected without consideration nor jeopardize the balance between the different commitments of the companies or exceed the financial capabilities of the company bearing the burden thereof.³⁴

24. The interest of individual companies is the main rule to assess the validity of the transaction. It appears, however, that the group context is a factor that can influence the final outcome in terms of discharge of the director's duties towards the company.

G. Germany

25. Under German law, the concept of "group liability" has been introduced to create an obligation on a director who is also a controlling shareholder, to compensate for any loss due to the misuse of its managerial power.³⁵ The German Federal Court has held that this regime also applies where the shareholder is a natural person:³⁶ the director, who was also the sole shareholder, had conducted the business pursuing only his personal interests, and was regarded as a "dominating company" analogous to the concept of liability in a corporate group.

26. The doctrine of piercing the corporate veil has been further defined as a liability in tort of the director to the company when the management has induced a subsidiary into financial assistance that may have the consequence of causing the insolvency of the subsidiary.³⁷ As a consequence, the director has a duty in the period approaching insolvency to protect the survival of the company regardless of the existence of a group.³⁸

H. Italy

27. Although Italian legislation has not enacted special provisions on directors' duties within enterprise groups in the period approaching insolvency, the Civil Code contains provisions relating to the liability of parent companies and their directors for damages caused to the subsidiaries' shareholders or creditors.³⁹ Legal entities exercising "direction and coordination" powers over an Italian company may be found liable to minority shareholders and creditors of the subsidiary for abuse of

³³ Ibid.

³⁴ Ibid.

³⁵ INSOL, *Directors in the Twilight Zone III*, supra note 1, p. 321.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid., p. 322.

³⁹ INSOL, *Directors in the Twilight Zone III*, supra note 1, pp. 446-448.

those powers when the controlling company acts in its own interest or in the interest of third parties.⁴⁰

28. Although the concept of “direction and coordination” has not yet been judicially interpreted, commentators are of the view that there will be “direction and coordination” powers where a significant part of the management decisions at the subsidiary is continuously and substantively taken by management at the controlling entity, even if the decisions are formally implemented by the subsidiary’s management. This legislation also applies to the case where those powers are exercised pursuant to any ad hoc arrangement or articles of association.

29. This liability regime is also extended to any person concurring in or benefitting from the mismanagement (such as the directors of the controlling entity or another of its subsidiaries), and they may be held jointly and severally liable.⁴¹ However, liability may be avoided when such damages are fully reversed, even through subsequent transactions specifically effected for this purpose, or when damages are offset by the overall effect of the direction and coordination activities over the subsidiary.⁴²

30. In addition, prejudiced parties (creditors and minority shareholders) can bring action against the controlling company and its directors only when they are unable to collect damages from the subsidiary.⁴³ Therefore, this action may in practice be limited to the case where the subsidiary has become insolvent.

31. Finally, in a group context, the parent company’s directors can be held jointly liable with the subsidiary’s directors for damages caused to the insolvent subsidiary by means of an abuse of direction powers within the group.⁴⁴

I. Spain

32. Under Spanish law, a group of companies has been defined as the situation where a company exercises or has the possibility to exercise, directly or indirectly, control over another company, in terms of voting rights or appointment of the management of the controlled company, whether by ownership of shares entitling the controlling company to voting rights or by any agreement whatsoever.⁴⁵

33. Directors under Spanish law are subject to a duty of loyalty, which must be exercised in light of the corporate interest of the company itself.⁴⁶ According to academic doctrine, Spanish law recognizes the existence and legitimacy of a group

⁴⁰ Italian Civil Code, Article 2497. Control is defined by Article 2359 of the Italian Civil Code as the situation where a company can: (i) exercise a particular influence on the general shareholders’ assembly of another company, whether disposing of the majority of the voting rights or not, or (ii) exercise a particular influence on the controlled company by virtue of the contractual relationships entered into between those companies.

⁴¹ Ibid.

⁴² INSOL, Directors in the Twilight Zone III, supra note 1, p. 448.

⁴³ Italian Civil Code, Article 2497.

⁴⁴ INSOL, Directors in the Twilight Zone III, supra note 1, p. 448.

⁴⁵ Spanish Code of Commerce, Article 42.

⁴⁶ Ley de Sociedades de Capital [Spanish Companies Act] (Real Decreto Legislativo 1/2010, de 2 de Julio, por el que se aprueba el texto refundido de la Ley de Sociedades de Capital), Article 226.

of companies, but it remains difficult to assess whether the interest of a company can be expanded to the interest of the whole group.⁴⁷

J. Switzerland

34. Under Swiss law, there is no provision relating to the treatment of a group of companies in the field of company or insolvency law, except for some specific provisions on accountancy and banking law. The main question in terms of the obligations of a director of a company that is part of a group is whether the subordination of the interests of the controlled company to the interests of the group as a whole may be qualified as a breach of the director's duty. This analysis is unchanged whether or not there is an insolvency.

35. Generally, the Swiss Federal Supreme Court takes a conservative position, holding that the interests of the company should be regarded from the perspective of each individual company rather than from the group as a whole.⁴⁸ This view was recently confirmed by the Court:⁴⁹ the liability of a member of the board of directors of the parent company, who was also chair of the board of directors of the subsidiary, was upheld because the parent company, later insolvent, had granted a loan to its subsidiary which at the time had already become insolvent. It was held that such a shift of the parent company's assets to a subsidiary shall be considered a breach of duty to the parent company if there were no prospects of repayment. Further, being a director for both companies subjected the board member to stricter scrutiny in respect of his liability for intra-group transactions, as he was deemed to be better informed than any external party about the financial situation of both companies and of the risks associated with the transaction.

K. United States of America

36. In the United States,⁵⁰ it has been held that the focus of directors' duties shifts somewhat upon the event of insolvency of a company. In a solvent company, fiduciary duties are owed by directors to the company and its shareholders,⁵¹ and generally not directly to creditors.⁵² Upon insolvency, however, it has been held that the fiduciary duties of directors shift at least partially to include the creditors of the company.⁵³ Although it has been said that the question of to whom directorial

⁴⁷ José Miguel Embrid Irujo, "Apuntes sobre los Deberes de Fidelidad y Lealtad de los Administradores de las Sociedades Anónimas" (2006) 46 Cuadernos de Derecho y Comercio 9.

⁴⁸ Bundesgericht [Swiss Federal Supreme Court] BGE 138 II 57, 61; BGE 130 III 213, 216 et seq.

⁴⁹ Bundesgericht [Swiss Federal Supreme Court] 4A_74/2012 (18 June 2012).

⁵⁰ As in the case of the section on the United States of America in INSOL, Directors in the Twilight Zone III (supra note 1, at 697), this section will focus on the law of Delaware, as a popular jurisdiction for incorporation, and on Federal law (for those issues resolved in US Bankruptcy Court rather than the state courts).

⁵¹ See, e.g. *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, 930 A.2d 92, 99 (Del. 2007).

⁵² J. Haskell Murray, "'Latchkey corporations': Fiduciary duties in wholly owned, financially troubled subsidiaries" (2011) 36 Delaware Journal of Corporate Law, p. 584; *Geyer v Ingersoll Publications Co.*, 621 A.2d 784, 787 (Del.Ch. 1992); and *In re Netzel*, 442 B.R. 896, 899 (Bankr. N.D. Ill. 2011).

⁵³ *Geyer v Ingersoll*, *ibid* at 787 and *In re Netzel*, *ibid* at 899.

fiduciary duties are owed during insolvency is an issue subject to considerable debate and confusion,⁵⁴ there is broad agreement that courts should provide creditors with some additional rights when a company is insolvent or approaching the period of insolvency.⁵⁵

37. However, the question of the extent of those rights and when they arise is not yet settled.⁵⁶ Although the law has been clear for some time that creditors are entitled to certain fiduciary duties by directors when the company crosses into insolvency,⁵⁷ a 1991 decision created uncertainty about the content and timing of those rights by holding that “[a]t least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise”.⁵⁸ A more recent decision clarified that corporate creditors do not have direct fiduciary claims against a company regardless of its solvency, but held that upon insolvency, a company’s creditors can take derivative claims on behalf of the company against the directors for breach of fiduciary duty.⁵⁹ Unfortunately, the decision did not address whether creditors have a similar right to bring derivative claims for breaches of fiduciary duty in the period approaching insolvency, nor has any case to date set out any guidelines for when a company is entering into the “vicinity of insolvency”. In addition, some states still grant creditors standing to sue for breaches of fiduciary duties when the subsidiary company is in the “zone” or “vicinity” of insolvency,⁶⁰ and do not limit such standing to derivative claims on behalf of the subsidiary.

38. In the context of an enterprise group, it has been held that the directors of solvent wholly owned subsidiaries⁶¹ are obligated to manage the affairs of the subsidiary only in the best interests of the parent company and its shareholders.⁶² Other case law, some more recent, has limited the application of that case, and has

⁵⁴ Murray, “Latchkey corporations”, supra note 52 at 587.

⁵⁵ Ibid at 588 and *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, supra note 51 at 101.

⁵⁶ See, generally, INSOL, Directors in the Twilight Zone III, supra note 1 at pp. 704-706.

⁵⁷ *Geyer v Ingersoll Publications Co.*, supra note 52 at 787.

⁵⁸ *Credit Lyonnais Bank Nederland, N.V. v Pathé Communications Corp.* 1991 WL 277613 (Del. Ch. Dec. 30, 1991).

⁵⁹ *N. Am. Catholic Educ. Programming Foundation, Inc. v Gheewalla*, supra note 51 at 101 and *In re Netzel*, supra note 52 at 901.

⁶⁰ Murray, “Latchkey corporations”, supra note 52 at 588-591 and 608; *Carrieri v Jobs.com Inc.*, 393 F.3d 508, 534 n.24; *In re James River Coal Co.*, 360 B.R. 139, 170 (Bankr. E.D. Va. 2007).

⁶¹ Outside of the context of the wholly owned subsidiary, it has been said that the conflict between duties owed to the controlled company and to the parent is of little practical importance, since directorial decisions are usually protected by the business judgment rule and exculpatory charter provisions. See Murray, “Latchkey corporations”, supra note 52 at p. 580 and *Orman v Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002) (noting that the business judgment rule presumption greatly protects directorial decisions, but can be rebutted in certain circumstances, such as if the directors were “interested” in the outcome of the challenged transaction) and Del. Code Ann tit. 8 § 102(b)(7) (allowing corporations to eliminate liability for damages for breaches of duty of care except for breaches of “the director’s duty of loyalty to the corporation or its stockholders”).

⁶² *Anadarko Petroleum Corp. v Panhalde Eastern Corp.* 545 A.2d 1171 (Supreme Court of Delaware, 1988) and *Trenwick Am. Litigation Trust v Ernst & Young, L.L.P.*, 906 A.2d 168, 196 n.75 (Del. Ch. 2006).

held that directors of a solvent wholly owned subsidiary owe fiduciary duties to both the subsidiary company and to its sole shareholder, the parent company.⁶³

39. However, the current state of the law in terms of directors' duties within enterprise groups in the period approaching insolvency is quite uncertain. As noted above in para. 37, creditors can bring derivative actions on behalf of an insolvent company for injuries caused to it by its directors or its controlling shareholder.⁶⁴ In addition, as noted above in footnote 61, directors of subsidiaries may be exposed to duty of loyalty claims or to "interested director" claims which can be brought derivatively by creditors of the subsidiary. In the period approaching insolvency, directors of wholly owned subsidiaries that simply follow the wishes of the parent company and approve deals that result in the insolvency of the subsidiary could be liable for breach of the duty of loyalty or to "interested director" claims.⁶⁵ Thus the current state of the law may encourage directors of wholly owned subsidiaries in the period approaching insolvency to focus on the interests of the creditors of the subsidiary rather than to manage the subsidiary with a view to the best interests of the parent company and of the subsidiary, even though there is no specific fiduciary duty owed to the creditors of the subsidiary because the subsidiary is not yet insolvent. In the period approaching insolvency, then, directors of wholly owned subsidiaries appear to be required to act in the best interests of the subsidiary, which may include the interests of the sole shareholder parent, and may also include the interests of the creditors of the subsidiary.⁶⁶

III. Issues for consideration

40. From the above analysis, it may be observed that the issue of directors' duties in the zone of insolvency in the context of enterprise groups does not appear to be clearly or widely addressed within national legislation. The concept of enterprise groups has been considered and developed in many jurisdictions, but issues remain somewhat confused in terms of the obligations of directors in such situations.

41. In light of the increasing importance of enterprise groups in the conduct of modern global commerce, the Working Group may wish to consider whether it can offer some guidance in this area by including the issue of the obligations of directors of enterprise group members within the period approaching insolvency in its current work. If so, the Working Group may wish to consider how best to include this topic. In its deliberations, the Working Group may also wish to consider whether it would be of assistance to recall the approach taken in respect of avoidance provisions among enterprise group members in recommendation 217 of Part three of the UNCITRAL Legislative Guide on Insolvency Law (Treatment of enterprise groups in insolvency).

⁶³ *First American Corporation v Al-Nahyan*, 17 F Supp. 2d 26 (DC, 1998) and *In re Touch American Holdings, Inc.*, 401 BR 107, 129 (US Bankruptcy Court for the District of Delaware, 2009) As a practical reality, however, when a wholly owned subsidiary is solvent, only the parent has standing to bring a typical claim for breach of fiduciary duties: Murray, "Latchkey corporations", *supra* note 52 at 597.

⁶⁴ Murray, "Latchkey corporations", *supra* note 52 at 603.

⁶⁵ *Ibid* at 605.

⁶⁶ *Ibid* at 607-608.

K. Note by the Secretariat on the UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective

(A/CN.9/778)

[Original: English]

I. Introduction

1. At its forty-fourth session, in 2011, the Commission finalized and adopted The Model Law on Cross-Border insolvency: the Judicial Perspective¹ and requested the Secretariat to establish a mechanism for updating that text on an ongoing basis in the same flexible manner as it was developed, ensuring that its neutral tone is maintained and that it continues to meet its stated purpose.²

2. The Secretariat established a board of experts to advise on updating The Judicial Perspective to take account of recent jurisprudence interpreting the Model Law on Cross-Border Insolvency and to reflect revisions being prepared to the Guide to Enactment of the Model Law.

3. The text below sets forth those paragraphs of The Judicial Perspective that have been updated to reflect the most recent jurisprudence, as well as the revisions to the Guide to Enactment of the Model Law proposed by Working Group V (see A/CN.9/WG.V/WP.112) for consideration by the Commission at its forty-sixth session, including proposed amendments made at the forty-third session of Working Group V (Insolvency Law) in April 2013 (see A/CN.9/766). Paragraphs that are not to be updated (and thus remain as set forth in the published version of the text) have not been included below; they are indicated by [...]. Annex I includes only summaries of new cases to be added to the text; the case list indicates all cases that will be included in the complete annex.

II. The UNCITRAL Model Law on Cross-Border

Insolvency: the judicial perspective

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¹ Available at the date of this document from
www.uncitral.org/uncitral/texts/insolvency/2011Judicial_Perspective.html.

² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, para. 198.

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Preface

Paras. 1-3 [...].

The Judicial Perspective was updated in 2013 to reflect the revisions to the Guide to Enactment of the Model Law adopted by the Commission in 2013 as the Guide to Enactment and Interpretation of the Model Law and to include recent jurisprudence applying and interpreting the Model Law. The updates to the published text of *The Judicial Perspective* were noted by Working Group V (Insolvency Law) at its forty-third session (April 2013) and by the Tenth Multinational Judicial Colloquium, held in The Hague in May 2013, prior to consideration by the Commission in 2013.

I. Introduction

A. Purpose and scope

1. The present text discusses the UNCITRAL Model Law on Cross-Border Insolvency from a judge's perspective. Recognizing that some enacting States have amended the Model Law to suit local circumstances, different approaches might be required if a judge concludes that the omission or modification of a particular article from the text as enacted necessitates such a course.³ The present text is based on the Model Law as endorsed by the General Assembly of the United Nations in December 1997 and its accompanying Guide to Enactment.⁴ The Guide to Enactment has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to

³ The present text neither makes reference to nor expresses views on the various adaptations to the Model Law made in some enacting States.

⁴ General Assembly resolution 52/158.

“centre of main interests” in the light of the emerging jurisprudence interpreting the Model Law in those States that have enacted legislation based upon it. The revisions were adopted by the Commission in 2013 as the “Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency”.

2. [...]

3. [...]

4. [...]

B. Glossary

1. Terms and explanations

5. [...]

2. Reference material

(a) References to cases

6. [...]

(b) References to texts

7. [...]

(a) [...]

(b) “Guide to Enactment and Interpretation”: Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, as revised in 2013;

(c) “UNCITRAL Legislative Guide”: UNCITRAL Legislative Guide on Insolvency Law (2004), including part three adopted in 2010;

(d)-(g) [...]

II. Background

A. Scope and application of the UNCITRAL Model Law

8. In December 1997, the General Assembly endorsed the Model Law on Cross-Border Insolvency, developed and adopted by the United Nations Commission on International Trade Law (UNCITRAL). The Model Law was accompanied by a Guide to Enactment that provided background and explanatory information to assist those preparing the legislation necessary to implement the Model Law and judges and others responsible for its application and interpretation. As noted above, the Guide to Enactment has been revised to include additional guidance with respect to the interpretation and application of selected aspects of the Model Law relating to “centre of main interests” and was adopted by the Commission in 2013 as the “Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency”.

9. Revise the last sentence as follows: “As at the end of April 2013, 20 States and territories had enacted legislation based on the Model Law.”⁵”

10-15. [...]

B. A judge’s perspective

16. While the UNCITRAL Model Law emphasizes the desirability of a uniform approach to its interpretation based on its international origins,⁶ the domestic law of most States is likely to require interpretation in accordance with national law; unless the enacting State has endorsed the “international” approach in its own legislation.⁷ In any event, any court considering legislation based on the Model Law is likely to find the international jurisprudence of assistance to its interpretation.

17-23. [...]

24. Add the following sentence at the end of the paragraph: “The revisions to the published text were noted by Working Group V (Insolvency Law) at its forty-third session (April 2013) and by the Tenth Multinational Judicial Colloquium, held in The Hague in May 2013, prior to consideration by the Commission in 2013.”

C. Purpose of the UNCITRAL Model Law

25. [...]

26. As mentioned above, the Model Law respects differences among national procedural laws and does not attempt a substantive unification of insolvency law. Rather it provides a framework for cooperation between jurisdictions, offering solutions that help in several modest but significant ways. These include:

(a)-(f) [...]

(g) Establishing rules for coordination of relief granted in the enacting State to assist two or more insolvency proceedings involving the same debtor that may take place in multiple States.

27-28. [...]

⁵ Australia (2008), British Virgin Islands (overseas territory of the United Kingdom of Great Britain and Northern Ireland; 2003), Canada (2005), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2002), Serbia (2004), Slovenia (2007), South Africa (2000), Uganda (2011) and United States of America (2005). The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment.

⁶ In States that enact the Model Law as drafted, its terms must be interpreted having regard “to its international origin and to the need to promote uniformity in its application and the observance of good faith” (UNCITRAL Model Law, art. 8).

⁷ Indeed, the UNCITRAL Model Law itself makes it clear that the terms of any relevant treaty or agreement to which an enacting State is a party will take precedence over the terms of the Model Law (art. 3) and paras. 76-78 of the Guide to Enactment and Interpretation.

III. Interpretation and application of the UNCITRAL Model Law

A. The “access” principle

29-34. [...]

35. The UNCITRAL Model Law envisages a “foreign representative” as including one appointed on an “interim basis”, but not one whose appointment has not yet commenced — for example, by virtue of a stay of an order appointing the insolvency representative pending an appeal.⁸ Where there is a change in the status of the foreign representative subsequent to their appointment, that issue would be addressed under article 18, subparagraph (a). One approach to determining whether a “foreign representative” has standing is to consider whether the definition of “foreign proceeding” is met before determining whether the applicant has been authorized⁹ to administer a qualifying reorganization or liquidation of the debtor’s assets or affairs, or to act as a representative of the foreign proceeding.

36. Under that approach, a judge would need to be satisfied that:

(a) The “foreign proceeding” in respect of which recognition is sought is a judicial or administrative proceeding, (including an interim proceeding) in a foreign State;¹⁰

(b)-(e) [...]

37. [...]

B. The “recognition” principle

1. Introductory comment

38-39. [...]

2. Evidential requirements

40. [...]

3. Power to recognize a foreign proceeding

41-45. [...]

⁸ See the definition of “foreign representative” in the UNCITRAL Model Law, art. 2, para. (d). A foreign representative whose appointment had commenced, but whose status might nevertheless be subject to further consideration by the originating court, would be considered to be a foreign representative for the purposes of article 2 (see *Lightsquared*, paras. 19-20). If the foreign representative’s status were to be changed as a result of that further consideration, however, the receiving court would have to review the issue in the light of article 18 of the Model Law.

⁹ For the purposes of the UNCITRAL Model Law, art 2, para. (d).

¹⁰ See the discussion of interim and final orders in *Gerova* (pp. 12 and 18), footnote to para. 54 (b) below.

4. Reciprocity

46. Add “and Uganda” to the footnote to this paragraph.

5. The “public policy” exception

47. The receiving court retains the ability to refuse to take any action covered by the Model Law, including to deny recognition or the relief sought, if to take that action would be “manifestly contrary” to the public policy of the State in which the receiving court is situated. The notion of “public policy” is grounded in domestic law and may differ from State to State. For that reason, there is no uniform definition of “public policy” in the Model Law.

48. 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. In many States, however, the public policy exception is construed as being restricted to fundamental principles of law, in particular constitutional guarantees. In those 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 to do otherwise would contravene those fundamental principles. What is considered to be a fundamental principle is governed by the constitutional and statutory legislation of the receiving State. In *Ephedra*, the inability to have a jury trial in Canada on certain issues to be resolved in the Canadian proceedings, in circumstances in which there was a constitutional right to such a trial in the United States, was held not to be “manifestly contrary to the public policy of the United States”. The United States court held, on appeal, that the term “manifestly contrary to public policy” created a very narrow exception “intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.” It concluded that, notwithstanding the importance in the United States of the constitutional right to a jury trial, the procedures at issue plainly afforded claimants a fair and impartial proceeding (notwithstanding that there was no jury trial) and nothing more was required by the provision of the United States law equivalent to article 6.¹¹

49-51. [...]

51A. Application of the public policy exception has been considered in several cases in addition to *Ephedra*. In *Gold & Honey*, a United States court refused recognition of Israeli proceedings on several grounds, including that of public policy. In that case, after insolvency proceedings had been commenced in the United States and after the automatic stay had come into force, a receivership order was made in Israel in respect of the debtor company. The United States judge declined to recognize that receivership proceeding on the basis that not only was the Israeli receivership not a collective proceeding or one in which the debtor’s assets and affairs were subject to control or supervision by the court, but also that to afford recognition “would reward and legitimize [the] violation of both the automatic stay and [subsequent orders of the court] regarding the stay”.¹² Because recognition “would severely hinder United States bankruptcy courts’ abilities to carry out two of the most fundamental policies and purposes of the automatic stay — namely, preventing one creditor from obtaining an advantage over other creditors, and

¹¹ *Ephedra*, p. 349.

¹² *Gold & Honey*, p. 371.

providing for the efficient and orderly distribution of a debtor's assets to all creditors in accordance with their relative priorities",¹³ the United States judge considered that the high threshold required to establish the public policy exception had been met.

51B. In *Toft*, a United States court declined to grant the foreign representative of German insolvency proceedings the right to intercept the debtor's postal and electronic mail in the United States. The judge considered that such an order would fall within the public policy exception because it exceeded the traditional limits on the powers of a trustee under United States law, constituted relief that was banned by statute in the United States and might subject anyone who carried it out to criminal prosecution. The request for such relief on an ex parte basis was also contrary to United States law. A similar order had been recognized and enforced in England on the basis that (a) the relief granted in Germany did not violate English public policy because, under English law, the court could enter a mail redirection order similar to the one entered in Germany, and (b) there should be no concern about lack of procedural fairness in granting ex parte relief, because the debtor had been able to oppose the mail interception order in the German proceeding, and his challenge had been rejected by the German court.¹⁴

6. "Main" and "non-main" foreign proceedings

52. [...]

7. Review or rescission of recognition order

53. It is possible for the receiving court to review its decision to recognize a foreign proceeding as either "main" or "non-main" where it is demonstrated that the grounds for making a recognition order were "fully or partially lacking or have ceased to exist".¹⁵

54. Examples of circumstances in which modification or termination of an earlier recognition order might be appropriate are:

(a) [...]

(b) [...]. Add the following footnote to the end of the paragraph: "In *Gerova*, certain creditors argued that the foreign proceedings should not be recognized in the United States because the order commencing the foreign proceedings was subject to an appeal. The United States court held that there was nothing in 11 USC § 1517, 1515 [article 17 or article 15, subparagraph 2(a) MLCBI] that required the decision to be final or not subject to an appeal. The court observed that the order of the foreign court was sufficient to permit the foreign representatives to take up their duties and if it were to be reversed on appeal, article 18 would require them to advise the court accordingly (p. 12)."

(c) If the nature of the recognized foreign proceeding has changed, for example, a reorganization proceeding has been converted into a liquidation proceeding or the status of the foreign representative has changed;

¹³ Ibid., p. 372.

¹⁴ Order by the High Court, 16 February 2011.

¹⁵ Ibid., art. 17, para. 4.

(d) [...]

55. [...]

C. The process of recognition

1. Introductory comments

56. [...]

(a) Is a collective judicial or administrative proceeding in a foreign State;

(b)-(c) [...]

57-58. [...]

59. The critical question, in determining whether a foreign proceeding (in respect of a corporate debtor) should be characterized as “main” is whether it is taking place “in the State where the debtor has the centre of its main interests”.¹⁶ In the case of a natural person, the “centre of main interests” is presumed to be the person’s “habitual residence”. In *Re Stojevic*¹⁷ the English court found that, essentially, a man’s habitual residence was his settled, permanent home, the place where he lived with his wife and family until the younger members of the family grew up and left home and the place to which he returned from business trips elsewhere or abroad. It also noted that a man might have another residence, called an ordinary residence, which was a place where he lived and which was not his settled, permanent home and the place where he lived when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man might well live away from his settled, permanent home for a greater number of days in any given year than he spent there with his wife and family. In *Williams v Simpson (No. 5)*, the New Zealand court held that a finding on location of the habitual residence would largely be based on the facts of each case. It noted that consideration would be given to factors like “settled purpose, the actual and intended length of stay in a State, the purpose of the stay, the strength of ties to the State and any other State (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration.”¹⁸ Although the debtor had carried on business in England, sometimes lived in England and held both United Kingdom and New Zealand passports, the court found the evidence was insufficient to rebut the presumption and the debtor’s habitual residence was in New Zealand.

60-63. [...]

64. A number of the decided cases that considered the meaning of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding” have involved members of enterprise groups. For the purposes of the Model Law, the focus is on individual entities and therefore on each and every member of an

¹⁶ See the discussion in paras. 75-110 below.

¹⁷ [2007] BPIR 141, para. 58 and following.

¹⁸ Para. 42, citing *Basingstoke v Groot* [2007] NZFLR 363 (CA).

enterprise group as a distinct legal entity.¹⁹ It may be that the centre of main interests of each individual group member is found to lie in the same jurisdiction, in which case the insolvency of those group members can be conducted in a single jurisdiction, but there is no scope for addressing the centre of main interests of the enterprise group as such under the Model Law.

65. [...]

2. Elements of the definition of “foreign proceeding”

65A. The following paragraphs discuss the various characteristics required of a “foreign proceeding” under article 2. Although discussed separately, these characteristics are cumulative and article 2, subparagraph (a) should be considered as a whole. Whether a foreign proceeding possesses or possessed those characteristics would be considered at the time the application for recognition is considered.

(a) “Collective judicial or administrative proceeding”

66. The UNCITRAL Model Law was intended to apply only to particular types of insolvency proceedings. Revisions to the Guide to Enactment and Interpretation indicate that the notion of a “collective” insolvency proceeding is based on the desirability of achieving a coordinated, global solution for all stakeholders of an insolvency proceeding. It is not intended that the Model Law be used merely as a collection device for a particular creditor or group of creditors who might have initiated a collection proceeding in another State, nor as a tool for gathering up assets in a winding up²⁰ or conservation proceeding that does not also include provision for addressing the claims of creditors. The Model Law may be an appropriate tool for certain kinds of actions that serve a regulatory purpose, such as receiverships for such publicly regulated entities as insurance companies or brokerage firms, provided the proceeding is collective as that term is used in the Model Law. If a proceeding is collective it must also satisfy the other elements of the definition, including that it be for the purpose of liquidation or reorganization (see below, paras. ...).

66A. In evaluating whether a given proceeding is collective for the purpose of the Model Law, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors. However, a proceeding should not be considered to fail the test of collectivity purely because a particular class of creditors’ rights is unaffected by it. An example would be insolvency proceedings that exclude encumbered assets from the insolvency estate, leaving those assets unaffected by the commencement of the proceedings and allowing secured creditors to pursue their rights outside of the insolvency law. Examples of the manner in which a collective proceeding for the purposes of article 2 might deal with creditors include providing creditors that are adversely affected by the proceeding with a right (though not necessarily the

¹⁹ This point is emphasized by the Canadian court in *Lightsquared*, para. 29; see also *Eurofood*, para. 37 (decided under the EC Regulation).

²⁰ “Winding up” is a procedure in which the existence of a corporation and its business are brought to an end.

obligation): to submit claims for determination; to receive an equitable distribution or satisfaction of their claims; to participate in the proceedings; and to receive notice of the proceedings in order to facilitate that participation.²¹

67-69. [...]

70. In another case, *Stanford International Bank*, a receivership order made by a court in the United States was held by a court in England not to be a collective proceeding pursuant to an insolvency law. The receiving court held that the order was made after an intervention by the Securities Exchange Commission of the United States “to prevent a massive ongoing fraud”. The purpose of the order was to prevent detriment to investors, rather than to reorganize the corporation or to realize assets for the benefit of all creditors.²² That view was upheld on appeal, largely for the reasons given by the English lower court.²³ In a further decision concerning *Stanford International Bank*, a United States appeal court noted the language in other United States court opinions that had contrasted a collective proceeding to a receivership and found a receivership not to be a collective proceeding²⁴ on the basis that it was a remedy instigated at the request and for the benefit of a single secured creditor. The United States court went on to find that the receivership in *Stanford* was not that type of receivership, it being instituted “at the request of the Securities and Exchange Commission for the benefit of all Stanford Entities’ investor-victims and creditors”. The court concluded that although the case before it did not require it to decide the question, it would nevertheless find the receivership to be a collective proceeding.²⁵

70A. In *ABC Learning Centres*, the United States court considered that various provisions of Australian law indicated the collective nature of the liquidation proceedings that were the subject of the application for recognition. Those provisions included the duty of the liquidator to consider the rights of the creditors in distributing the assets of the debtor; that subject to priorities etc. debts and claims ranked equally and were to be paid pro rata; that adequate notice was to be given to all creditors with respect to the insolvency proceedings and related creditors’ meetings; that the decision to commence those proceedings was backed by the majority of creditors both in number and in amount of debt; that the creditors’ committee set up as required by Australian law had included representatives of various types of creditors; and that creditors had the right to seek court review. The receivership proceedings that were taking place concurrently with the liquidation proceedings, a situation contemplated under Australian law, were agreed not to be

²¹ In *Ashapura Minechem*, the United States court considered that although the Indian legislation under which the foreign proceeding had commenced did not include a formal mechanism for participation by unsecured creditors, in practice those creditors were given a voice (at the discretion of the Board for Industrial and Financial Reconstruction that administered the legislation), they could receive distributions under an arrangement with creditors and had the ability to appeal adverse determinations made by the Board and have those appeals heard in the Indian judicial system. The court concluded that the availability of appellate review and the ability of creditors to participate before the Board demonstrated that the proceedings were collective (pp. 5-6).

²² *Stanford International Bank*, paras. 73 and 84.

²³ *Stanford International Bank* (on appeal), paras. 26-27.

²⁴ These cases are cited in *Betcorp*, p. 281.

²⁵ *Stanford International Bank*, District Court, Northern District of Texas, 2012, p. 19, footnote 20.

collective proceedings as they were, by design, for the benefit of the secured creditors that had commenced that action.²⁶

(b) “Pursuant to a law relating to insolvency”

70B. The Model Law includes the requirement that the foreign proceeding be “pursuant to a law relating to insolvency” to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but that nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained²⁷ and irrespective of whether the law that contained the rules related exclusively to insolvency.

70C. This aspect of article 2, subparagraph (a) has been considered by the courts in several cases concerning voluntary liquidation proceedings. In *Stanford International Bank*, the English court at first instance concluded that the liquidation of an Antiguan company, ordered by the Antiguan court on the basis that it was just and equitable to do so, was “pursuant to a law relating to insolvency”. Although the ground for liquidation was confined to regulatory misbehaviour under the applicable legislation, the insolvency of the company was a factor relevant to the Antiguan court’s discretion to make the order. That decision was upheld on appeal, the English appellate court observing that since the Antiguan law provided for liquidation of corporations on just and equitable grounds, which included insolvency, as well as infringements of regulatory requirements, it could be characterized as “pursuant to a law relating to insolvency”. In *Betcorp*, the United States court held that a voluntary liquidation commenced under Australian law was “pursuant to a law relating to insolvency” because when the nature of the relevant legislation (the Corporations Act) was considered as a whole, it was a law that regulated the whole life-cycle of an Australian corporation, including its insolvency. That decision was followed by the United States court in *ABC Learning Centres*, which also concerned an Australian creditors’ voluntary liquidation conducted under the same law.

70D. In *Chow Cho Poon*, an Australian court considered whether a judicial liquidation, ordered by a court in Singapore on the ground that it was just and equitable to do so, was a proceeding “pursuant to a law relating to insolvency”. The court considered the decisions in *Stanford International Bank*, *Betcorp* and *ABC Learning Centres* and concluded that those decisions pointed to a clear basis on which provisions concerning such liquidations might be classified as “a law relating to insolvency”. Accordingly, even though the particular liquidation was ordered on the just and equitable ground alone and apparently without any finding, express or implied, of insolvency, it could be said to be made “pursuant to a law relating to insolvency”.

70E. Following consideration and discussion of this issue in the Working Group and the Commission, revisions to the Guide to Enactment and Interpretation of the Model Law take a different approach to the decisions cited above, clarifying that a

²⁶ *ABC Learning Centres*, at IV.1.c.

²⁷ United Nations document A/CN.9/422, para. 49, available at www.uncitral.org/uncitral/en/commission/sessions/29th.html.

simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or severe financial distress for the purposes of article 2, subparagraph (a). Where a type of proceeding serves several purposes, including the winding up of a solvent entity, it falls under article 2 subparagraph (a) of the Model Law only if the debtor is insolvent or in severe financial distress.

(c) “Subject to control or supervision by a foreign court”

71. No distinction is drawn, in the definition of “foreign court”,²⁸ between a reorganization and liquidation proceeding controlled or supervised by a judicial body or by an administrative body. That approach was taken to ensure that those legal systems in which control or supervision was undertaken by non-judicial authorities would still fall within the definition of “foreign proceeding”.²⁹

71A. The Model Law specifies neither the level of control or supervision required to satisfy this aspect of the definition nor the time at which that control or supervision should arise. Revisions to the Guide to Enactment and Interpretation indicate that although it is intended that the control or supervision required under subparagraph (a) should be formal in nature, it may be potential rather than actual. A proceeding in which the debtor retains some measure of control over its assets, albeit under court supervision, such as a debtor-in-possession, would satisfy this requirement. Control or supervision may be exercised not only directly by the court, but also by an insolvency representative where, for example, the insolvency representative is subject to control or supervision by the court. Mere supervision of an insolvency representative by a licensing authority would not be sufficient.

71B. Proceedings in which the court exercises control or supervision at a late stage of the insolvency process or in which the court has exercised control or supervision, but at the time of the application for recognition is no longer required to do so, should not be excluded. An example of the latter might be cases where a reorganization plan has been approved and although the court has no continuing function with respect to its implementation, the proceedings nevertheless remain open or pending and the court retains jurisdiction until implementation is completed.

71C. Subparagraph (a) of article 2 makes it clear that both assets and affairs of the debtor should be subject to control or supervision; it would not be sufficient if only one or the other were covered by the foreign proceeding.³⁰

72. The concept of “control or supervision” has received limited judicial attention to date.

73. [deleted]

²⁸ UNCITRAL Model Law, art. 2, para. (e).

²⁹ Guide to Enactment and Interpretation, para. 74. In *Ashapura Minechem*, for example, the Indian proceeding recognized in the United States was pending before the Board for Industrial and Financial Reconstruction, an administrative agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions Act, 1985). In *Tradex Swiss AG* (384 BR 34 at 42 (2008)) [CLOUT case no. 791], the Swiss Federal Banking Commission was held to be a “foreign court” because it controlled and supervised liquidation of entities in the brokerage trade.

³⁰ *Gold & Honey*, p. 371.

74. The court in *Betcorp* held that the voluntary liquidation proceeding in Australia was subject to supervision by a judicial authority: the Australian courts. That view was based on three factors: (a) the ability of liquidators and creditors in a voluntary liquidation to seek court determination of any question arising in the liquidation; (b) the general supervisory jurisdiction of Australian courts over actions of liquidators; and (c) the ability of any person “aggrieved by any act, omission or decision” of a liquidator to appeal to an Australian court, which could “confirm, reverse or modify the act or decision or remedy the omission, as the case may be”.³¹

74A. In the later case of *ABC Learning Centres*, the application for recognition of foreign proceedings commenced in Australia was opposed on several grounds, including that the foreign insolvency proceeding was not controlled or supervised by a foreign court. However, the United States court found, based upon the factors outlined in *Betcorp* that, notwithstanding that Australian courts do not direct the day-to-day operations of the debtor and that most liquidators proceed with their duties largely without court involvement, the relevant law gave the Australian court various control and supervisory roles with respect to liquidation proceedings that satisfied the requirements of article 2, subparagraph (a).³²

(d) “For the purpose of liquidation or reorganization”

74B. Some types of proceeding that may satisfy certain elements of the definition of foreign proceeding may nevertheless be ineligible for recognition because they are not for the stated purpose of reorganization or liquidation. They may take various forms, including proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganize the insolvency estate; proceedings designed to prevent detriment to investors rather than to all creditors (in which case the proceeding is also likely not to be a collective proceeding); or proceedings in which the powers conferred and the duties imposed upon the foreign representative are more limited than the powers or duties typically associated with liquidation or reorganization, for example, the power to do no more than preserve assets.

74C. Types of procedures that might not be eligible for recognition could include financial adjustment measures or arrangements undertaken between the debtor and some of its creditors on a purely contractual basis concerning some debt where the negotiations do not lead to the commencement of an insolvency proceeding conducted under the insolvency law.³³ Such measures would generally not satisfy the requirement for collectivity nor for control or supervision by the court (see paras. 71-74 above).

3. The main proceeding: centre of main interests

(a) Introductory comments

75-76. [...]

³¹ *Betcorp*, pp. 283-284.

³² *ABC Learning Centres*, [citation to be completed].

³³ Such contractual arrangements would remain enforceable outside the Model Law without the need for recognition; nothing in the Model Law or Guide to Enactment and Interpretation is intended to restrict such enforceability.

77. Delete the words “In contrast to the UNCITRAL Model Law provision,” at the beginning of the third sentence.

78-80. [...]

(b) Court decisions interpreting “centre of main interests”

81. There have been a number of court decisions which consider the meaning of the phrase “centre of main interests”, either in the context of the EC Regulation or domestic laws based on the UNCITRAL Model Law and which identify the factors relevant to rebutting the presumption in article 16, paragraph 3 of the Model Law as it relates to corporate debtors and to individuals. A number of subtle differences in approach have emerged, and it might be noted that courts in some jurisdictions might seek evidence of a greater quality or quantity to rebut the presumption than is the case in other States.³⁴

82-85. [...]

86. *Eurofood* places significant weight on the need for predictability in determining the centre of main interests of a debtor. In the subsequent case of *Interdil*, the ECJ held that the second sentence of article 3 must be interpreted to mean that “a debtor company’s main centre of interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties.” When management, including the making of management decisions, and supervision of a company takes place in the same location as the registered office, in a manner that is ascertainable by third parties, the presumption cannot be rebutted. However, where a company’s central administration is not in the same place as its registered office, a comprehensive assessment of all the relevant factors must be undertaken in order to establish, in a manner that is ascertainable by third parties, the location of the company’s actual centre of management and supervision and of the management of its interests. In that particular case, the court held that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated could not be regarded as sufficient factors to rebut the presumption, unless the comprehensive assessment of all relevant factors pointed to that other Member State.”³⁵

87. [moved to the footnote to para. 81]

88. [deleted]

89. In *Bear Stearns*, the United States court considered the question of determination of the centre of main interests of a debtor. The application for

³⁴ For example, under Chapter 15 of the United States Bankruptcy Code (the chapter enacting the UNCITRAL Model Law), the wording of the presumption was changed from “proof” to the contrary to “evidence” to the contrary (Section 1516 (c) provides: “In the absence of evidence to the contrary the debtor’s registered office ... is presumed to be the centre of the debtor’s main interests.”). The legislative history behind that change suggests it was one reflecting terminology, namely that the way in which the word “evidence” is used in the United States may more closely reflect the term “proof” as used in some other English-speaking States. Decisions of United States courts must be read in that context.

³⁵ *Interdil*, para. 59.

recognition involved a company registered in the Cayman Islands which had been placed into provisional liquidation in that jurisdiction.

90. The court identified the rationale for the change made to the presumption by the United States legislation, i.e. replacing “proof” with “evidence”.³⁶ The judge said, by reference to the legislative history of the provision:

“The presumption that the place of the registered office is also the centre of the debtor’s main interest is included for speed and convenience of proof where there is no serious controversy.”³⁷

91-92. [...]

93. Add the following sentence to the footnote: “The decision was affirmed on appeal to the District Court [2011 WL 4357421 (SDNY, 16 Sept. 2012)] and is now on further appeal.”

94. The decision in *Bear Stearns* was appealed, on the ground that the judgement did not “accede” to principles of comity and cooperation and on the ground of an asserted erroneous interpretation of the presumption by the judge. On appeal, the appellate judge had no difficulty in holding that principles of comity had been overtaken by the concept of recognition. The appellate judge held that “recognition” ought to be distinguished from “relief”.

95. The appellate court affirmed the lower court’s decision that the burden lay on a foreign representative to rebut the presumption and that the court had a duty to determine independently whether that had been done, irrespective of whether party opposition was or was not present.³⁸

96. [...]

97. Sentences 1-3 [...]; sentences 4-7 dealing with timing have been moved to paragraph 102L.

98. Further decisions are those of the English courts at first instance and on appeal in *Stanford International Bank*. That case involved an application for recognition in England of a proceeding commenced in Antigua and Barbuda. It considered whether a “head office functions” test, articulated in earlier decisions by English courts, was still good law, having regard to *Eurofood*.

99-101. [...]

102. Add the following sentence to the end of the paragraph: “Subsequent cases under the Model Law have confirmed the requirement of ascertainability.”³⁹

(c) Revisions to the Guide to Enactment and Interpretation

102A. Revisions to the Guide to Enactment and Interpretation of the Model Law [adopted by the Commission in 2013] respond to uncertainty and unpredictability that have arisen with respect to interpretation of the concept of centre of main

³⁶ See footnote to para. 81.

³⁷ [Citation to be completed.]

³⁸ *Bear Stearns* (on appeal), p. 335.

³⁹ *Lightsquared, Massachusetts Elephant & Castle; Millennium Global; Ackers v Saad* ([2010] FCA 221); *Gerova*.

interests. The revised Guide notes (paras. 123-123E) that where the debtor's centre of main interests coincides with its place of registration, no issue concerning rebuttal of the presumption in article 16, paragraph 3 of the Model Law will arise. In reality, however, the debtor's centre of main interests may not coincide with its place of registration and the party alleging that it is not at that place will be required to satisfy the court as to its location. The court of the receiving State will be required to consider independently where the debtor's centre of main interests is located and whether the requirements of the Model Law are met. It may in some cases be assisted in that task by information included in the order of the originating court as to the nature of the foreign proceeding,⁴⁰ although that order clearly is not binding on the receiving court. In those cases where the debtor's centre of main interests does not coincide with its place of registration, the centre of main interests will be identified by factors that indicate to those who deal with the debtor (especially creditors) where it is located.

102B. The revisions to the Guide propose that the following principal factors, considered as a whole, will tend to indicate whether the location in which the foreign proceeding has commenced is the debtor's centre of main interests. The factors are the location: (a) where the central administration of the debtor takes place, and (b) which is readily ascertainable by creditors.

102C. When these principal factors do not yield a ready answer regarding the debtor's centre of main interests, a number of additional factors concerning the debtor's business may be considered. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the endeavour is an holistic one, designed to determine that the location of the foreign proceeding in fact corresponds to the actual location of the debtor's centre of main interests, which is readily ascertainable by creditors.

102D. The additional factors may include the following: the location of the debtor's books and records; the location where financing was organized or authorized, or from where the cash management system was run; the location in which the debtor's principal assets or operations are found; the location of the debtor's primary bank; the location of employees; the location in which commercial policy was determined; the site of the controlling law or the law governing the main contracts of the company; the location from which purchasing and sales policy, staff, accounts payable and computer systems were managed; the location from which contracts (for supply) were organized; the location from which reorganization of the debtor was being conducted; the jurisdiction whose law would apply to most disputes; the location in which the debtor was subject to supervision or regulation; and the location whose law governed the preparation and audit of accounts and in which they were prepared and audited.

⁴⁰ As an example, the Canadian court in *Cinram International* outlined the factors that the applicants had submitted indicated that the location of the debtors' centre of main interests was Canada. The court indicated that it had included that outline with respect to the centre of main interests "for informational purposes only. This court clearly recognizes that it is the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the centre of main interests and to determine whether this CCAA proceeding is a 'foreign main proceeding' for the purposes of Chapter 15" (para. 42).

102E. The Guide indicates that the order in which the additional factors are set out is not intended to indicate the priority or weight to be accorded to them, nor it is intended to be an exhaustive list of relevant factors; other factors might be considered by the court as applicable in a given case.

102F. Several cases decided during the revision of the Guide to Enactment and Interpretation considered the factors determining centre of main interests and adopted the approach of focusing upon a few principal factors. In *Massachusetts Elephant & Castle*, the Canadian court considered three principal factors — that the location was one (a) where the debtor’s principal assets or operations are found; (b) where the management of the debtor took place; and (c) that was readily ascertainable by a significant number of creditors as the debtor’s centre of main interests, noting that while other factors might also be considered relevant, they should perhaps be considered to be of secondary importance and only to the extent that they supported these three factors.⁴¹ Those factors were followed in *Lightsquared*,⁴² where the Canadian judge also observed that while in most cases these principal factors will all point to a single jurisdiction as the centre of main interests, there may be some instances where there will be conflicts among the factors that would require a more careful review of the facts. The court may need to give greater or less weight to a given factor, depending on the circumstances of the particular case. In all cases, however, the judge said, the review is designed to determine that the location of the proceeding, in fact, corresponds to where the debtor’s true seat or principal place of business actually is, consistent with the expectations of those who dealt with the enterprise prior to commencement of the proceedings.

102G. In *Think3*,⁴³ the Japanese court was required to determine whether the foreign main proceeding was a proceeding commenced in the United States or one commenced in Italy. At both first instance and on appeal, the courts considered the factors being discussed in the course of the revision of the Guide to Enactment and Interpretation and also whether the location of the headquarter function or nerve centre of the debtor was an element of the factors to be considered.

(d) Movement of centre of main interests

102H. A debtor’s centre of main interests may move prior to commencement of insolvency proceedings, in some instances in close proximity to commencement and even between the time of the application for commencement and the actual commencement of those proceedings.⁴⁴ Whenever there is evidence of such a move

⁴¹ *Massachusetts Elephant & Castle*, para. 30.

⁴² *Lightsquared*, paras. 25-26.

⁴³ In the Japanese legislation enacting the Model Law, the phrase “principal place of business” is used rather than “centre of main interests” and there is no presumption with respect to registered office that is equivalent to article 16, paragraph 3 of the Model Law. As the court at first instance explains in *Think3*, however, principal place of business is considered to have substantively the same meaning in the Japanese legislation as “centre of main interests” and judicial precedents in other countries regarding centre of main interests and the trend of discussion in UNCITRAL are to be considered and examined [chapter 3, issue 2-2(2), p. 19].

⁴⁴ In some examples, the move was intended to give the debtor access to an insolvency process, such as reorganization, that more closely met its needs than what was available under the law of its former centre of main interests. In other examples, the move of the centre of main interests may have been designed to thwart the legitimate expectations of creditors and third parties.

in close proximity to the commencement of the foreign proceeding, it may be desirable for the receiving court, in determining whether to recognize those proceedings, to consider the factors identified in paragraphs 102B and D above more carefully and to take account of the debtor's circumstances more broadly. In particular, the test that the centre of main interests is readily ascertainable to third parties may be harder to meet if the move of the centre of main interests occurs in close proximity to the opening of proceedings.

102I. In *Interdil*, the ECJ considered the impact of the move of the debtor's registered office before commencement of the insolvency proceedings. It held that where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the company's centre of main activities is presumed to be the place of the new registered office.⁴⁵

102J. It is unlikely that a debtor could move its place of registration (or habitual residence) after the commencement of insolvency proceedings, since many insolvency laws contain specific provisions preventing such a move. In any event, if this were to occur, it should not affect the decision as to centre of main interests for the purposes of the Model Law, since the time relevant to that determination is the date of commencement of the foreign proceeding, as discussed below in paragraph 102O.

(e) Date at which to determine centre of main interests

102K. The Model Law does not expressly indicate the date by reference to which the centre of main interests (or establishment) should be determined, other than to provide in article 17, subparagraph 2(a) that the foreign proceeding is to be recognized as a main proceeding "if it is taking place in the State where the debtor has the centre of its main interests." The use of the present tense in article 17 requires the foreign proceeding to be current or pending at the time of the recognition decision; if the proceeding for which recognition is sought is no longer current or pending in the originating State, there is no proceeding eligible for recognition under the Model Law.

102L. There has been some judicial consideration of the question of timing. In *Betcorp*, for example, the judge held that the time at which the centre of main interests should be determined was the time at which the application for recognition was made.⁴⁶ That interpretation seems to arise from the tense in which the definition of "foreign main proceeding" is expressed: "means a foreign proceeding taking place in the State where the debtor has the centre of its main interests". A similar problem arises in relation to the place of an "establishment" under the definition of "foreign non-main proceeding": "means a foreign proceeding ... taking place in a State where the debtor has an establishment". The approach in *Betcorp* was followed in *In Re Ran (Fifth Circuit)* and *British American Insurance*.

102M. In more recent cases, courts have held that the relevant date for determining centre of main interests is the date on which the foreign proceeding commenced. In *Millennium Global*, the United States judge at first instance observed that recognition proceedings are ancillary to the foreign proceeding and that the date of

⁴⁵ *Interdil*, para. 59.

⁴⁶ *Betcorp*, p. 292.

the application for recognition is mere happenstance and may take place at any time, even some years, after the commencement of the foreign proceeding. Moreover, if centre of main interests is viewed as equivalent to a debtor's principal place of business, an interpretation used by a number of courts, centre of main interests must refer to the debtor's business before commencement of the foreign proceeding, since after commencement, particularly of liquidation proceedings, the business typically ceases and there is no place of business.⁴⁷ This decision was followed in *Gerova*, the United States judge observing that at the date of the application for recognition, the debtor had no business activities or connections with Bermuda, only the activities of the liquidator winding up the business.⁴⁸ The date of the filing of the application for commencement of the foreign proceeding or the commencement of that proceeding was also followed by the Japanese court at first instance in *Think3* and affirmed on appeal.⁴⁹ The Japanese court at first instance observed that if the timing of the determination was to be governed by the date of the application for recognition, then in cases where there were multiple applications for recognition of the same foreign proceeding in different countries, the timing of the determination would end up being different in each of those countries and would lead to a lack of unification, with different results in different courts. Moreover, the court said, use of the date of the application for recognition might encourage an arbitrary choice of the time to apply for recognition.

102N. In *Interedil*, decided under the EC Regulation, the ECJ held that it is the location of the debtor's centre of main interests at the date on which the request to open insolvency proceedings was lodged that is relevant for determining the court having jurisdiction.

102O. Revisions to the Guide to Enactment and Interpretation indicate that having regard to the evidence required to accompany the application for recognition under article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, the date of commencement of the foreign proceeding is the appropriate date for determining the location of debtor's centre of main interests. The choice of that date provides a test that can be applied with certainty to all insolvency proceedings. It also addresses issues that may arise where the business activity of the debtor has ceased at the time of the application for recognition,⁵⁰ where, as may occur in cases of reorganization, it is not the debtor entity that continues to have a centre of main interests, but rather the reorganizing entity, as well as circumstances where there is a change of residence

⁴⁷ *Millennium Global*, pp. 12-19; the issue of the date at which to determine centre of main interests and establishment was not considered by the appeal court.

⁴⁸ *Gerova*, p. 10.

⁴⁹ High Court, chapter 3-2, p. 6; District Court, chapter 3, issue 2-1, pp. 12-14.

⁵⁰ In *Fairfield Sentry*, the United States court noted that the debtor had effectively ceased doing business some time before the commencement of liquidation proceedings and before the application for recognition and that its activities had for an extended period of time been conducted only in connection with the liquidation of its business. The judge found that it was appropriate to take that extended period into account in determining the debtor's centre of main interests (p. 64). In *British American Insurance*, the court found that the debtor's centre of main interests may become lodged with the foreign representative where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to that location (or brings that business to a halt), thereby causing creditors and other parties to look to the [foreign representative] as the location of the debtor's business, (p. 914).

between the commencement of the foreign proceeding and the application for recognition under the Model Law.

103-107. [*deleted*]

(f) Abuse of process

108. On a recognition application, ought the court to be able to take account of abuse of its processes as a ground to decline recognition? There is nothing in the UNCITRAL Model Law itself which suggests that extraneous circumstances should be taken into account on a recognition application. The Model Law envisages the application being determined by reference to the specific criteria set out in the definitions of “foreign proceeding”, “foreign main proceeding” and “foreign non-main proceeding”. Since what constitutes abuse of process depends upon domestic law or procedural rules, the Model Law does not explicitly prevent receiving courts from applying domestic law, particularly procedural rules, to respond to a perceived abuse of process.

109. [*deleted*]

110. [*moved to article 6 — para. 51A*]

4. Non-main proceedings: “establishment”

(a) Introductory comments

111-113. [...]

(b) Court decisions on interpretation of “establishment”

114. [...]

115. It may be that more emphasis should be given to the words “with human means and goods and services” in the definition of “establishment”. A business operation, run by human beings and involving goods or services, seems to be implicit in the type of local business activity that will be sufficient to meet the definition of the term “establishment”. In *Interedil*, decided under the EC Regulation, the ECJ observed that the fact that the definition links the pursuit of an economic activity to the presence of human resources shows that a minimum level of organization and a degree of stability are required. It follows that, conversely, the presence alone of goods in isolation or bank accounts does not, in principle, satisfy the requirements for classification as an “establishment”.

116. Add the following sentence to the end of the paragraph: “In *Williams v Simpson (No. 5)*, the difficulty in that case was that while, under English law, the winding up of a business in the United Kingdom (by paying debts) constituted a ground on which the debtor could be subject to the insolvency laws of England, it did not amount to an ‘establishment’ in the context of person who had been retired for some 12 years and had no (actual) existing business in that country.”

(c) Date at which to determine the existence of an establishment

116A. As noted above, the Model Law does not expressly indicate the relevant date for determining the centre of main interests of the debtor. The same is true with respect to determining the existence of an establishment. Revisions to the Guide to

Enactment and Interpretation suggest that the date of commencement of the foreign proceeding is the appropriate date for determining the existence of an establishment for the debtor.

D. Relief

1. Introductory comments

117-120. [...]

121. Consideration of a particular statute enacting the Model Law is required in order to determine whether any type of relief (automatic or discretionary) envisaged by the Model Law has been removed or modified in the enacting State.⁵¹ Once available relief has been identified, it is up to the receiving court, in addition to automatic relief flowing from a recognized “main” proceeding, to craft any appropriate relief required. The decision in *Bear Stearns* that the question of relief should be clearly distinguished from the question of recognition was followed in *Atlas Shipping*, in which the United States court held that, once a court had recognized a foreign main proceeding, Chapter 15 of the United States Bankruptcy Code specifically contemplated that the court would exercise its discretion to fashion appropriate post-recognition relief consistent with the principles of comity.⁵² It was also followed in *Metcalfe & Mansfield*, in which a United States court was asked to enforce certain orders for relief issued by a Canadian court, orders that were broader than would have been permitted under United States law. The court noted that principles of comity did not require the relief granted in the foreign proceedings and the relief available in the United States to be identical. The key determination was whether the procedures used in the foreign proceeding met the fundamental standards of fairness in the United States; the court held that the Canadian procedures met that test.⁵³

2. Interim relief⁵⁴

122-124. [...]

125. Add the following sentences to the footnote: “In the same case, a second application was made for interim relief to allow the examination of certain persons in order to determine issues of ownership of the items that had been seized pursuant to the search warrant. The court refused to grant the application on the grounds that the relief sought was not urgent as required under article 19, paragraph 1 of the Model Law. It held that since the assets whose ownership was in question had already been seized and the issue of ownership would become relevant after the

⁵¹ States that have enacted legislation based on the Model Law have taken different approaches. For example, in the United States, the scope of the automatic stay is wider (to conform to chapter 11 of its Bankruptcy Code). In Mexico the stay does not operate to prevent the pursuit of individual actions, as opposed to enforcement. Japan and the Republic of Korea provide that the relief available upon recognition is subject to the discretion of the court on a case-by-case basis, rather than applying automatically as provided by the Model Law.

⁵² *Atlas Shipping*, p. 78.

⁵³ *Metcalfe & Mansfield*, pp. 697-698.

⁵⁴ The summary that follows is based substantially on the Guide to Enactment and Interpretation, paras. 135-140.

determination on recognition of the foreign proceedings, the order was not necessary.”

126-129. [...]

129A. Several cases have considered issues relating to adequate protection of creditors. In *Sivec*, the debtor obtained recognition of an Italian reorganization proceeding as a foreign main proceeding and modification of the automatic stay to permit litigation in the United States of two potentially offsetting claims. This litigation resulted in a United States creditor seeking relief from the stay to permit set-off of the two judgements. The Italian debtor requested enforcement of the Italian proceedings, which would apparently result in the United States creditor being unable to set-off the two judgements. The United States court determined that it would not accord comity to the Italian proceedings, as the Italian debtor “had failed to provide information regarding Italian law, the status of the Italian bankruptcy case or meet its burden of proof in requesting comity.” The court expressed particular concern about lack of notice to the United States creditor, found that basic elements of due process were lacking and that there was a failure to provide protection of a United States creditor’s interests.⁵⁵

129B. In *SNP Boat Service*, the concept of “sufficient protection” was interpreted more narrowly. In that case, a Canadian creditor objected to the debtor in a French insolvency proceeding seeking to repatriate assets in the United States to France on the basis that it would not receive “sufficient protection” of its interests in the French proceeding. On appeal, the United States court distinguished between relief under article 21, paragraph 2 and article 22, paragraph 1 of the Model Law, the latter providing more generally that the court may grant relief under articles 19 and 21 only if “the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.”⁵⁶ Although the objecting creditor was Canadian, the court held that it was not precluded from satisfying itself that the interests of foreign creditors in general were sufficiently protected before remitting property to the foreign jurisdiction, but rejected the idea that it could inquire into the individual treatment the particular creditor would receive in France.⁵⁷

3. Automatic relief upon recognition of a main proceeding⁵⁸

130-133. [...]

134. [...] Add the following footnote to the paragraph: “In *JSC BTA Bank* [434 BR 334 (Bankr. S.D.N.Y. 2010)], the United States court held that the scope of

⁵⁵ *Sivec*, p. 324-326.

⁵⁶ *SNP Boat Service*, p. 11.

⁵⁷ In a further United States case, *In re Lee*, [472 B.R. 156 (Bankr. D. Mass. 2012)] the foreign representative of Hong Kong-based debtors applied to take possession and control of property owned by the debtor in the United States, testifying that he had a duty under Hong Kong law to take possession of the property interests and that he was a rational actor, with a duty to protect and maximize the value of the property and to respect applicable transfer restrictions. The United States court concluded that the foreign representative had satisfied the burden of proof that creditors and the debtor would be sufficiently protected if the order for possession were granted, and that the debtors had not met their “ultimate burden of establishing the absence of sufficient protection.”

⁵⁸ The summary that follows is based substantially on the Guide to Enactment and Interpretation, paras. 141-153.

the automatic stay [applicable under the Bankruptcy Code] was limited to proceedings that could have an impact on the property of a debtor located in the United States. An arbitration conducted in Switzerland after the commencement of the Chapter 15 proceedings did not violate that automatic stay where the law of the debtor's centre of main interests did not stay the arbitration and the debtor had apparently participated in it without objection. Similarly, the automatic stay did not apply to actions for purely post-recognition breaches of contract by a foreign debtor or related non-debtors."

135. [...]

136. [...] Add the following footnote: "United States law, for example, includes an exception for governmental units acting in a regulatory or police capacity. In the case of *In re Nortel Networks Corp.*, [669 F.3d 128 (3d Cir. 2011)], the United Kingdom pension regulator sought to commence a proceeding regarding a funding shortfall for Nortel's United Kingdom pension fund and gave notice under United Kingdom law to Nortel's subsidiaries in the United States and Canada, all of which were involved in plenary and concurrent bankruptcy cases. The United States courts held that since the United Kingdom pension regulator was acting as a trustee on behalf of private creditors for a pecuniary purpose and not as a regulator protecting the public safety or welfare, the action proposed by the regulator would violate the automatic stay."

137. [...]

4. Post-recognition relief⁵⁹

(a) The provisions of the Model Law

138-143. [...]

144. Add a cross-reference at the end of the first sentence to paras. 129-129C above.

145. [...]

146. On a second appeal, the Supreme Court overturned the decision of the Court of Appeal and held that the judgements were subject to the ordinary private international law rules preventing enforcement because the defendants were not subject to the jurisdiction of the foreign court.⁶⁰ The court also held that there was nothing in the Model Law that suggests it would apply to recognition and enforcement of foreign judgements against third parties.

(b) Approaches to questions of discretionary relief

147-149. [...]

⁵⁹ The present summary is taken substantially from the Guide to Enactment and Interpretation, paras. 154-160.

⁶⁰ The decision of the United Kingdom Supreme Court in *Rubin* was conjoined with an appeal in the case of *New Cap Reinsurance Corp Ltd & Anor V Grant and others* [2012] UKSC 46. In that case, the Supreme Court held that the foreign judgement could be enforced because New Cap had submitted to jurisdiction by filing proofs of debt in the foreign insolvency proceedings.

149A. Another example is provided by *In re Vitro*, in which the United States appeal court outlined an approach for analysing requests for relief under articles 7 and 21 that required a court to first determine whether relief requested by a foreign representative fell into one of the enumerated categories of article 21. If not, the court should decide whether the relief could be considered “appropriate relief” under article 21, paragraph 1, which entailed consideration of whether the requested relief had previously been granted under the law applicable before the enactment of Chapter 15 and whether it would otherwise be available under United States law. Third, if the requested relief went beyond the relief available under the previous law or currently available under United States law, article 7 functioned as a “catch-all” that included forms of relief “more extraordinary” than those permitted under either the specific or the general provisions of article 21.⁶¹ The court reasoned that such a framework would prevent courts from subjecting relief under article 7 to the same limitations as relief under article 21, unless those limitations were specifically applicable and would avoid “all-encompassing applications” under article 7 and “prematurely expanding the reach of Chapter 15 beyond current international insolvency law.”⁶²

149B. Applying this framework to the facts before it, the court affirmed the denial of the foreign representative’s request to enforce an order confirming a Mexican reorganization plan that novated and in effect released the obligations of subsidiaries of the Mexican debtor that had guaranteed notes issued by the debtor but had not themselves applied to commence insolvency proceedings. The court first determined that article 21, paragraphs 1 and 2 did not provide for discharge of the obligations of non-debtor guarantors. Next, the court determined that the general grant of relief in article 21, paragraph 1 did not provide the requested relief because non-consensual, non-debtor releases through a bankruptcy proceeding were “generally not available” under United States law and were “explicitly prohibited” in the particular court.⁶³ Turning to article 7, the court noted that such releases were sometimes available in other courts and the relief sought was therefore not precluded under article 7. The court found, however, that since *Vitro* had failed to provide evidence of the existence of extraordinary circumstances sufficient to establish a case for non-debtor releases under the law of those courts that allowed such releases, the lower court had not abused its discretion in denying relief under article 7.⁶⁴

(c) Relief in cases involving suspect antecedent transactions

150-153. [...]

⁶¹ *Vitro*, para. 19.

⁶² *Vitro*, para. 20.

⁶³ *Vitro*, para. 22.

⁶⁴ The refusal to recognize third-party releases in *Vitro* stands in contrast to the recognition of such releases in *Metcalfe & Mansfield*. There the court found that the Canadian court approved non-debtor relief in limited circumstances which were in accord with the United States courts narrow application of article 7. Thus, the United States court concluded that the orders granted in the foreign proceeding should be enforced.

E. Cooperation and coordination

1. Introductory comments

154-156. [...]

157. 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 representatives. 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 UNCITRAL Model Law does not require a formal decision to recognize that foreign proceeding. Accordingly, cooperation may occur at an early stage and before an application for recognition is made. Since the articles of chapter 4 apply to the matters referred to in article 1, cooperation is available not only in respect of applications for assistance made in the enacting State, but also applications from proceedings in the enacting State for assistance elsewhere (see also article 5). Moreover, cooperation is not limited to foreign proceedings within the meaning of article 2, subparagraph (a) that would qualify for recognition under article 17 (i.e. that they are either main or non-main), and cooperation may thus be available with respect to proceedings commenced on the basis of presence of assets.

158. [...]

2. Cooperation

159. [...]

160. [...]

(a) [...]

(b) Add to the footnote after the word “involved” the following sentences: “In *Chow Cho Poon*, the court pointed out that there should be express acknowledgement of cooperation by the courts involved and that it is not possible for one court to cooperate with another without the other being aware. It observed that article 27 of the Model law contemplates cooperation to start by either a request from one court to another or by way of subscribing to an agreed plan (para. 56).”

(c)-(e) [...]

161-165. [...]

165A. A different example is the efforts of courts to cooperate by containing the effects of their decisions, when those decisions conflict with decisions of another States courts. In *Perpetual Trustee Company Ltd v Lehman Bros. Special Financing Inc.*,⁶⁵ a series of requests led to an English court responding to the United States

⁶⁵ [2009] EWHC 2953 paras. 12-23. In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd.*, ([2011] UKSC 38), the English Supreme Court summarized communications between the English and United States courts as follows (para. 33): “Following communications between the High Court in England and the Bankruptcy Court in New York, it was agreed that, in order to limit potential conflict between decisions in the two jurisdictions, relief would be limited to declaratory relief: *Perpetual Trustee Co. Ltd v BNY Corporate Trustee Services Ltd.* [2010 2 BCLC 237]; *In re Lehman Bros Holdings Inc.* (2010) 422 BR 407 (Bankr. SDNY).”

court in a form that explained the steps and decisions taken in England and inviting the United States judge not to make formal orders, at that time, that might be in conflict with those made in England.⁶⁶ Knowing that its decision would directly conflict with that of the English court, the United States court declared its view of the law, but did not require immediate compliance by the parties. The conflict was discussed by the courts but not resolved, although part of it was subsequently settled in the United States case.

166. Another example of cooperation is the exchange of correspondence containing or responding to requests for assistance from one of the courts involved in the proceeding. In *In re Lehman Brothers Australia Limited*,⁶⁷ the court discussed the impact of the decisions in the United States and United Kingdom Lehman cases on the statutory responsibilities of the liquidator of the Australian entities and a request by those liquidators that the court communicate with the United States court. The Australian court declined to do so at that time on the basis that it might pre-empt the United States court decision on certain matters; impinge on the principle of comity which is based on common courtesy and mutual respect and be seen by the United States judge as an unwarranted interference; the application had been made ex parte and all concerned parties had not been heard; and cooperation between the Australian court and any foreign court would generally occur within a framework or protocol that had previously been approved by the court, and was known to the parties in the particular proceeding. Nevertheless, the judge agreed that it might be appropriate to write to the United States judge to inform him of the present application and to ask whether a protocol for future communication might be established. A draft of the letter to be sent to the United States court was appended to the judgement.

167-170. [...]

3. Coordination

171-187. [...]

⁶⁶ *Perpetual Trustee*, paras. 41-50.

⁶⁷ *Parbery; in the matter of Lehman Brothers Australia Limited* (in liq) [2011] FCA 1449 [CLOUT case no. 1215].

Annex I

Case summaries

1. *In re ABC Learning Centres Limited* 445 B.R. 318 (Bankr. D. Del 2010)
[CLOUT case no. 1210]
2. *Ashapura Minechem Ltd* 480 B.R. 129 (S.D.N.Y. 2012)
3. *In re Atlas Shipping A/S* 404 B.R. 726 (Bankr. S.D.N.Y. 2009)
4. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd* 389 B.R. 325 (S.D.N.Y. 2008)
[CLOUT case nos. 760, 794]
5. *In re Betcorp Ltd (in liquidation)* 400 B.R. 266 (Bankr. D. Nev. 2009)
[CLOUT case no. 927]
6. *In re British American Ins. Co. Ltd* 425 B.R. 884 (Bankr. S.D.Fla. 2010)
[CLOUT case no. 1005]
7. *Re Chow Cho Poon (Private) Limited* (2011) NSWSC 300 (15 April 2011)
[CLOUT case no. 1218]
8. *Re Cinram International Inc* 2012 ONSC 3767 (Ont. SCJ
[Commercial List])
[CLOUT case no. ...]
9. *In re Ephedra Products Liability Litigation* 349 B.R. 333 (S.D.N.Y. 2006)
[CLOUT case no. 765]
10. *Re Eurofood IFSC Ltd* [2006] Ch 508 (ECJ)
11. *In re Fairfield Sentry Ltd* 2011 WL 4357241
12. *Fogarty v Petroquest Resources Inc. (In re Condor Ins. Ltd)* 601 F.3d 319, (5th Cir. 2010)
[CLOUT case nos. 928, 1006]
13. *Gainsford, in the matter of Tannenbaum v Tannenbaum* (2012) FCA 904
[CLOUT case no. 1214]
14. *In re Geroval Financial Group, Ltd.* 482 B.R. 86 (Bankr. S.D.N.Y. 2012)
15. *In re Gold & Honey, Ltd* 410 B.R. 357 (Bankr. E.D.N.Y. 2009)
[CLOUT case no. 1008]
16. *Re HIH Casualty and General Insurance Ltd* [2005] EWHC 2125; first appeal
[2006] EWCA Civ 732;
McGrath v Riddle second appeal [2008] UKHL 21
17. *Interdil, Srl* [2011] EUECJ C-396/09, [2012] Bus LR 1582
18. *Re Lightsquared LP* 2012 ONSC 2994 (Ont. SCJ
[Commercial List])
[CLOUT case no. 1204]

19. *Massachusetts Elephant & Castle Group, Inc.* 2011 ONSC 4201 (Ont. SCJ [Commercial List])
[CLOUT case no. 1206]
20. *In re Metcalfe & Mansfield Alternative Investment* 421 BR 685 (Bankr. S.D.N.Y. 2010)
[CLOUT case no. 1007]
21. *Millennium Global Emerging Credit Master Fund Limited et al* District Ct 11 Civ. 7865 June 2012
22. *In re Ran* 607 F.3d. 1017 (5th Cir. 2010)
[CLOUT case no. 929]
23. *Rubin v Eurofinance SA* [2012] UKSC 46
24. *In re Sivec Srl, as successor in liquidation to Sirz Srl* 476 B.R. 310 (Bankr. E.D. Okla 2012)
25. *SNP Boat Service, S.A. v. Hotel le St. James* 483 B.R. 776 (S.D. Fla. 2012)
26. *Stanford International Bank Ltd* [2010] EWCA Civ. 137
[CLOUT case no. 1003]
27. *Think3* Case no. 1757 of 2012 Appeal against dismissal order on petition for recognition of and assistance for foreign insolvency proceedings and administration order (Case no. of the court of first instance: 3 and 5 of 2011 at the Tokyo District Court)
28. *In re Juergen Toft* 453 B.R. 186 (Bankr. S.D.N.Y. 2011)
[CLOUT case no. 1209]
29. *In the matter of Vitro S.A.B. de C.V.* 2012 WL 5935630
(5th Cir. 28 Nov 2012)
30. *Williams v Simpson* [2011] B.P.I.R. 938 (High Court of New Zealand, Hamilton, 17 September 2010);

Williams v Simpson (no. 5) High Court of New Zealand, Hamilton, 12 October 2010

1. *In re ABC Learning Centres Limited*⁶⁸

The debtor was the Australian parent company of a group of 38 subsidiaries, which had owned and operated child care centres in Australia, New Zealand, the United Kingdom, Canada and the United States of America. In November 2008, the boards of directors of the debtor and its 38 subsidiaries resolved that since the companies were likely to become insolvent, they should enter into voluntary administration in Australia and administrators were appointed. The commencement of the voluntary administration breached the terms of certain loan agreements, and the lenders exercised their rights under the Australian Corporations Act as secured creditors to

⁶⁸ 445 B.R. 318 (Bankr. D. Del 2010) [CLOUT case no. 1210].

appoint receivers to represent their interests and commence receivership proceedings. In June 2010, creditors resolved to liquidate the companies and the administrators were appointed as liquidators. The receivership proceedings were conducted concurrently with the liquidation. In 2008 and 2009, litigation was commenced in the United States against certain of the debtor companies. In 2010, the liquidators sought recognition in the United States of the liquidation proceedings as foreign main proceedings. The court found that the liquidation proceedings were “foreign proceedings” for the purposes of Chapter 15 and accorded recognition as foreign main proceedings.

2. *Ashapura Minechem Ltd*⁶⁹

In October 2011, the foreign representative of the debtor, a mining and industrial business headquartered in Mumbai, sought recognition in the United States of America of proceedings commenced in India and pending before the Board for Industrial and Financial Reconstruction, an agency authorized to function as an administrative tribunal under the Sick Industrial Companies (Special Provisions) Act 1985. The United States court considered that although the Indian legislation in question did not include a formal mechanism for participation by unsecured creditors, in practice the manner in which those creditors could participate in the proceedings demonstrated that the proceedings were collective for the purposes of 11 USC § 101(23) [article 2 MLCBI]. Although the public policy exception was argued by several creditors, the court found that they had not discharged the burden of proof on that issue and recognition of the application could not be refused on that ground.

4. *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd*⁷⁰

Add the following sentence at the end of the paragraph: “That decision was affirmed on appeal.”

7. *Re Chow Cho Poon (Private) Limited*⁷¹

In 2007, the Singapore High Court ordered the liquidation of Chow Cho Poon (CCP), a company incorporated in Singapore, on the basis that it was just and equitable to do so (a decision not based upon the insolvency of the debtor). Having discovered that CCP had bank assets in Australia, the liquidator appointed in Singapore made various requests with respect to those assets, which the Australian bank in question declined to implement, pending recognition in Australia of the liquidator’s appointment. Although that recognition was sought under other legislation, the court considered the impact of those provisions on the Cross-Border Insolvency Act 2008 [enacting the Model Law in Australia]. In particular, the court considered whether the Singapore proceeding was a foreign proceeding within the meaning of article 2 of the Model Law. The court found that the liquidator was a foreign representative within article 2, that the liquidation was a judicial proceeding and that the assets of the company were subject to control or supervision by a foreign court. Two issues remained for consideration: whether CCP was a debtor

⁶⁹ 480 B.R. 129 (S.D.N.Y. 2012).

⁷⁰ 389 B.R. 325 (S.D.N.Y. 2008) [CLOUT case nos. 760, 794].

⁷¹ (2011) NSWSC 300 (15 April 2011) [CLOUT case no. 1218].

and whether the proceeding was one pursuant to “a law relating to insolvency”. Although the court indicated that its instinctive reply to those two questions was negative, a consideration of the decisions of courts in England (*Stanford International Bank Ltd*) and the United States (*Betcorp* and *ABC Learning*) led it to conclude there was a clear basis upon which “the whole of the Singapore Companies Act, or at least the whole of the winding up provisions, might be classified as ‘a law relating to insolvency’, even though the particular winding up was ordered on the just and equitable ground alone and apparently without any finding (express or implied) of insolvency.” On the second issue, the court noted that in none of the decisions considered was any separate attention given to the question of whether the company subjected to the winding up was properly described as a “debtor”, each court apparently content to work on the basis that an entity subject to a “foreign proceeding” was, for that reason alone, within the relevant “debtor” concept.

8. *Re Cinram International Inc*⁷²

The Cinram Group was a replicator and distributor of CDs and DVDs with an operational footprint across North America and Europe. Having experienced financial difficulties, several Canadian incorporated entities of the group commenced proceedings in Canada seeking extensive relief to enable them to put in place various restructuring measures, as well as authorization for one of the debtor entities to act as foreign representative to pursue recognition of the Canadian proceedings in the United States. In addition to the Canadian incorporated entities, the group included entities incorporated in the United States and Europe, although the latter were not to form part of the proceedings. The parties in the Canadian proceedings contended that the centre of main interests of the group was Canada, providing extensive evidence in support of that claim. The court commenced the proceedings and granted the relief sought. With respect to the issue of centre of main interests, the court outlined in its order the evidence provided by the Canadian debtors, noting that it was doing so for informational purposes only. The court said it clearly recognized that it was the function of the receiving court — in this case, the United States Bankruptcy Court for the District of Delaware — to make the determination on the location of the COMI and to determine whether the Canadian proceeding is a “foreign main proceeding” for the purposes of Chapter 15 of the United States Bankruptcy Code.

11. *In re Fairfield Sentry Ltd*⁷³

Add the following sentence at the end of the paragraph: “The decision was affirmed on appeal to the District Court and is now on further appeal.”

13. *Gainsford, in the matter of Tannenbaum v Tannenbaum*⁷⁴

The South African insolvency representatives of Tannenbaum, a South African citizen who had moved to Australia in 2007, sought recognition of the South African proceedings in Australia and various orders relating to examination of the affairs of

⁷² 2012 ONSC 3767 (Ont. SCJ [Commercial List]).

⁷³ 2011 WL 4357241 (S.D.N.Y., 16 Sept. 2012).

⁷⁴ (2012) FCA 904 [CLOUT case no. 1214].

the debtor and his wife and other specified persons and entities. The court considered what would constitute the debtor's habitual residence for the purposes of sections 17(2) (a) and 16(3) of the Cross-Border Insolvency Act [articles 17(2) (a) and 16(3) MLCBI], noting the decision in *Williams v Simpson* (see below) and the interpretation of that term as used in the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. The court made two points: first, that application of the expression "habitual residence" permitted consideration of a wide variety of circumstances that bear upon where a person is said to reside and whether that residence is to be described as habitual. Secondly, the past and present intentions of the person under consideration will often bear upon the significance to be attached to particular circumstances, such as the duration of a person's connections with a particular place of residence. Since Tannenbaum had taken a deliberate decision to quit South Africa in 2007, had lived and worked in Australia since 2007 and had his habitual residence in Australia, the fact that he retained his South African citizenship and had not made any steps towards enrolment onto the Australian electoral roll was not determinative. Since the debtor was not a habitual resident of the South Africa and did not have an establishment in South Africa, the foreign proceedings could not be recognized as either main or non-main proceedings. Relief was granted under other applicable legislation.

14. Gerova Financial Group, Ltd⁷⁵

Both Gerova entities were registered in Bermuda. After a securities analyst published a report claiming Gerova was in effect a Ponzi scheme, Gerova was sued in the United States and subsequently ceased all business by May 2011. In October 2011, three creditors sought to commence insolvency proceedings in Bermuda. The proceedings were adjourned at the request of Gerova, which managed to settle the claims of two of those creditors and successfully disputed the claims of the third. A fourth creditor was substituted as a petitioner and presented an amended petition, which the court declined to stay or dismiss. It did, however, give Gerova the opportunity to pay the fourth creditor's debt in full. Having failed to do so, the court ordered commencement of insolvency proceedings against the two Gerova entities in July and August 2012. The liquidators sought recognition of the Bermudan proceedings in the United States; an appeal against the July order of the Bermudan court was pending at the time. Recognition was opposed by several creditors on the basis that (a) it was unnecessary, including because it was opposed by a significant number of creditors, (b) the order for commencement was subject to appeal, and (c) for these reasons recognition would be covered by the public policy exception in 11 USC § 1506 [article 6 MLCBI]. The court found that the Bermudan proceedings were foreign main proceedings, that there was nothing in § 1507 of the Bankruptcy Code [article 7 MLCBI] that conditioned recognition on a cost-benefit analysis or approval by a majority of creditors; that it was for the Bermudan court to decide whether the proceedings should be commenced and not for the receiving court to condition recognition on a re-examination of that need; that nothing in the language of § 1517 [article 17 MLCBI] required the Bermudan decision to be final or non-appellable and since the order of the Bermudan court was sufficient to enable the liquidators to take up their duties, § 1518 [article 18 MLCBI] would require the liquidators to notify the United States court if that order was reversed on appeal;

⁷⁵ 482 B.R. 86 (Bankr. S.D.N.Y. 2012).

and that nothing in the present case violated a matter of fundamental importance that would invoke the public policy exception.

15. *In re Gold & Honey, Ltd*⁷⁶

In July 2008, a receivership proceeding was commenced in Israel by the debtor's principal lender, but due to the occurrence of certain events, the appointment of a receiver was denied by the Israeli court. In September 2008, reorganization proceedings were commenced in the United States and the debtor's principal lender was notified of that commencement. Notwithstanding the commencement of the proceedings in the United States and the automatic stay that arose on such commencement, the principal lender continued its application for appointment of a receiver in the Israeli court, arguing that the automatic stay did not apply to its actions or its attempt to have a receiver appointed. In October 2008, the United States court determined, on an application by the debtor and on the basis of a hearing at which the principal lender was represented, that the automatic stay applied to the debtor's property wherever located and by whomever held. While the court did not reach the issue of whether the stay applied specifically to the Israeli receivership or whether it had in personam jurisdiction over the principal lender, it did advise the principal lender that if it proceeded with the receivership proceeding in Israel, it did so at its own peril. The principal lender continued with the receivership application and in late October 2008, the Israeli court determined that it had jurisdiction and in November 2008 appointed receivers to liquidate the debtor's assets in Israel despite the proceedings in the United States and the application of the worldwide stay. In early January 2009, the principal lender sought an order from the United States court vacating the automatic stay with respect to the Israeli receivership or dismissing the United States insolvency proceedings. In late January 2009, the Israeli receivers applied for recognition of the Israeli proceedings in New York in order to transfer assets located in New York to Israel for application in the Israeli proceeding. The United States court denied recognition, finding: (a) that the Israeli representatives had not met the burden of showing that the Israeli proceeding was a collective proceeding and that the debtor's assets and affairs were subject to the control or supervision of a foreign court pursuant to the definition in 11 U.S.C. § 101 (23) [article 2, subparagraph (a) MLCBI]; (b) that the Israeli representatives had been appointed in violation of the automatic stay; and (c) that the threshold required to establish the public policy exception in 11 U.S.C. § 1506 [article 6 MLCBI] had been met.

17. *Interdil, Srl*⁷⁷

Interdil was registered in Italy until July 2001 when it transferred its registered office to the United Kingdom, was removed from the register of companies in Italy and added to the register of companies in the United Kingdom. At the time of the transfer, *Interdil* was being acquitted by a British group Canopus and a few months later its title to properties in Italy was transferred to another British company as part of that acquisition. In 2002, *Interdil* was removed from the United Kingdom register of companies. In October 2003, Intesa applied to commence insolvency proceedings against *Interdil* in Bari, Italy. *Interdil* challenged the application on

⁷⁶ 410 B.R. 357 (Bankr. E.D.N.Y. 2009) [CLOUT case no. 1008].

⁷⁷ [2011] EUECJ C-396/09, [2012] Bus LR 1582.

the basis that only the courts of the United Kingdom had jurisdiction and sought a ruling on jurisdiction from the superior court in Italy. Without waiting for that ruling, the Bari court commenced proceedings in May 2004. In June 2004, Interdil lodged an appeal against that order. In May 2005, the Italian superior court ruled on the first application, ordering that the Bari court had jurisdiction on the basis that the presumption that the centre of main interests of a debtor was its registered office could be rebutted, in this case by the presence of immovable property in Italy, a lease agreement in respect of two hotels, a contract with a bank and that fact that the Italian companies register had not been notified of the transfer of the registered office. The Bari court then referred several questions to the European Court of Justice for a preliminary ruling. With respect to the question concerning rebuttal of the registered office presumption, the ECJ ruled that a debtor's main centre of interests must be determined by attaching greater importance to the place of its central administration which must be established by objective factors ascertainable by third parties. Where management, including the making of management decisions and supervision are conducted in the same place as the registered office in a manner ascertainable by third parties, the presumption cannot be rebutted. Where the central administration is not in the same place as the registered office, the factors cited in the present case were not sufficient to rebut the presumption unless a comprehensive assessment of factors makes it possible to establish, in a manner ascertainable to third parties, that the actual centre of management and supervision is located in that other place. It went on to hold that where a debtor company's registered office is transferred before an application to commence insolvency proceedings, the centre of main interests is presumed to be the place of the new registered office.

18. *Re Lightsquared LP*⁷⁸

The debtor included *Lightsquared* and some 20 of its affiliates — sixteen were incorporated and had their headquarters in the United States, three were incorporated in various provinces of Canada and one was incorporated in Bermuda. They each commenced voluntary reorganization proceedings in the United States and in May 2012 *Lightsquared*, as foreign representative of the debtor, sought recognition in Canada of the United States proceedings as foreign main proceedings, recognition of certain orders of the United States court and certain ancillary relief. The Canadian court considered the facts concerning the organization and structure of the debtor entities in order to determine the location of the centre of main interests of the Canadian entities. The judge concluded that where it was necessary to go beyond the registered office presumption, the following principal factors, considered as a whole, would tend to indicate whether the location in which the proceeding commenced was the debtor's centre of main interests: (i) the location was readily ascertainable by creditors; (ii) the location is the one in which the debtor's principal assets or operations are found; and (iii) the location is where the management of the debtor takes place. On the basis of those factors, the judge found the centre of main interests of the Canadian entities to be in the United States, recognized the foreign proceedings as foreign main proceedings, recognized the orders of the United States court and granted the ancillary relief sought.

⁷⁸ 2012 ONSC 2994 (Ont. SCJ [Commercial List]) [CLOUT case no. 1204].

19. *Massachusetts Elephant & Castle Group, Inc.*⁷⁹

The debtors operated and franchised full-service British-style pubs in the United States of America and Canada. In June 2011, Chapter 11 proceedings commenced against the debtors in the United States and recognition of those proceedings was sought in Canada. Except for three group members that were incorporated in Canada, the remaining 11 debtor companies were incorporated in the United States. The Canadian court considered the factors relevant to determining the location of the centre of main interests of the three Canadian companies, finding that the following three factors were usually significant: (a) the location of the debtor's headquarters or head office functions or nerve centre, (b) the location of the debtor's management, (c) the location which significant creditors recognize as being the centre of the company's operations. While other factors might be relevant in specific cases, the court took the view that they should be considered to be of secondary importance and only to the extent that they related to or supported the three prime factors. Applying those factors to the facts, the court noted that: the head office of all of the Chapter 11 debtors was in Boston; the group functioned as an integrated North American business, all decision-making for which was centralized at the head office in Boston; and all members of the debtors' management were located, as were the human resources, accounting/finance, other administrative functions and information technology functions in Boston. The court concluded that the centre of main interests of the Canadian companies was located in Boston, recognized the United States proceedings as foreign main proceedings and granted relief additional to the mandatory relief available on recognition, primarily recognizing certain orders of the United States court in the Chapter 11 proceedings.

21. *Millennium Global Emerging Credit Master Fund Limited et al*⁸⁰

The two debtors (a feeder fund and a master fund) were offshore investment funds that invested in sovereign and corporate debt instruments from issuers in developing countries. Both funds were incorporated in Bermuda, the feeder fund in 2006 and the master fund in 2007. After incorporation of the master fund, the feeder fund transferred substantially its entire asset to it, in exchange for a 97 per cent ownership interest in the master fund. In October 2008, the funds ran into severe cash flow problems and failed to meet various margin calls. The fund directors applied for commencement of liquidation proceedings in Bermuda and in 2009 the court commenced the proceeding and appointed the foreign representatives as liquidators of both funds. The liquidators sought informal discovery from several United States-based entities, but when attempts to negotiate informal production of documents failed, they sought recognition of the Bermudan proceedings in the United States of America. At first instance, the United States court held that the debtor's centre of main interests should be determined by reference to the date of the commencement of the foreign proceeding and that both debtors' centre of main interests at that date was Bermuda. The finding as to the location of the centre of main interests was challenged on the basis that a number of facts concerning the arrangement of the debtors' affairs pointed to the centre of main interests as being in the United Kingdom. The finding with respect to timing was not challenged. On appeal, the court assessed the circumstances against five factors (the location of the

⁷⁹ 2011 ONSC 4201; (2011) 81 C.B.R. (5th) [CLOUT case no. 1206].

⁸⁰ District Ct 11 Civ. 7865 (LBS) June 2012.

debtor's headquarters, the location of those who manage the debtor, the location of the debtor's primary assets, the location of the majority of the debtor's creditors who would be affected by the case, and the jurisdiction whose law would apply to most disputes) and the expectations of creditors and other interested third parties in terms of the ascertainability of the Funds' centre of main interests. The court concluded that although some of those factors might support a centre of main interests in the United Kingdom, the preponderance of evidence supported Bermuda as the centre of main interests of the debtors, irrespective of whether centre of main interests was to be determined by reference to the date of the commencement of the foreign proceeding or the date of the filing of the Chapter 15 application.

23. *Rubin v Eurofinance SA*⁸¹

The representatives of insolvency proceedings commenced in the United States in 2007 against The Consumers Trust sought recognition of those proceedings in England under the Cross-Border Insolvency Regulations 2006, which give effect to the Model Law in Great Britain, and enforcement of a judgement of the United States court holding Eurofinance liable for the debts of The Consumers Trust. The Consumers Trust was a business trust, recognized as a legal entity under United States law. In 2009, the English court at first instance recognized the foreign insolvency proceedings as main proceedings, but dismissed the application for enforcement of the judgement. The first appeal against the dismissal of the application for enforcement was allowed, the court concluding that ordinary rules for enforcing or not enforcing foreign judgements in personam did not apply to insolvency proceedings and that the mechanisms available in insolvency proceedings to bring actions against third parties for the collective benefit of all creditors were integral to the collective nature of insolvency and not merely incidental procedural matters. The orders against Eurofinance were therefore part of the insolvency proceedings and for the purpose of the collective enforcement regime of the insolvency proceedings. As such, the orders were not subject to the ordinary rules of private international law preventing the enforcement of judgements because the defendants were not subject to the jurisdiction of the foreign court. A second appeal to the Supreme Court rejected the approach of the appeal court and dismissed the application for enforcement of the judgement. The court held that the orders were subject to the ordinary rules of private international law and that none of the conditions for common law enforcement were met. The court also considered that articles 21 and 25 of the Model Law were concerned with procedural matters and did not impliedly empower the courts to enforce a foreign insolvency judgement against a third party.

24. *In re Sivec*⁸²

In *Sivec*, the debtor obtained recognition in the United States of America of an Italian reorganization as a foreign main proceeding and modification of the automatic stay to permit litigation in the United States of two potentially offsetting claims. The litigation resulted in a judgement for the Italian debtor on the first claim and a judgement in favour of the United States creditor (the creditor) on the second. The creditor then sought relief from the automatic stay to set off the two amounts,

⁸¹ [2010] EWCA Civ. 895.

⁸² 476 B.R. 310 (Bankr. E.D. Okla. 2012).

and the Italian debtor requested enforcement of the reorganization proceeding, which would apparently require payment of the first judgement by the creditor, but give it no ability to claim in the Italian case on the second judgement, as it had not filed a timely claim (it alleged it had never received appropriate notice). The United States court determined that it would not accord comity to the Italian proceedings, as the Italian debtor “had failed to provide information regarding Italian law, the status of the Italian bankruptcy case or meet its burden of proof in requesting comity.” The court expressed particular concern about lack of notice to the creditor, found that basic elements of due process were lacking and that there was a failure to provide protection of a United States creditor’s interests. Exercising what it called “broad latitude to fashion the appropriate relief in this case,” the court determined that the creditor should have stay relief to exercise setoff or recoupment rights under United States law.

25. *SNP Boat Service, S.A. v. Hotel le St. James*⁸³

SNP Boat Service was a French company that entered into a contract with a third party requiring it to accept a trade-in of property owned by St James, a Canadian company. Issue was taken with performance of the contract and the dispute led to litigation in France and Canada. An insolvency proceeding commenced in France for SNP, in which St James lodged a claim. In the Canadian litigation, the court entered a default judgement in favour of St James, which it then sought to enforce against property of SNP in Florida. Before that property could be sold, the foreign representative sought recognition of the French proceeding in the United States. Recognition was granted and a stay with respect to the sale of the Florida property ordered. The property was subsequently released to the foreign representative, but its removal from the jurisdiction of the court prohibited and its sale made subject to approval of the court. The foreign representative then sought approval to repatriate the property to France to be handled under the French proceeding. St James objected claiming, among other things, that it would not receive “sufficient protection” of its interests in the French proceeding. The lower court ordered discovery to determine whether St. James’ interests as a creditor were sufficiently protected in the French proceeding and ultimately denied the repatriation request, directed the property to be handed over to the relevant local official and dismissed the Chapter 15 proceeding. On appeal, the court held that it was not precluded from satisfying itself that the interests of foreign creditors in general were sufficiently protected before remitting property to the foreign jurisdiction. However, it rejected the idea that it could inquire into the individual treatment the creditor would receive in France, concluding that “a bankruptcy court is without jurisdiction to inquire whether a particular creditor’s interests are sufficiently protected in any specific foreign proceeding.” The court concluded that both the discovery order and the denial of the repatriation request were an abuse of discretion and remanded the case for further proceedings.

⁸³ 483 B.R. 776 (S.D. Fla. 2012).

27. *Think3*⁸⁴

The debtor (think3.Inc), which was the successor of various companies originally established in Italy and the United States of America, was incorporated in the United States, with a branch office in Italy and subsidiaries in six countries, including Italy and Japan. Insolvency proceedings commenced in Italy in April, 2011, followed by Chapter 11 proceedings in the United States in May 2011. On 1 August 2011, recognition of the Italian proceedings was sought in the United States. On 11 August 2011, recognition of the United States proceedings was sought in Japan and granted the same day, together with certain relief. In October 2011 recognition of the Italian proceedings was also sought in Japan, on the basis that the debtor's principal place of business (the term used in the Japanese legislation enacting the Model Law, which is considered to have substantively the same meaning as centre of main interests) was in Italy, not the United States.⁸⁵ In determining the factors to be considered with respect to the debtor's principal place of business, the court at first instance looked to the work being undertaken by UNCITRAL to revise the Guide to Enactment of the Model Law. It found that while it was appropriate to take into consideration all of the various factors that had been raised by different courts around the world, emphasis should be placed on the location of the head office functions, the key assets, the actual place of business of the debtor, the debtor's business management and whether that location was perceivable to creditors. With respect to timing, the court took the view that the determination should be made by reference to the time at which the very first insolvency proceedings concerning the debtor was filed or when those proceedings commenced. Having considered the complex facts of the debtor's recent history in the light of the various factors to be taken into account, the court concluded that the debtor's principal place of business was the United States. That decision was affirmed on appeal.

28. *In re Dr. Juergen Toft*⁸⁶

The debtor, who was the subject of insolvency proceedings in Germany, had refused to cooperate with the foreign representative, hidden his assets and relocated to an unknown country. The foreign representative had obtained a mail interception order relating to postal and electronic mail in the German proceedings, as well as ex parte recognition of the German proceedings and enforcement of the German mail interception order in England. The foreign representative sought recognition of the German proceedings in the United States, together with ex parte relief enforcing the mail interception order in the United States and compelling certain service providers to disclose and deliver to him all of the debtors emails currently stored on their servers, as well as those received in the future. On the basis that such relief would not be available to an insolvency representative under United States law and that it would contravene certain legislation relating to privacy and wiretapping leading to criminal liability, the court denied the relief sought as being manifestly contrary to

⁸⁴ Case no 1757 of 2012 Appeal against dismissal order on petition for recognition of and assistance for foreign insolvency proceedings and administration order (Case no. of the court of first instance: Case nos. 3 and 5 of 2011 at the Tokyo District Court) available in English and Japanese at www.insol.org/page/304/japan.

⁸⁵ See footnote 157 to para. 102G above.

⁸⁶ 453 B.R. 186 (Bankr. S.D.N.Y. 2011) [CLOUT case no. 1209].

the public policy of the United States under 11 U.S.C. § 1506 [article 6 MLCBI]. That denial was without prejudice to the right of the foreign representative to seek recognition after providing notice as required under United States law.

29. *In the matter of Vitro S.A.B. de C.V.*⁸⁷

Vitro was a holding company that together with its subsidiaries constitutes the largest glass manufacturer in Mexico. Between 2003 and 2007, Vitro borrowed a significant sum, predominantly from United States investors, that was evidenced by three series of unsecured notes, which variously fell due in 2012, 2013 and 2017 and guaranteed by substantially all of its subsidiaries. The guarantees, which were governed by New York law, provided that the guarantors would not be released, discharged or otherwise affected by any settlement or release as the result or any insolvency, reorganization or bankruptcy proceeding affecting Vitro and that disputes would be litigated in New York. In 2008, Vitro announced its intention to restructure its debt and stopped making payments on the unsecured notes. In 2009, Vitro entered into certain agreements with Fintech Investments Ltd., one of its largest creditors, which resulted in Vitro generating a large amount of intercompany debt. That debt was not disclosed to the holders of the unsecured notes until approximately 300 days after the completion of the transactions, which took those transactions outside Mexico's 270 day suspect period, during which they would have been subject to additional scrutiny before a business enters insolvency. Between 2009 and 2010, Vitro engaged in several rounds of reorganization negotiations, but its proposals were rejected by creditors. In December 2010, Vitro made an application under Mexico's Business Reorganization Act. Despite an initial rejection of the application because Vitro could not reach the required 40 per cent creditor approval threshold necessary to support such an application without having to rely on the intercompany claims, that decision was overturned on appeal and Vitro was declared bankrupt in April 2011. A reorganization plan was then negotiated with the recognized creditors (including those holding intercompany debt), which provided, inter alia, for extinguishment of the unsecured notes and discharge of the obligations owed by the guarantors. The plan was ultimately approved by the requisite percentage of creditors and approved by the Mexican court in February 2012. That approval decision was then appealed. Creditors dissatisfied with the reorganization attempted to collect on the unsecured notes and guarantees in various ways. On one action commenced in New York, the court held that New York law applied to the guarantees and that non-consensual release, discharge or modification of the obligations in the guarantees was prohibited. In April 2011, recognition of the Mexican proceeding was sought in the United States and ultimately granted as a foreign main proceeding. That decision has been appealed. In March 2012, Vitro's foreign representatives sought various orders for relief in the United States, including enforcement of the Mexican reorganization plan and an injunction prohibiting certain actions in the United States against Vitro, which were denied. That decision was appealed on the ground that the court erred as a matter of law in refusing to enforce the plan because it novated guaranty obligations of non-debtor parties. On appeal, the United States court affirmed the order recognizing the Mexican proceeding and the order denying the relief sought on the ground that although, in exceptional circumstances, the court could under

⁸⁷ 2012 WL 5935630 (5th Cir., 28 Nov 2012).

Chapter 15 enforce an order extinguishing the obligations of non-debtor parties, Vitro had failed to demonstrate the existence of exceptional circumstances in this case.

Annex II

Decision of the United Nations Commission on International Trade Law and General Assembly resolution 66/9

[...]

V. SECURITY INTERESTS

A. Report of the Working Group on Security Interests on the work of its twenty-second session (Vienna, 10-14 December 2012)

(A/CN.9/764)

[Original: English]

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I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session (New York, 21 June-9 July 2010).¹ The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17)*, para. 268.

on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries.²

2. At that session, the Commission considered a note by the Secretariat (A/CN.9/702 and Add.1) and agreed that all issues mentioned in that note (including registration of security rights in movable assets, a model law on secured transactions and security rights in non-intermediated securities) were interesting and should be retained on its future work agenda for consideration. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.³

3. At its eighteenth session (Vienna, 8-12 November 2010), the Working Group began its work on the preparation of a text on the registration of notices with respect to security rights in movable assets by considering a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Add.1 and 2). At that session, the Working Group adopted the working assumption that the text would take the form of a guide on the implementation of a security rights registry and that the text should be consistent with the UNCITRAL *Legislative Guide on Secured Transactions* (the "*Secured Transactions Guide*"), while, at the same time, it would take into account the approaches followed in modern security rights registration systems, national and international (A/CN.9/714, para. 13). Having agreed that the *Secured Transactions Guide* was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group also considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the *Secured Transactions Guide*, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

4. At its nineteenth session (New York, 11-15 April 2011), the Working Group considered a note by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.46 and Add.1 to 3). At that session, differing views were expressed as to the form and content of the text to be prepared (A/CN.9/719, paras. 13-14), as well as with respect to the question of whether the text should include model regulations or recommendations (A/CN.9/719, para. 46).

5. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission emphasized the significance of the Working Group's work in particular in view of efforts undertaken by States towards establishing a registry, as well as the potential beneficial impact of such a registry on the availability and the cost of credit. With respect to the form and content of the text to be prepared, the Commission agreed that the mandate of the Working Group, leaving the specific form and content of the text to the Working Group, did not need to be modified. It was further agreed that, in any case, the Commission would make a final decision once the Working Group had completed its work and submitted the text to the Commission.⁴

6. At its twentieth session (Vienna, 12-16 December 2011), the Working Group continued its work based on a note by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.48/Add.3). The Working Group agreed that

² Ibid., para. 265.

³ Ibid., paras. 264 and 273.

⁴ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 237.

the text should take the form of a guide (the “draft Registry Guide”) with commentary and recommendations along the lines of the *Secured Transactions Guide* (A/CN.9/740, para. 18). In addition, the Working Group agreed that, where the draft Registry Guide offered options, examples of model regulations could be included in an annex to the draft Registry Guide. As to the presentation of the text, the Working Group agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the *Secured Transactions Guide*, and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/740, para. 30).

7. At its twenty-first session (New York, 14-18 May 2012), the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.50 and Add.1 and 2; the “draft Registry Guide”). At that session, the Working Group approved the substance of the terminology and the recommendations of the draft Registry Guide (A/CN.9/743, para. 21). In addition, the Working Group agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session in 2013 (A/CN.9/743, para. 73). Moreover, the Working Group agreed to propose to the Commission that the mandate be given to the Working Group to develop a model law on secured transactions and that the topic of security rights in non-intermediated securities should be retained on its future work agenda and be considered at a future session (A/CN.9/743, para. 76).

8. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission expressed its appreciation to the Working Group and requested the Working Group to proceed with its work expeditiously and to complete it so that the draft Registry Guide would be submitted to the Commission for final approval and adoption at its forty-sixth session, in 2013.⁵ In addition, the Commission agreed that, upon its completion of the draft Registry Guide, the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the *Secured Transactions Guide* and consistent with all texts prepared by UNCITRAL on secured transactions.⁶ Moreover, the Commission agreed that, consistent with the Commission’s decision at its forty-third session, in 2010, the topic of security rights in non-intermediated securities, in the sense of securities other than those credited in a securities account, should continue to be retained on the future work programme for further consideration, on the basis of a note to be prepared by the Secretariat, which would set out all relevant issues so as to avoid any overlap or inconsistency with texts prepared by other organizations.

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its twenty-second session in Vienna from 10 to 14 December 2012. The session was attended by representatives of the following States members of the Working Group: Brazil, Canada, China, Colombia, Czech Republic, El Salvador, France, Germany, India, Israel, Italy, Japan, Mexico, Nigeria, Norway,

⁵ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 100.

⁶ Ibid., para. 105.

Pakistan, Philippines, Republic of Korea, Russian Federation, Spain, Thailand, Turkey, Ukraine, United States of America and Venezuela (Bolivarian Republic of).

10. The session was attended by observers from the following States: Belarus, Belgium, Brunei Darussalam, Cyprus, Dominican Republic, Indonesia, Kuwait, Oman, Poland, Qatar, Saudi Arabia, Switzerland and Viet Nam. The session was also attended by observers from Palestine and the European Union.

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

(a) *United Nations system*: The World Bank;

(b) *Intergovernmental organizations*: Council of the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States and European Center for Peace and Development (ECDP);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Forum for International Conciliation and Arbitration (FICACIC), International Federation of Film Distributors Association (FIAD), International Insolvency Institute (III) and National Law Centre for Inter-American Free Trade (NLCIFT).

12. The Working Group elected the following officers:

Chairman: Ms. Kathryn SABO (Canada)

Rapporteur: Mr. Hiroo SONO (Japan)

13. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.51 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.52 and Add.1-6 (Draft Technical Legislative Guide on the Implementation of a Security Rights Registry).

14. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Registration of security rights in movable assets.
5. Other business.
6. Adoption of the report.

III. Deliberations and decisions

15. The Working Group considered a note by the Secretariat entitled "Draft Technical Legislative Guide on the Implementation of a Security Rights Registry" (A/CN.9/WG.VI/WP.52 and Add.1-6). The deliberations and decisions of the Working Group are set forth below in chapters IV and V. The Working Group adopted the substance of the draft Registry Guide and requested the Secretariat to

prepare a revised version of the text reflecting the deliberations and decisions of the Working Group.

IV. Registration of security rights in movable assets

A. Preface (A/CN.9/WG.VI/WP.52)

16. The Working Group adopted the substance of the preface of the draft Registry Guide on the understanding that the preface would be updated following the sessions of the Working Group and the Commission to reflect the respective deliberations.

B. Introduction (A/CN.9/WG.VI/WP.52 and A/CN.9/WG.VI/WP.52/Add.1, paras. 1-39)

17. The Working Group adopted the substance of section A (purpose of the draft Registry Guide and its relationship with the *Secured Transactions Guide*) unchanged.

18. With respect to section B (terminology and interpretation), it was agreed that: (a) the bracketed text in the terms “amendment” and “cancellation” should be deleted and the matter of multiple secured creditors should be discussed in the commentary; (b) the term “amendment” should refer to the act of adding or modifying information or deleting some information in a registered notice, as deletion of all information would result in a cancellation, while the legal effect of an amendment should be discussed in the commentary (see para. 49 below); (c) the commentary should clarify that, while an amendment might result in certain information being removed from the registry record accessible to the public, such information should be retained in the registry archives; (d) the term “cancellation” should be clarified by reference to recommendation 74 of the *Secured Transactions Guide*, according to which, while information contained in a notice could be removed from the registry record accessible to the public upon the expiry or the cancellation of a notice, such information should be archived so as to be capable of retrieval, and the legal effect of a cancellation should be discussed in the commentary (see para. 49 below); (e) the term “notice” should be used consistently throughout the draft Registry Guide (see para. 30 below) and the term “registered notice” should be distinguished from the term “registry record”; (f) the use of both the terms “registry record” and “registry database”, which could have the same meaning, should be avoided; (g) the term “regulation” should be explained by reference to the draft Registry Guide, without prejudice to the right of an enacting State to decide which issues should be addressed in the regulation and which issues should be addressed in the secured transactions law; and (h) the term “designated field” should be included in the terminology to mean a specific place on the notice designated by the registry for entering specific information. Subject to those changes, the Working Group adopted the substance of section B.

19. With respect to section C (key objectives and fundamental policies), it was agreed that it should be shortened to avoid dealing with matters dealt with elsewhere in the draft Registry Guide (e.g., the key objectives of enhancing

certainty and transparency through a notice-registration system) or not relevant to registration (e.g., the functional approach). Subject to that change, the Working Group adopted the substance of section C.

20. With respect to section D (transitional considerations), it was agreed that: (a) it should avoid the use of terms such as “harmonization” that might inadvertently imply that the new law might have to be similar to prior law; and (b) it should be logically placed after current section E (overview of secured transactions law and the role of registration). Subject to those changes, the Working Group adopted the substance of section D.

21. With respect to section E, differing views were expressed. One view was that it should be shortened but retained in the Introduction of the draft Registry Guide to provide guidance as to concepts and approaches that might be new in many legal systems. Another view was that it should be significantly shortened, focusing more on the concepts of third-party effectiveness and priority, while any other discussion should be moved to an annex. After discussion, the Working Group agreed to first consider the substance of the section and then come back to the question of its placement in the draft Registry Guide (see para. 27 below).

22. With respect to subsection E.2 (notion and function of a security right), it was agreed that, if examples of any exceptions to the “substance-over-form” approach of the *Secured Transactions Guide* were to be provided, they should be carefully considered. With respect to subsection E.3 (creation of a security right), it was agreed that the discussion of proceeds should be reduced to address only relevant points that were not made elsewhere in the text. With respect to subsection E.4 (third-party effectiveness of a security right), it was agreed that the discussion of notice registration in immovable property registries should be aligned more closely with recommendation 43 and relevant commentary of the *Secured Transactions Guide*.

23. With respect to subsection E.5 (priority of a security right), it was agreed that: (a) subsection E.5.(a) should be carefully reviewed to ensure accuracy; (b) in subsection E.5.(b) and elsewhere in the draft Registry Guide, the term “knowledge” should be used to refer to “actual knowledge” in line with the *Secured Transactions Guide*; and (c) subsection E.5.(d) should be reviewed to ensure accuracy and consistency with the *Secured Transactions Guide* and the *Insolvency Guide*.

24. With respect to subsection E.6 (broad transactional scope of the registry), it was agreed that: (a) the heading should refer to the “extended transactional scope” of the registry, as the broad scope of the registry as a result of the functional, integrated and comprehensive approach of the *Secured Transactions Guide* was discussed elsewhere in the draft Registry Guide; (b) with respect to outright assignments, it should be clarified that the enforcement recommendations of the *Secured Transactions Guide* did not necessarily apply; and (c) with respect to additional non-security transactions, the discussion should be aligned more closely with the *Secured Transactions Guide* (in particular as to registration of enforcement actions and preferential claims).

25. With respect to subsection E.7 (conflict-of-laws considerations), it was agreed that it should be clarified that the mandatory nature of conflict-of-laws rules applicable to the property aspects of a security right did not affect party autonomy with respect to the law applicable to the rights and obligations of the parties. With

respect to subsection E.8 (notice registration), it was agreed that the last paragraph should be deleted as it addressed matters already covered elsewhere.

26. With respect to subsection E.9 (the role of registration and its legal consequences), it was agreed that the discussion of creation, third-party effectiveness and priority should be deleted as repetitive and the discussion of registration and enforcement should be deleted or placed elsewhere in the text, as it addressed a different issue. With respect to subsections E.10 and E.11, it was agreed that it should be shortened and aligned more closely with the relevant discussion in the *Secured Transactions Guide*.

27. Subject to those changes, the Working Group adopted the substance of section E of the Introduction. As to the placement of section E in the text, the Working Group agreed that a shorter and more reader-friendly version of it should be retained in the Introduction of the draft Registry Guide.

C. Establishment and functions of the security rights registry (A/CN.9/WG.VI/WP.52/Add.1, paras. 40-55)

28. With respect to subsection A.1 (establishment of the security rights registry), it was agreed that it should deal only with the establishment of the registry. With respect to subsection A.4 (additional implementation consideration), it was agreed that: (a) the discussion on common gateways and perhaps even coordination of registries should be included here; and (b) in the context of the discussion of storage capacity of the registry record, reference should also be made to any requirements for the migration of data from existing registries to the security rights registry.

29. With respect to subsection A.5 (registry terms and conditions of use), it was agreed that the discussion of additional registry services could be retained with examples of services provided to registry users as well as to the public, but those examples should be consistent with the recommendations of the *Secured Transactions Guide*.

30. With respect to subsection A.6 (electronic or paper-based registry), it was agreed that the text should be reviewed to ensure clarity, completeness and accuracy. In that connection, the Working Group reconsidered the term “notice” and agreed that its meaning in the draft Registry Guide should be qualified by reference to a communication in writing (paper or electronic) with respect to a security right that was submitted to a registry. It was further agreed that the two paragraphs on direct electronic registration and searching should be streamlined (see para. 18 above).

31. With respect to recommendation 3, it was agreed that: (a) cross-references to the relevant recommendations provided useful guidance to the reader and should thus be kept; and (b) a new recommendation should be included in the draft Registry Guide and briefly referred to in recommendation 3, to provide, in line with recommendation 54, subparagraph (f), of the *Secured Transactions Guide* for an obligation of the registry to protect the information in the registry record through secure back-up mechanisms.

32. Subject to the above-mentioned changes (see paras. 28-31 above), the Working Group adopted the substance of chapter I (establishment and functions of the security rights registry).

D. Access to registry services (A/CN.9/WG.VI/WP.52/Add.1, paras. 56-61 and A/CN.9/WG.VI/WP.52/Add.2, paras. 1-10)

33. With respect to subsection A.1 (public access), it was agreed that: (a) the discussion of the benefits of electronic access to registry services did not need to be repeated here; and (b) privacy concerns of the grantor and the secured creditor should be dealt with elsewhere in the draft Registry Guide.

34. With respect to subsection A.2 (operating days and hours of the registry), it was agreed that an additional example for entering information contained in paper notices into the registry record would be to have the registry staff enter the information within a short period of time (e.g., a few hours) after its submission.

35. With respect to subsections A.3 (access to registration and search services) and A.5 (rejection of a registration or search request), it was agreed that: (a) access to registration services should be discussed separately from access to search services; (b) the discussion of access to registration services should be followed by a discussion of the grounds for rejection of a registration and access to searching services should be followed by a discussion of the grounds for rejection of a search request; (c) the discussion of the rejection of a registration or search request should be recast as an obligation of the registry in cases where the necessary conditions were not met; and (d) it should be explained that, in the case of an electronic registry, the grounds for rejection should be provided by the registry immediately, while, in the case of a not fully electronic registry, the grounds for rejection should be provided as soon as practicable.

36. With respect to subsection A.4 (verification of identity, evidence of authorization or scrutiny of the content of the notice not required), it was agreed that: (a) it should be clarified that there was no need for the registry to verify the identity of the registrant and, in any case, the identification of the registrant should be discussed in subsection A.3, dealing with access to registration services; (b) measures to protect grantors from unauthorized registrations should also be discussed in that context with cross-references to other sections of the draft Registry Guide (e.g., the section on compulsory amendment and cancellation of a notice); and (c) the issue of amendments or cancellations that were not authorized by the secured creditor should be discussed in the section dealing with copies of registered notices.

37. With respect to recommendations 4 to 9, it was agreed that: (a) for reasons of consistency with the formulation of the recommendations of the *Secured Transactions Guide*, in recommendation 5, the words “must be” should be replaced by the word “is”; (b) in recommendation 5, subparagraph (c) (i), the suspension of the access to the registry services should be qualified by reference to a reasonably short period of time and to the reason of the suspension (e.g., maintenance); (c) in recommendations 6 and 7, the words “is entitled to register” and “is entitled to search” should be replaced by words along the lines “is entitled to submit a notice for registration” and “is entitled to submit a search request”, as the registry

could reject a registration or search request according to recommendation 9; (d) recommendation 6 should be followed by a recommendation dealing with the rejection of a registration request along the lines of recommendation 9, subparagraphs (a) and (c), with the change that rejection should be mandatory if the conditions set out therein were not met; (e) recommendation 7 should be placed right after recommendation 8; (f) recommendation 8 should be retained with some drafting improvements of subparagraph (c); and (g) the rest of recommendation 9, dealing with the rejection of a search request, should be retained along the lines of subparagraphs (b) and (c), with the change that the rejection should be mandatory if the conditions set out therein were not met.

38. In the context of the discussion of recommendations 4 to 9, it was also agreed that the commentary should: (a) clearly separate access issues from the grounds for rejection of a registration or a search request; (b) revise the title of chapter II to reflect that distinction; (c) explain the relationship of recommendations 6 and 9 with recommendation 54, subparagraph (c), of the *Secured Transactions Guide*; and (d) explain that the registry could require and maintain the identity of the registrant but not require verification of the registrant's identity (other than the minimal verification referred to in the *Secured Transactions Guide*, chapter IV, para. 48).

39. Subject to the above-mentioned changes (see paras. 33-38 above), the Working Group adopted the substance of chapter II (access to the registry services) of the draft Registry Guide.

E. Registration (A/CN.9/WG.VI/WP.52/Add.2, paras. 11-58)

40. With respect to subsection A.1 (time of effectiveness of registered notice), it was agreed that: (a) the discussion of the obligation of the registry to assign a registration number to an initial notice should be dealt with as a separate matter, since it did not fit under the heading "time of effectiveness of registered notice"; (b) the discussion of the priority of security rights covered in notices that were registered simultaneously could be deleted as it was not relevant in that context, the issue was rather unlikely to occur and, in any case, was sufficiently addressed in recommendations 70 and 76, subparagraph (a) of the *Secured Transactions Guide*; (c) the importance of certainty as to the exact time the registered notice became effective should be emphasized by reference to the commencement of insolvency proceedings with respect to the grantor, as the commencement of insolvency proceeding was more likely to coincide with the time of registration; (d) the discussion of the time lag between the time of receipt of a notice by the registry and the time the notice became available to searchers should be streamlined and corrected; (e) the obligation of the registry to enter in the record each notice in the order it was received (which was important for the order of priority of each security right and was not intended to address the time lag problem) should be clearly explained as a separate issue from the obligation of the registry to do so without delay; and (f) the discussion of "currency dates" should be deleted as it was not relevant in the context of a secured transactions system in which the time of effectiveness was the time a notice became available to searchers (rather than the time a notice was received).

41. With respect to subsection A.2 (period of effectiveness of registered notice), it was agreed that: (a) the discussion of the mandatory requirement of indicating in the notice its period of effectiveness should be placed in the part of the draft Registry Guide dealing with the required content of a notice; and (b) the discussion of a default period of effectiveness in options B and C should be deleted as it was inconsistent with the *Secured Transactions Guide*.
42. With respect to subsection A.3 (time when a notice may be registered), it was agreed that the discussion of the issue of grantor protection against unauthorized registrations should be shortened and a cross-reference should be included in the discussion in the draft Registry Guide of compulsory amendment and cancellation of a notice.
43. With respect to subsection A.4 (sufficiency of a single notice), it was agreed that the commentary should clarify that a registration of a single notice was sufficient to achieve third-party effectiveness of one or more than one security right in the encumbered asset described in the notice and in favour of the secured creditor identified in the notice.
44. With respect to subsection A.5 (indexing or other organization of information in the registry record), it was agreed that: (a) the discussion of grantor-based indexing should be separated from the discussion of asset-based indexing; (b) the latter should be shortened, as it was discussed in the commentary of the *Secured Transactions Guide*, but not recommended; and (c) it should be clarified that information in an amendment notice should be indexed or otherwise organized so that, when a search was made, it would retrieve the information in the initial notice as well as the information in all amendment notices that related to that initial notice.
45. With respect to subsection A.6 (integrity of the registry record), it was agreed that: (a) the commentary should discuss the obligation of the registry to protect the information in the registry record through secure back-up mechanisms (see para. 31 above); (b) the role of the registry staff should be discussed in a more flexible manner, as it could vary from one State to another and, in any case, the registry staff should be allowed to give practical advice with respect to the registration process to registrants and in particular to small lenders; and (c) the discussion about the registry staff not being allowed to give legal advice should be moved to subsection A.7 dealing with liability of the registry.
46. With respect to subsection A.7 (liability of the registry), it was agreed that the heading of that subsection should be re-drafted so as not to imply the existence of liability of the registry.
47. With respect to subsection A.8 (copy of registered notice), it was agreed that: (a) the subsection should be divided into two parts, one dealing with the registry's duty to send a copy of the registered notice to the registrant and the other dealing with the registrant's duty to send a copy to the grantor; (b) the commentary should explain that the purpose of sending a copy of the registered notice to the grantor was to ensure the existence of the grantor's authorization and the conformity of the scope of the notice with that authorization; and (c) in the case of the initial notice, the copy should be sent to the address of the grantor set forth in the notice, while, in the case of an amendment notice, the copy could be sent to that address or to the grantor's current address known to the registrant.

48. With respect to subsection A.9 (amendment of information in a registered notice), it was agreed that: (a) the subsection could be shortened and the discussion on compulsory amendment could be dealt with in the relevant part of the draft Registry Guide; and (b) the heading should be revised along the following lines “amendment of a registered notice”, as the term “amendment” already included a reference to information in a registered notice.

49. In that connection, the Working Group reconsidered the terms “amendment” and “cancellation” in the draft Registry Guide and agreed that: (a) the meaning of the term “amendment” should not refer to the act of deleting information contained in a registered notice, as, in the case of an amendment, information would be added to the record without the deletion of the existing information; and (b) the meaning of the term “cancellation” should refer to the act of removing all information contained in a registered notice but only from the publicly accessible record, as that information would be retained in the registry archives for a long period of time (see also para. 18 above). However, noting that those terms were used in different contexts throughout the draft Registry Guide to reflect a noun, process or legal effect, it was agreed that the commentary should be carefully revised to explain their meaning depending on the context.

50. With respect to subsection A.10 (removal of information from the publicly available registry record and archival of such information), it was agreed that: (a) examples of situations where the need to retrieve information arose could be further developed; (b) the possibility of retaining information in expired or cancelled notices in the publicly accessible registry record should not be mentioned, as it was inconsistent with the recommendations of the *Secured Transactions Guide*; and (c) the discussion of the correction of errors by the registry staff should be moved to the subsection dealing with the integrity of the registry record.

51. With respect to subsection A.11 (language of a notice), it was agreed that: (a) reference should be made to the possibility of a search result being displayed in an official language other than the language of the initial notice (namely, to the possibility of multiple official languages); and (b) the use of personal identification numbers as grantor identifier should not be discussed as a way to mitigate the language problem as, in any case, the name of the grantor would need to be provided.

52. With respect to recommendations 10 to 20, it was agreed that: (a) the obligation of the registry to assign a registration number to the initial notice should form a separate recommendation, as it did not fit under the heading of recommendation 10 (time of effectiveness of registered notice); (b) in recommendation 10, the reference to the “initial notice” should be retained (rather than to the “initial registered notice”), as an initial notice would be assigned a registration number at the same time it would be registered; (c) the use of the terms “registered notice” and “registration” in recommendation 11 and other recommendations should be carefully examined and streamlined; (d) the last part of recommendation 14, subparagraph (b), should be revised along the following lines “so as to make it retrievable together with the initial notice as amended”, as the term “retrievable” conveyed more closely the correct meaning of finding information; (e) recommendation 16 should be revised to refer to the address set forth in the notice in the case of initial notices, and to that address or the grantor’s current address known to the registrant in the case of an amendment notice; and

(f) recommendation 19 should include a cross-reference to recommendation 14 to ensure that archived information would be retrieved with the initial notice as amended.

53. Subject to the above-mentioned changes (see paras. 40-52 above), the Working Group adopted the substance of chapter III (registration) of the draft Registry Guide.

F. Registration information (A/CN.9/WG.VI/WP.52/Add.3, paras. 1-56)

54. With respect to subsection A.1 (information required in an initial notice), it was agreed that: (a) the inclusion of all required information in the notice should be discussed as a condition of the notice being accepted (or not rejected) by the registry, rather than as a condition of effectiveness; (b) the commentary dealing with the grantor identifier should be moved to the part of the draft Registry Guide dealing with that matter; (c) the commentary should be revised to state that a search disclosed the notices registered against the grantor (rather than security rights that might have been granted); (d) the commentary should elaborate on the hierarchy among documents used for the identification of grantors that were natural persons, in line with the relevant table and recommendation; (e) the matching of names entered in registered notices against names in other databases, which took place during the registration process, was relevant to, and should thus be discussed with respect to, both natural and legal persons; (f) the address of the grantor should be discussed as additional information that was neither part of the grantor identifier nor a search criterion, with appropriate cross-references to the part of the draft Registry Guide in which that matter was discussed; (g) the issue of identity theft should be discussed in more detail; (h) the discussion of identifiers of grantors that were domestic or foreign corporations should be streamlined; (i) the discussion of the special cases should be aligned more closely with the relevant table; (j) the grantor's address should be discussed without encouraging unsolicited communications of third parties with grantors; (k) in the discussion of the required contents of a notice, cross-references should be included to the discussion of incorrect or insufficient information; (l) the commentary should explain that, without authority by the grantor, the secured creditor could not provide third parties with information about the grantor.

55. With respect to subsection A.2 (secured creditor information), it was agreed that a trustee or agent in a syndicated lending transaction should be referred to as a secured creditor (rather than as a representative of the secured creditor).

56. With respect to subsection A.3 (description of encumbered assets), it was agreed that: (a) the commentary should explain that the description of an encumbered asset could be specific or generic, depending on the nature of the asset and the grantor's estate; and (b) the description of serial number assets should be discussed as an option (not a requirement), permitting also serial number indexing and searching, and clarifying that a negative search result after a serial number search should not be relied upon.

57. With respect to subsection A.5 (maximum amount for which the security right may be enforced), it was agreed that: (a) the commentary should clarify that the

maximum amount mentioned in a notice should not be used as an opportunity to impose registry fees at a level higher than necessary for cost recovery (recommendation 54, subpara. (i), of the *Secured Transactions Guide*); and (b) the commentary should clarify that, even if there was no competing claimant, the secured creditor could enforce its security right up to the maximum amount stated in the security agreement and the notice, and claim payment of any remaining balance of the secured obligation only as an unsecured creditor.

58. With respect to subsection A.6.(a) (grantor information), it was agreed that the commentary should clarify that an error with respect to additional grantor information (such as the grantor's address, birth date or identity card number) should not render a notice ineffective unless it would seriously mislead a reasonable searcher.

59. With respect to subsection A.6.(b) (secured creditor information), it was agreed that: (a) a change in the secured creditor identifier after registration of a notice should not render the notice ineffective; and (b) the discussion of an amendment should be placed in the discussion of amendments in the draft Registry Guide.

60. With respect to subsection A.6.(c) (asset description), it was agreed that: (a) the discussion of the description of serial number assets should be separated from the discussion of a serial number as a search criterion; (b) where the indication of a serial number in a notice was optional, an error should not render the registered notice ineffective, unless it would seriously mislead a reasonable searcher; (c) where such indication was mandatory, an error should not render a registered notice ineffective, unless the notice would not be retrieved by a search with the correct serial number; (d) the impact of an incorrect statement in the registered notice of the period of effectiveness of registration should be discussed to clarify, inter alia, that: (i) if a shorter period than intended was indicated in the registered notice, upon its expiry, its effectiveness would lapse and could be re-established with the registration of a new notice but only as of the time of the new registration; and (ii) if a longer period than intended was mentioned in the registered notice, third parties would not be prejudiced as they would have been alerted to the fact that security right might exist; and (e) the discussion of the maximum monetary amount and the impact of error should clarify that: (i) if the maximum amount indicated in the notice was, as a result of a mistake, lower than the maximum amount indicated in the security agreement, the secured creditor could enforce its security right up to the maximum amount and claim any balance as an unsecured creditor (in accordance with law other than secured transactions law), if there were other competing claimants; and (ii) if there were no other competing claimants, the secured creditor could enforce its security right up to the amount indicated in the security agreement as, based on that agreement, the security right would be effective between the parties.

61. With respect to recommendations 21 to 27 (see also para. 77 below), it was agreed that: (a) in recommendation 22, subparagraph (b), it should be clarified that each component of the name should be entered in the field designated for the respective component; (b) in recommendations 26 and 27, the reference to the initial or the amendment notice should be reviewed, as recommendation 21, subparagraph (a), sufficiently clarified that recommendations 21 to 27 applied to the initial notice and recommendation 28, subparagraph (a) (ii) and (iii), properly

adjusted, could clarify that the recommendations that applied to entering information in an initial notice would also apply to entering information in an amendment notice; and (c) recommendation 27, subparagraph (e), should be retained within square brackets and with appropriate adjustments to provide guidance on how third parties that relied on an incorrect statement in the registered notice of the period of effectiveness or the maximum amount for which the security rights could be enforced would be protected.

62. Subject to the above-mentioned changes (see paras. 54-61 above), the Working Group adopted the substance of chapter IV (registration information) of the draft Registry Guide.

G. Amendment and cancellation information (A/CN.9/WG.VI/WP.52/Add.4, paras. 1-30)

63. With respect to subsection A.1.(a) (general), it was agreed that: (a) the terminology used should be adjusted to avoid implying that an amendment could result in a change (as opposed to the addition) of information in the registry record; (b) the question of whether an amendment would require the authorization by the grantor should be clarified by setting out examples (rather than setting a general test of adverse economic impact), such as adding encumbered assets or increasing the maximum amount for which the security right could be enforced; (c) situations in which the grantor had authorized an amendment should be distinguished from situations in which the grantor had not given such authorization; (d) emphasis should be given to multiple amendments with a single notice; and (e) the focus should be on guidance to registrants, while the text that provided guidance to the registry should be moved to the appropriate place in the draft Registry Guide.

64. With respect to subsection A.1.(b) (change of the grantor identifier), it was agreed that: (a) reference should be made to permanent unique numbers (rather than identity card numbers) and to the fact that their use as a supplementary identifier could not address the problem that arose from the change in the grantor identifier as the name would still be the main grantor identifier; (b) it was the function of the registry to preserve the old grantor identifier even if a new identifier was entered; (c) the impact of the old and the new grantor identifier on the third-party effectiveness and priority of the security right to which the notice related should be explained; and (d) the question whether a search would be possible against both the new and the old identifier, and if so, what would be the consequence for third parties that relied on a negative search result should be elaborated on.

65. With respect to subsection A.1.(c) (transfer of an encumbered asset), it was agreed that: (a) the different approaches taken by States with respect to the effectiveness of the registration upon the transfer of the encumbered asset should be discussed in a more streamlined manner; (b) even in States that did not require an amendment notice, the registrant could make such an amendment if it wished to; and (c) an amendment did not involve the deletion of information from the registry record.

66. With respect to subsection A.1.(e) (assignment of the secured obligation and transfer of the security right), it was agreed that: (a) reference should be made to article 10 of the United Nations Convention on the Assignment of Receivables in

International Trade; (b) the new secured creditor would not have to provide to the registry evidence of consent by the original secured creditor to register an amendment notice, and the matter would be left to the parties in their agreement; (c) the registry record would not need to disclose whether an amendment notice was registered by the original or the new secured creditor; and (d) the secured creditor was under no obligation to disclose the identity of the assignee to the grantor upon request.

67. With respect to subsections A.1.(f) (addition of newly encumbered assets) and (g) (deletion of encumbered assets), it was agreed that the discussion of instances where the grantor had partially satisfied the secured obligation should be merged with the discussion of the deletion of encumbered assets.

68. With respect to subsection A.1.(h) (change of description of encumbered assets), it was agreed that: (a) where the description of the encumbered assets in the registered notice was correct but no longer corresponded to the encumbered assets due to changes in their characteristics, the registration continued to be effective against third parties as long as it reasonably allowed their identification; (b) where the description of the encumbered assets in the registered notice was erroneous and the amendment notice corrected the errors, third-party effectiveness would be achieved as of the time the amendment notice was registered.

69. With respect to subsection A.1.(i) (extension of the period of effectiveness of a registration), it was agreed that: (a) the registration of an amendment notice to extend that period was not an obligation of, but an option for, the registrant; (b) the extension of the period of effectiveness before it expired was an amendment and not a new registration; (c) cross-references should be made to the relevant part of the draft Registry Guide providing options with regard to the period of effectiveness; and (d) the possibility of setting no limit to the period of effectiveness should not be mentioned as it was not an approach recommended in the *Secured Transactions Guide*.

70. With respect to subsection A.1.(j) (global amendment), it was agreed that the discussion should be shortened and explain how a global amendment was made with a single notice.

71. With respect to subsection A.2 (voluntary cancellation), it was agreed that: (a) the registrant should be able to cancel a notice at any time; (b) the grantor identifier was not required for a cancellation notice in order to facilitate the cancellation of registered notices; and (c) all relevant issues with respect to a cancellation notice submitted by one of the secured creditors in the registered notice should be discussed, including: (i) what kind of effect such a notice would have on the rights of other secured creditors and on third parties that relied on the non-existence of such information in the publicly accessible registry record; (ii) whether authorization by other secured creditors would be required and if so, the mechanism to obtain such authorization; (iii) whether the registry should be designed to reject such a notice and to request that it be submitted as an amendment notice; and (iv) whether the registry should be designed to treat such a notice as an amendment notice.

72. With respect to subsection A.3 (correction of erroneous lapse or cancellation), it was agreed that the commentary should explain that: (a) regardless of whether the lapse or cancellation of the registered notice was erroneous or not, a new initial

notice was required to correct the lapse or cancellation and re-establish third-party effectiveness; and (b) the matter might be discussed together with voluntary cancellation under a revised heading (“effect of lapse or cancellation”).

73. With respect to recommendations 28 to 31, it was agreed that: (a) at the end of recommendation 28, subparagraphs (a)(ii) and (iii), the words “in an initial notice” should be added; (b) recommendation 28, subparagraph (b), should be retained outside square brackets and the commentary should explain that in States that required the disclosure of the transferee identifier in an amendment notice, the recommendation would reflect a requirement, in other States it would indicate an option; (c) in recommendation 28, subparagraph (d), only option B should be retained and the commentary should discuss both options to better explain the recommended option; (d) recommendation 29 should be revised to provide two distinct options; (e) at the end of recommendation 30, the words “of the registered notice to which the cancellation relates” should be added and the formulation of the recommendation should be aligned with the formulation of other recommendations; (f) with respect to recommendation 31, subparagraph (a)(iii), the difference between the terms “inaccurate” and “incorrect” should be explained in the commentary by way of examples; (g) in recommendation 31, subparagraph (c), the words “to the extent appropriate” should be reviewed and perhaps replaced by words along the lines “as the case may be”; and (h) the bracketed text in recommendation 31, subparagraph (g), should be retained outside square brackets.

74. Subject to the above-mentioned changes (see paras. 63-73 above), the Working Group adopted the substance of chapter V (amendment and cancellation information) of the draft Registry Guide.

H. Searches (A/CN.9/WG.VI/WP.52/Add.4, paras. 31-41)

75. With respect to subsection A.1 (search criteria), it was agreed that: (a) commentary on the access to search services and on search results should be removed as those matters were addressed elsewhere in the draft Registry Guide; and (b) the commentary should discuss the use of a serial number as an optional search criterion.

76. With respect to subsection A.2 (search result), it was agreed that: (a) the discussion should be streamlined and carefully illustrate registry systems that disclosed “close matches”; (b) clarify the difference between the terms “match” and “exact match”; and (c) explain the reasons why no reference to currency dates was needed.

77. With respect to recommendations 32 and 33, it was agreed that: (a) only the grantor name should be a search criterion and thus the reference to additional grantor information in recommendations 22, 23 and 24 could be moved to recommendation 21, subparagraph (a)(i) (see also para. 61 above); (b) in recommendation 33, subparagraph (b), explicit reference should be made to close matches if a State chose to introduce any exceptions to the rule of “exact matches”.

78. Subject to the above-mentioned changes (see paras. 75-77 above), the Working Group adopted the substance of chapter VI (searches) of the draft Registry Guide.

I. Registration and search fees (A/CN.9/WG.VI/WP.52/Add.4, paras. 42-48)

79. After discussion, the Working Group adopted the substance of chapter VII (registration and search fees) unchanged.

J. Examples of registry forms (A/CN.9/WG.VI/WP.52/Add.6)

80. The Working Group next considered examples of registry forms and agreed that a number of changes would need to be made to reflect decisions taken by the Working Group at the present session and ensure the internal consistency of the examples of the registry forms. It was also agreed that the commentary should emphasize the importance to international trade of coordination among States to ensure the harmonization of secured transactions laws and regulations, as well as the standardization of registry forms.

V. Future work

81. The Working Group noted that the twenty-third session of the Working Group was scheduled to take place in New York from 8 to 12 April 2013.

**B. Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-second session**

(A/CN.9/WG.VI/WP.52 and Add.1-6)

[Original: English]

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Preface

At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.¹ In accordance with that decision,² the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The

¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 313-320.

² *Ibid.*

colloquium was attended by experts from governments, international organizations and the private sector.³

At its forty-third session (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.⁴

In that connection, it was widely felt that a text on registration of security rights in movable assets would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Secured Transactions Guide*") did not address in sufficient detail the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful implementation of a registry.⁵

The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Secured Transactions Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Secured Transactions Guide*. After discussion, the Commission decided that the Working Group should be entrusted with the preparation of a text on registration of security rights in movable assets.⁶

At its eighteenth session (Vienna, 5-10 November 2010), the Working Group considered a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Add.1 and 2). At the outset, the Working Group expressed its broad support for a text on the registration of security rights in movable assets, noting that empirical evidence clearly demonstrated that the efficacy of a secured transactions law depended on an effective registration system (A/CN.9/714, para. 12). As to the specific form and structure of the text to be prepared, the Working Group adopted the working assumption that the text would be a guide on the implementation and operation of a registry of security rights in movable assets that could include principles, guidelines, commentary and possibly model regulations. The Working Group also agreed that the text of the proposed registry guide should be consistent with the type of secured transactions legal regime contemplated by the *Secured Transactions Guide*, while also taking into account the diverse approaches taken by modern national and international registry regimes. It was also observed that, in line with the *Secured Transactions Guide*

³ For the colloquium papers, see www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

⁴ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

⁵ Ibid., para. 265.

⁶ Ibid., paras. 266-267.

(see recommendation 54, subpara. (j)), the proposed registry guide should take into account the need to accommodate a hybrid electronic/paper system in which parties would have the option of submitting registration and search inquiries either electronically or in paper form (A/CN.9/714, para. 13). The Secretariat was asked to prepare a draft of the proposed registry guide based on the discussions and conclusions of the Working Group (A/CN.9/714, para. 11).

At its nineteenth session (New York, 11-15 April 2011), the Working Group considered notes by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.46 and Add.1 and 2) and “Draft Model Regulations” (A/CN.9/WG.VI/WP.46/Add.3). At the outset, the Working Group considered the form and content of the text to be prepared. One view was that a stand-alone guide should be prepared that would include an educational part introducing the secured transactions law recommended in the *Secured Transactions Guide* and a practical part that would consist of model registration regulations and commentary thereon (see A/CN.9/719, para. 13). Another view was that emphasis should be placed on model registration regulations and a commentary thereon, which would provide States that had enacted the secured transactions law recommended in the *Secured Transactions Guide* with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry (see A/CN.9/719, para. 14). At that session, differing views were also expressed as to whether the regulations should be formulated as model regulations or as recommendations (A/CN.9/719, para. 46). The Working Group requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group (A/CN.9/714, para. 12).

At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission considered the reports of the eighteenth and nineteenth sessions of the Working Group (A/CN.9/714 and A/CN.9/719, respectively). At that session, the significance of the work undertaken by Working Group VI was emphasized in particular in view of efforts currently undertaken by several States with a view to establishing a general security rights registry and the significant beneficial impact the operation of such a registry had on the availability and the cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach followed with respect to the *Secured Transactions Guide*, the text should be formulated in the form of a guide with commentary and recommendations, rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that the mandate of the Working Group, leaving the decision on the form and content of the text to be prepared to the Working Group, did not need to be modified, and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.⁷

At its twentieth session (Vienna, 12-16 December 2011), the Working Group continued its work based on a note by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.48 and Add.1-3). At that session, the Working Group agreed that the text should take the form of a guide (the “draft Registry

⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 233.

Guide”) with commentary and recommendations along the lines of the *Secured Transactions Guide*. In addition, the Working Group agreed that, where the draft Registry Guide offered options, examples of model regulations could be included in an annex to the draft Registry Guide (A/CN.9/740, para. 18). As to the presentation of the text, it was agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the *Secured Transactions Guide*, and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/740, para. 30).

At its twenty-first session (New York, 14-18 May 2012), the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry: Annex I. Terminology and recommendations” (A/CN.9/WG.VI/WP.50 and Add.1-2). At that session, the Working Group approved the substance of the terminology and the recommendations of the draft Registry Guide (A/CN.9/743, para. 21). In addition, the Working Group agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session, in 2013 (A/CN.9/743, para. 73).

At its forty-fifth session (New York, 25 June-6 July 2012), the Commission considered the reports of the twentieth and twenty-first sessions of the Working Group (A/CN.9/740 and A/CN.9/743, respectively). At that session, the Commission expressed its appreciation to the Working Group and requested the Working Group to proceed with its work expeditiously and to complete it so that the draft Registry Guide would be submitted to the Commission for final approval and adoption at its forty-sixth session, in 2013.⁸

[Note to the Working Group: The Working Group may wish to note that the preface will be updated after each Working Group meeting and completed after the Commission adopts the draft Registry Guide at its forty-sixth session, in 2013.]

⁸ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 99.

Introduction

A. Purpose of the draft Registry Guide and its relationship with the *Secured Transactions Guide*

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the “*Secured Transactions Guide*”) deals with the full range of issues that should be addressed in a modern secured transactions law (as supplemented with respect to security rights in intellectual property by the *Supplement on Security Rights in Intellectual Property*; the “*Supplement*”). The establishment of a publicly accessible registry in which information about the potential existence of a security right in movable assets may be registered is an essential feature of the *Secured Transactions Guide* and of modern law reform initiatives in this area generally. Chapter IV of the *Secured Transactions Guide* contains commentary and recommendations on many aspects of a security rights registry. In addition, chapters III and V of the *Secured Transactions Guide* address the related issues of third-party effectiveness and priority of a security right.

2. However, the *Secured Transactions Guide* does not address in every detail the myriad of legal, technological, administrative and operational issues involved in developing and operating an effective and efficient security rights registry. This is in line with the typical legislative drafting approach, under which the detailed rules applicable to the establishment and the operation of the registry, as well as the registration and search process, are left to be dealt with in subordinate regulations, ministerial guidelines or the like. Thus, the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (the “draft Registry Guide”) seeks to implement the *Secured Transactions Guide* by addressing these issues in greater detail.

3. It should be emphasized at the outset that the recommendations of the draft Registry Guide are intended to be implemented by States that have enacted a secured transactions law that is substantially in conformity with the recommendations of the *Secured Transactions Guide*. It follows that, in order to understand the legal framework in which the registry is intended to function, a user of the draft Registry Guide should have a basic understanding of the secured transactions law contemplated by the *Secured Transactions Guide*. Thus, section E of the Introduction to the draft Registry Guide offers a concise summary of the secured transactions regime recommended by the *Secured Transactions Guide*. Other chapters of the draft Registry Guide include additional guidance about matters addressed in the secured transactions law recommended by the *Secured Transactions Guide*. For a thorough understanding, however, the draft Registry Guide should be read together with the *Secured Transactions Guide*.

4. The experience of States that have instituted the kind of general security rights registry contemplated by the *Secured Transactions Guide* demonstrates how advances in information technology can vastly improve the operational efficiency of such a registry. Particularly in relation to the technical aspects of registry design and operation, the draft Registry Guide draws on these national precedents. In addition, the draft Registry Guide has benefitted from international sources, including the following:

(a) Law and Policy Reform at the Asian Development Bank — A Guide to Movables Registries (2002);

(b) Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry, European Bank for Reconstruction and Development (EBRD) (2004);

(c) Publicity of Security Rights: Setting Standards for Charges Registries, EBRD (2005);

(d) Principles, Definitions and Model Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets), chapter 3 (Effectiveness as Against Third Parties), section 3 (Registration), (2010), prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group);

(e) Model Registry Regulations under the Model Inter-American Law on Secured Transactions, Organization of American States (OAS) (2009);

(f) Secured Transactions Systems and Collateral Registries, The International Finance Corporation (World Bank Group) (2010); and

(g) Convention on International Interests in Mobile Equipment (Cape Town, 2001) and its Protocols, providing for the establishment of international registries (which, although they are asset-based and cover other transactions in addition to secured transactions, are notice-based, with registration resulting in third-party effectiveness and priority).

5. The national, regional and international sources referred to above are largely consistent with, but do not always fully accord with, the recommendations of the *Secured Transactions Guide*. Where appropriate, the draft Registry Guide explains the policy rationale for the approach recommended in the *Secured Transactions Guide* relative to other possible approaches.

6. The draft Registry Guide is addressed to all those who are interested or actively involved in the design and implementation of a security rights registry, as well as to those who may be affected by or interested in its establishment and operation, including:

(a) Policymakers implementing the recommendations of the *Secured Transactions Guide*, especially in relation to the establishment of a security rights registry;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with fulfilling the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry clientele, including potential secured creditors, credit reporting agencies, other creditors of the grantor of a security right and the grantor's insolvency representative, as well as all other persons whose rights may be affected by a security right, such as a potential buyer of an encumbered asset;

(e) The general legal community (including judges, arbitrators and practising lawyers); and

(f) All those involved in secured transactions law reform and the provision of technical assistance, such as the World Bank Group, the EBRD, the ADB and the Inter-American Development Bank.

7. Not all of these potential readers will be versed in the intricacies of secured transactions law or have legal training. Accordingly, the draft Registry Guide is written in "plain language" style employing "reader-friendly" aids.

8. The draft Registry Guide uses neutral generic legal terminology that is consistent with the terminology used in the *Secured Transactions Guide*. Consequently, it can be adapted readily to the diverse legal traditions and drafting styles of different States. The draft Registry Guide is also formulated in a flexible fashion enabling it to be implemented in accordance with local drafting conventions regarding which types of rule must be incorporated in principal legislation and which may be left to subordinate regulations, or ministerial or other administrative guidelines.

B. Terminology and interpretation

9. The terminology and interpretation section of the *Secured Transactions Guide* (see Introduction, sect. B, para. 20), applies also to the draft Registry Guide. The terminology of the draft Registry Guide is also consistent with the refinement of these terms and the explanations of additional terms in the various chapters of the *Secured Transactions Guide*.

10. For example, when the draft Registry Guide uses the term "future asset", it means, as explained in the *Secured Transactions Guide*, assets that come into existence or are acquired by the grantor after the time the security agreement is entered into (see *Secured Transactions Guide*, chap. I, para. 8; chap. II, para. 51; and chap. V, para. 151).

11. However, the draft Registry Guide refines certain of the terminological and interpretation provisions of the *Secured Transactions Guide* and also introduces additional terms as follows:

(a) Address

"Address" means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; (iii) an electronic address; or (iv) another address that is equivalent to (i), (ii) or (iii).

(b) Amendment

“Amendment” means the act of adding, deleting or modifying information contained in a registered notice, [by the one and only registrant or, if there is more than one registrant, some of them,] as well as the effect thereof.

[Note to the Working Group: The Working Group may wish to consider the text within square brackets in the terms “amendment” and “cancellation”), which, as explained in para. 12 below, is intended to distinguish between an amendment and a cancellation in cases in which there is more than one registrant.]

12. Examples of amendments include the following: (a) the extension or reduction of the period of effectiveness of a notice (if applicable); (b) the addition or deletion or modification of the identifier or address of a secured creditor or grantor; (c) the addition or deletion of encumbered assets; and (d) the modification of the maximum monetary amount for which the security right may be enforced (if applicable) (for a discussion of amendments, see A/CN.9/WG.VI/WP.52/Add.2, paras. 47-50 and A/CN.9/WG.VI/WP.52/Add.4, paras. 1-22). If information is deleted by one of several registrants, it is an amendment. Only the deletion of all information by all registrants amounts to a cancellation (see the term “cancellation” below).

(c) “Cancellation” means the act of deleting all information contained in a registered notice [by the one-and only registrant or, if there is more than one registrant, all of them].

(d) Grantor

“Grantor” means the person identified in the notice as the grantor.

(e) Law

“Law” means the law governing security rights in movable assets.

13. “Law governing security rights in movable assets” means a law based on the recommendations of the *Secured Transactions Guide*. This is because the recommendations of the draft Registry Guide may only be implemented by States that have enacted or are prepared to enact a secured transactions law in substantive conformity with the recommendations of the *Secured Transactions Guide*. For example, in order to implement the recommendations of the draft Registry Guide, a State would need to have in place or be prepared to enact a secured transactions law that provides for notice (rather than document) registration and that treats registration as a method of making a security right effective against third parties (rather than also for creating a security right).

(f) Notice

“Notice” means a communication in writing (paper or electronic) and includes an initial notice, an amendment notice or a cancellation notice.

14. The *Secured Transactions Guide* uses the term “notice” in the general sense of a communication (that is, in a broader sense than the draft Registry Guide). Thus, in the *Secured Transactions Guide* the term covers not only a form (or screen) used to transmit information to the registry (see *Secured Transactions Guide*, Introduction, B, “notice”, and recs. 54, subpara. (b), and 57), but also other communications, such as the non-registry-related notices required to be sent by secured creditors in the context of enforcing their security rights (see *Secured*

Transactions Guide, recs. 149-151). Chapter IV of the *Secured Transactions Guide* supplements the meaning of the term “notice” in the registration context by referring to: (a) “information contained in a notice” or “the content of the notice” (see *Secured Transactions Guide*, recs. 54, subpara. (d), and 57); and (b) the “registry record” in the sense of information contained in all notices that have been accepted by the registry and entered into the registry database that is available to the public (see *Secured Transactions Guide*, rec. 70). The draft Registry Guide uses the term “notice” only in the narrower sense, emphasizing more the information contained in the paper or electronic communication to the registry rather than the medium of communication. Thus, the word “notice” in the draft Registry Guide should be understood in that sense.

(g) Registrant

“Registrant” means the person identified in the notice as the secured creditor.

15. The registrant may be the secured creditor or its representative (see rec. 57, subpara. (a)).

(h) Registrar

“Registrar” means the person designated pursuant to the law and the regulation to supervise and administer the operation of the registry.

(i) Registration

“Registration” means the entry of information contained in a notice into the registry database.

(j) Registration number

“Registration number” means a unique alphanumeric identifier assigned to an initial registered notice by the registry and permanently associated with that notice and any related subsequent amendment or cancellation notice.

(k) Registry record

“Registry record” means the information in all registered notices that is stored in the registry database and includes both the information that is publicly available to searchers and the information in cancelled notices that is in the archives.

16. The term “registry record” includes all registered notices and not just the notices relating to a specified grantor. For this reason, to refer to one notice in the registry record, reference is made to a “registered notice”.

(l) Regulation

“Regulation” is the body of rules implementing the provisions of the law with regard to the registry.

[Note to the Working Group: The Working Group may wish to consider whether, if the secured transactions law is enacted in two or more statutes (e.g., one that deals with all the substantive rules, another that deals with conflict-of-laws rules, and another that establishes the registry), there may be rules relating to registration that are enacted as subordinate legislation (e.g., a regulation that is a separate enactment) in respect of all these statutes. If so, the scope of the term “regulation” may be slightly expanded beyond a text that establishes the registry

and explained in the commentary. The Working Group may also wish to consider whether, because of its importance, the term “designated field” should be explained, for example, along the following lines: “‘designated field’ means a specific place on the notice designated by the registry for entering specified information.”]

C. Key objectives and fundamental policies of an efficient registry

17. The key objectives and fundamental policies of an effective and efficient secured transactions regime discussed in the *Secured Transactions Guide* (see Introduction, section D) are relevant for the establishment and operation of an efficient security rights registry. Particularly relevant in this respect are: (a) the key objective of enhancing certainty and transparency by providing for registration of a notice in a general security rights registry (see *Secured Transactions Guide*, Introduction, para. 54, and rec. 1, subpara. (f)); and (b) the fundamental policy of adopting a functional, integrated and comprehensive approach to secured transactions and to establishing a general security rights registry (see *Secured Transactions Guide*, Introduction, paras. 62 and 66).

18. Consistently with the key objectives and fundamental policies of the *Secured Transactions Guide*, the draft Registry Guide is informed by the following overarching principles:

(a) Legal efficiency: the legal and operational guidelines governing registry services, including registration and searching, should be simple, clear and certain;

(b) Operational efficiency: registry services, including registration and searching, should be designed so as to be as fast and inexpensive as possible, while also ensuring the security and searchability of the information entered in the registry record; and

(c) A balanced approach to the interests of all registry users: the legal and operational framework of the registry should be designed to fairly balance the interests of all persons who may have an interest in the extent and scope of information that is entered in a security rights registry, as well as in the availability of that information, including potential grantors and secured creditors, the grantor’s other creditors and insolvency representative, and other potential competing claimants, such as potential buyers of assets encumbered by a security right.

D. Transitional considerations

19. The *Secured Transactions Guide* contains a detailed discussion of the various issues that States implementing its recommendations may wish to consider (see *Secured Transactions Guide*, Introduction, sect. E). These issues include harmonization with prior law, legislative method and drafting technique, as well as issues relating to post-enactment acculturation.

20. Harmonization with prior law is important as a law based on the recommendations of the *Secured Transactions Guide* may well constitute a significant departure from prior law. The *Secured Transactions Guide* contains a set of balanced and efficient recommendations governing the transition from the prior

law to the new law (see *Secured Transactions Guide*, recs. 228-234). In particular, these recommendations address two important transition issues, the date as of which the new law will come into force (the “effective date”) and the extent to which the new law will apply to transactions or security rights that existed before the effective date.

21. Generally, the *Secured Transactions Guide* recommends that the secured transactions law contemplated therein apply to all security rights including those already in existence on the effective date. However, it recognizes four important exceptions. First, prior law applies to matters that are the subject of litigation or alternative binding dispute resolution proceedings that have commenced before the effective date (however, out-of-court enforcement that has commenced before the effective date law may continue under the new law; see *Secured Transactions Guide*, rec. 229). Second, prior law determines whether a security right has been created before the effective date (see *Secured Transactions Guide*, rec. 230). Third, a security right that was effective against third parties under prior law remains effective until the earlier of: (a) the time it would cease to be effective against third parties under prior law; and (b) the expiration of a period of time specified in the law after the effective date (the “transition period”) (see *Secured Transactions Guide*, rec. 231). Under this approach, the holder of a security right that was created under prior law is given a transition period to comply with the third-party effectiveness requirements of the new secured transactions law. And fourth, the priority of a security right is determined by prior law if: (a) the security right and all competing rights arose before the effective date; and (b) the priority of none of these rights changed after the effective date (see *Secured Transactions Guide*, rec. 233).

22. The new general security rights registry contemplated by the *Secured Transactions Guide* would give all existing secured creditors a quick, easy and inexpensive way of maintaining the third-party effectiveness and priority status of their security rights. The new registry would also allow grantors to use more easily than under prior law the full value of their assets as security for credit as they would be able to create security rights in the same assets in favour of more than one secured creditor as long as the priority status of each secured creditor would be clear.

23. If the enacting State already has in place a registry for security rights in movable assets, additional transitional considerations will need to be addressed. For example, if the new registry is intended to cover security rights previously within the scope of an existing registry, the enacting State or the private entity responsible for implementing the registry may assume responsibility for migrating the information in the existing records into the new registry record. However, as mentioned above, the *Secured Transactions Guide* recommends that the burden of migration can be placed on secured creditors by giving them a transitional period (for example, one year) to register or otherwise make their security right effective against third parties. This latter approach has been used with considerable success in a number of States (especially, when such “re-registration” is free of charge). If this option is chosen, a space or field on the registration form should be provided for entering a note that the registration is a continuation (or transfer) of a registration made prior to the coming into operation of the new registry (for a more detailed discussion of these types of transition issue, see chap. XI of the *Secured Transactions Guide*).

24. States considering the draft Registry Guide for implementation will also need to consider issues of legislative methods and drafting technique. Certain of the recommendations of the draft Registry Guide reiterate or implement recommendations of the *Secured Transactions Guide* because of their importance or because of their relevance to the administration of the registry or its technical design. Such recommendations include the following: 8 (see recs. 55, subpara. (b), and 54, subpara. (d)); 10, subparagraph (a) (see rec. 70); 11 (see rec. 69); 12 (see rec. 67); 13 (see rec. 68); 16 (see rec. 55, subparas. (c), and (d)); 21 (see rec. 57); 26, subparagraph (a) (see rec. 63); 27, subparagraph (a) (see rec. 58); 27, subparagraph (b) (see rec. 64); 27, subparagraph (c) (see rec. 65); 31 (see rec. 72). The rest of the recommendations address purely technical registration matters. Enacting States will need to consider whether to deal with all these issues in the secured transactions law, in the registry regulation, in the terms of use of the registry, or in all or more than one of these texts.

25. Enacting States will also need to consider issues of post-enactment acculturation and, in particular, will need to design a programme aimed at familiarizing potential registry users with the operation of the registry. More specifically, to ensure the smooth implementation of the registry and its active take up by potential users, enacting States will need to consider entrusting an implementation team with the task of developing education and awareness programmes, disseminating promotional and explanatory material and conducting training sessions. The implementation team should also develop instructions on entering information into paper registration forms and electronic screens.

E. Overview of secured transactions law and the role of registration

1. General

26. As already mentioned, a general security rights registry does not exist in a vacuum. It is an integral component of the secured transactions regime recommended by the *Secured Transactions Guide*. Accordingly, this chapter provides an overview of that regime, focusing in particular on the legal function and consequences of registration. For more detailed information, the reader is encouraged to refer to the *Secured Transactions Guide*.

2. Notion and function of a security right

27. Under the *Secured Transactions Guide*, a security right is a property right (a right in rem, distinct from ownership and personal rights) in a movable asset that is created by agreement and secures payment or other performance of an obligation (see the term “security right” and “grantor” in the introduction to the *Secured Transactions Guide*, sect. B). The function of a security right is to mitigate the risk of loss resulting from a default in payment by entitling the secured creditor to claim the value of the assets encumbered by the security right as a back-up source of repayment in preference to the claims of the grantor’s other creditors. For example, if a business that borrows funds on the security of its equipment fails to repay the loan, a secured creditor with a security right in that equipment will be entitled to obtain possession and dispose of the equipment and apply the proceeds to the

outstanding balance. As the risk of loss from default is mitigated, the grantor's access to credit is expanded, quite often on more favourable terms.

28. The *Secured Transactions Guide* adopts a functional, integrated and comprehensive approach to secured transactions so as to encompass any type of property right in a movable asset that functions in substance to secure performance of an obligation regardless of the form of the transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties (see *Secured Transactions Guide*, chap. I, paras. 101-112, and recs. 2 and 10). Thus, the concept of "security right" is not limited to the types of nominated security device conventionally recognized by different legal systems, such as a pledge, charge or hypothec. It also encompasses any type of property right, including ownership, that functions as security, such as a retention-of-title right to secure payment of the purchase price of an asset, financial lease right, the right of a transferee in a transfer of assets for security purposes and the right of an assignee in an assignment of receivables for security purposes (see *Secured Transactions Guide*, chap. I, paras. 101-112 and recs. 2, 8 and 9).

29. The *Secured Transactions Guide* adopts this substance-over-form approach to the concept of security in order to ensure that the legal rights of the immediate parties and any third parties affected by a security agreement are subject to the same uniform set of legal rules. The *Secured Transactions Guide* recommends that, to the extent that exceptions are recognized for general policy reasons (for example, to protect buyers of relatively low-value consumer assets), these exceptions should be narrow and clearly specified in the law (see *Secured Transactions Guide*, recs. 4 and 7).

3. Creation of a security right

30. The *Secured Transactions Guide* recommends that a distinction should be drawn between the creation of a security right (effectiveness between the grantor and the secured creditor) and its effectiveness against third parties (see *Secured Transactions Guide*, chap. I, paras. 1-7, chap. III, paras. 6-8, and recs. 1, subpara. (c), 13 and 30). The main reason for this approach is to implement one of the key objectives of an effective and efficient secured transactions law, that is, to enable parties to create a security right in their assets in a simple and efficient manner by keeping the creation-related formalities to a minimum (see *Secured Transactions Guide*, recs. 1, subpara. (c) and 13).

31. Thus, the *Secured Transactions Guide* contains a number of features intended to achieve this objective. It recommends that: (a) a security right be created simply by agreement between the grantor and the secured creditor; (b) the agreement be in writing if it is not accompanied by a transfer of actual possession of the encumbered asset to the secured creditor; (c) the required form of writing be flexible to include electronic means of communications and require the signature of the grantor only; and (d) the agreement reflect the intent of the parties to create a security right, identify the parties and describe the secured obligation and the encumbered assets (see *Secured Transactions Guide*, recs. 14 and 15).

32. By dispensing with the need for a transfer of possession of the encumbered assets to create a security right, the secured transactions law contemplated by the *Secured Transactions Guide* enables an enterprise to encumber not only its tangible

existing assets but also its intangible and future assets, as well as pools of circulating assets, including, most significantly, receivables and inventory (see *Secured Transactions Guide*, chap. II, paras. 49-70 and recs. 2 and 17). Under the recommendations of the *Secured Transactions Guide*, a security right in future assets is created as soon as the grantor acquires rights in the assets (see *Secured Transactions Guide*, rec. 13). This approach is likely to increase access to credit by expanding the range of assets that a grantor can offer as security. The recommendations of the *Secured Transactions Guide* further confirm that a security right may secure any type of obligation, including future and indeterminate obligations (see *Secured Transactions Guide*, rec. 16).

33. This recognition by the *Secured Transactions Guide* of non-possessory security rights also enhances consumer access to credit since it enables consumer grantors to take immediate possession of assets acquired on secured credit terms. The *Secured Transactions Guide*, however, is mindful of the need to preserve the rights of consumers and other persons that may require special protection. Thus, it recommends that the secured transactions law should not affect the rights of consumers under consumer protection legislation or override statutory limitations relating to whether particular types of assets may be transferred or encumbered (see *Secured Transactions Guide*, chap. I, paras. 10 and 11; chap. II, paras. 56, 57 and 107; recs. 2, subpara. (b), and 18).

34. The *Secured Transactions Guide* also confirms that a security right automatically continues in any proceeds of the encumbered assets (and proceeds of proceeds) without the need for a specific agreement (see *Secured Transactions Guide*, rec. 19). This approach is consistent with the expectations of the parties. If the security right did not extend in the proceeds, an authorized transfer of the encumbered assets could defeat or sharply diminish its ability to rely on those assets to secure the debt. Even where the security right follows the encumbered assets in the hands of a transferee, an extension of the security right in the proceeds is meaningful as it may provide more security in particular where the proceeds happen to be more valuable than the encumbered assets (see *Secured Transactions Guide*, chap. II, paras. 72-81).

4. Third-party effectiveness of a security right

35. Under the recommendations of the *Secured Transactions Guide*, a security right becomes effective between the parties as soon as the requirements outlined above are satisfied. However, the security right cannot be set up against rights acquired by third parties in the encumbered assets unless and until the requirements for third-party effectiveness of the security right are satisfied. The reason for this distinction is to ensure that the security right created by the parties' private agreement is adequately publicized to third parties that might be negatively affected by its existence.

36. Registration of a notice in a general security rights registry is the main method recognized by the *Secured Transactions Guide* for achieving the third-party effectiveness of a security right (see *Secured Transactions Guide*, rec. 32). While this is the only method available for all types of encumbered asset, the *Secured Transactions Guide* recognizes other methods depending on the type of encumbered asset.

37. First, the transfer of possession of the encumbered assets to the secured creditor or its representative is considered to be sufficient practical notice to third parties that the grantor's rights in the assets are likely to be encumbered. Consequently, the dispossession of the grantor qualifies as an alternative method of achieving third-party effectiveness, provided that the dispossession is actual (not constructive, fictive, deemed or symbolic; see *Secured Transactions Guide*, Introduction, sect. B, "possession" and rec. 37). Clearly, this method of achieving third-party effectiveness is available only for the presently owned tangible assets of a grantor that, as a practical matter, the grantor is prepared to relinquish possession of.

38. Second, the *Secured Transactions Guide* recommends that, where the encumbered asset is the right to payment of funds credited to a bank account or a right to receive the proceeds of a letter of credit, secured creditors be given the option of achieving third-party effectiveness by taking "control" of the encumbered asset in lieu of registration in the general security rights registry (see *Secured Transactions Guide*, Introduction, sect. B, "control" and rec. 103). It should be noted that securities and payment rights arising under or from financial contracts governed by netting agreements and foreign exchange contracts are excluded from the scope of the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. I, paras. 37-39, and rec. 4, subparas. (c)-(e)). For these types of asset, an enacting State will typically wish to also provide for alternative methods of achieving third-party effectiveness.

39. Third, the *Secured Transactions Guide* may apply to security rights in types of asset that are subject to a specialized registration regime, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)). To the extent that the *Secured Transactions Guide* applies to security rights in these types of asset, it recommends that registration in the specialized registry be recognized as an alternative method of achieving third-party effectiveness (see *Secured Transactions Guide*, rec. 38).

40. Fourth, where the encumbered asset is or may be attached to immovable property so as to form part of the immovable property, the *Secured Transactions Guide* recommends that the security right in the encumbered asset may be made effective against third parties by the registration of a notice either in the general security rights registry or in the immovable property registry (see *Secured Transactions Guide*, rec. 43). It should be noted that the asset description requirements for an effective registration may differ depending on where the notice is registered owing to differences in the way in which registrations are organized in the two types of registry. The *Secured Transactions Guide* recommends that a description of an encumbered asset in a notice registered in the general security rights registry is sufficient if it reasonably allows its identification since notices in that registry are organized, not by asset description, but by grantor identifier (see *Secured Transactions Guide*, rec. 57, subpara. (b)). In contrast, registrations in an immovable property registry are generally organized by reference to the specific identifier for the relevant parcel of land. Consequently, the identifier used to identify the parcel of immovable property to which the encumbered asset is or will be attached will also need to be included in the notice that is registered in the immovable registry.

5. Priority of a security right

(a) Competing security rights

41. If more than one security right created by the same grantor in the same encumbered asset has been made effective against third parties, it is necessary to have a priority rule to rank the competing security rights as among themselves (see *Secured Transactions Guide*, chap. III, paras. 12-14). Where the competing security rights were all made effective against third parties by registration, priority is generally determined by the order of registration (see *Secured Transactions Guide*, rec. 76, subpara. (a)). Where the competing security rights were all made effective against third parties otherwise than by registration, priority is determined by the order of third-party effectiveness (see *Secured Transactions Guide*, rec. 76, subpara. (b)). In the event a security right that was made effective against third parties otherwise than by registration (e.g. by delivery of possession) comes into competition with a security right that was made effective against third parties by registration, priority is generally determined by the respective order of registration or third-party effectiveness (e.g. delivery of possession), whichever occurs first (see *Secured Transactions Guide*, rec. 76, subpara. (c)).

42. Although these recommendations provide the baseline rules, a modern secured transactions law along the lines recommended in the *Secured Transactions Guide* will invariably recognize some exceptions in the interest of facilitating other business practices and policy objectives. The following paragraphs summarize the principal exceptions recognized by the *Secured Transactions Guide*.

43. First, the *Secured Transactions Guide* recognizes a special priority in favour of a secured creditor that finances the grantor's acquisition of tangible assets (for example, consumer goods, equipment or inventory) or intellectual property (see *Secured Transactions Guide*, chap. X, paras. 125-139, and *Supplement*, paras. 181-183). Provided the requirements recommended by the *Secured Transactions Guide* for obtaining this special priority are satisfied, the "acquisition security right" has priority with respect to the value of those assets over security rights in the grantor's future assets of that kind that were previously acquired and registered or otherwise made effective against third parties. This approach does not prejudice the prior secured creditor since the grantor would not have been able to acquire these new assets but for the new financing (and the secured creditor could first enter into the security agreement, check the registry, wait for a short period of time and then disburse any funds). Giving priority to acquisition security rights also benefits the grantor by giving it access to diversified sources of secured credit to finance new acquisitions.

44. Second, a security right in money and in negotiable instruments or negotiable documents that is made effective against third parties by a transfer of possession to the secured creditor has priority over a security right that was previously made effective against third parties by registration (see *Secured Transactions Guide*, recs. 101, 102, 108 and 109). This exception is based on the policy of preserving the free negotiability of these types of asset in the market place.

45. Third, where the encumbered asset is the right to payment of funds credited to a bank account or a right to receive the proceeds of a letter of credit, a secured creditor that achieves priority by taking "control" of the encumbered asset has priority over a prior or subsequent security right that is made effective against

third parties by registration (see *Secured Transactions Guide*, Introduction, sect. B, “control” and recs. 103 and 107). As already mentioned (see para. 38 above), securities and payment rights arising under or from financial contracts governed by netting agreements and foreign exchange contracts are excluded from the scope of the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. I, paras. 37-39, and rec. 4, subparas. (c)-(e)). Enacting States will need to enact special priority rules in relation to these types of asset.

46. Fourth, to the extent that the secured transactions law applies to security rights in types of movable asset that are subject to specialized registration systems, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)), the *Secured Transactions Guide* recommends that priority be given to a security right that was made effective against third parties by registration in the specialized registry as against a security right registered in the general registry; and where both security rights are registered in the immovable registry, priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 77 and 78). These rules are designed to preserve the integrity and completeness of the specialized registry record.

47. Fifth, the *Secured Transactions Guide* recommends a similar approach to priority competitions involving competing security rights in attachments to immovable property. More concretely, the *Secured Transactions Guide* recommends that priority should be given to a security right, notice of which was registered in the immovable property registry, over a security right in the attachment, notice of which was registered only in the general security rights registry; and where registration with respect to the competing security rights in the attachment or in the immovable property has been made in the immovable property registry, priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 87 and 88). These rules are designed to preserve the integrity and completeness of the immovable property registry record.

(A/CN.9/WG.VI/WP.52/Add.1)(Original: English)

**Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-second session****[Original: English]****ADDENDUM****Contents**

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Introduction (*continued*)

E. Overview of secured transactions law and the role of registration (*continued*)

5. Priority of a security right (*continued*)

(b) Buyers or other transferees of encumbered assets

1. As a general rule, the *Secured Transactions Guide* recognizes that a secured creditor that has complied with the requirements for third-party effectiveness with respect to its security right has a “right to follow” the encumbered asset into the hands of a buyer or other transferee from the grantor that acquires rights in the encumbered asset (see *Secured Transactions Guide*, chap. II, paras. 72-89, chap. III, paras 15, 16 and 89, and rec. 79). Conversely, a transferee will take free of a security right that has not been made effective against third parties by registration or by some other method even if it has actual knowledge of the existence of the security right. This approach is not unfair to secured creditors since they could have protected themselves by timely registration or by otherwise making their security right effective against third parties.

2. However, the *Secured Transactions Guide* recognizes a number of exceptions to this general rule. The following paragraphs summarize the principal exceptions.

3. First, a buyer or lessee or licensee that acquires an encumbered asset with the consent of the secured creditor acquires the asset free of the security right or takes its rights unaffected by the security right (see *Secured Transactions Guide*, rec. 80). This approach facilitates transactions that have been approved by a secured creditor typically after some arrangement has been made to provide other security to the secured creditor.

4. Second, a buyer or lessee or licensee that acquires an encumbered asset in the ordinary course of the grantor’s business takes free of any security right in that asset even if the secured creditor has registered a notice of the security right or otherwise complied with the requirements for third-party effectiveness (see *Secured Transactions Guide*, rec. 81). This approach is consistent with the reasonable commercial expectations of the parties involved. It is not realistic to expect buyers dealing with a commercial enterprise which routinely sells the types of asset in which the buyer is interested, for example, computer equipment, to check the registry before entering into the transaction. Moreover, a secured creditor that takes a security right in a grantor’s inventory will normally have done so on the understanding that the grantor may dispose of the inventory free of the security right in the ordinary course of the grantor’s business. After all, for the grantor to be able to generate the revenue necessary to pay back the secured loan, its customers need to be assured that they will acquire unencumbered title in any inventory sold to them in the grantor’s ordinary course of business.

5. Third, the same policy of preserving negotiability that justifies awarding a special priority to secured creditors that take physical possession of encumbered assets in the form of money or negotiable documents (such as a bill of lading) or negotiable instruments (such as a cheque) also justifies awarding priority to outright

transferees of these types of encumbered asset (see *Secured Transactions Guide*, recs. 101, 102, 108 and 109).

6. Fourth, as already mentioned, the *Secured Transactions Guide* may apply to assets that are subject to a specialized registration regime, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)). These registries typically serve broader goals than simply publicizing security rights in the relevant assets, notably, also recording ownership or transfers of ownership. Accordingly, to the extent that the *Secured Transactions Guide* applies to security rights in these types of asset, it recommends that priority be given to a buyer or other transferee that registered in the specialized registry as against a security right registered in the general security rights registry; and where the security right is also registered in the specialized registry, priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 77 and 78).

7. Fifth, a similar approach is taken to priority competitions involving security rights in attachments to immovable property. The *Secured Transactions Guide* recommends that priority should be given to a buyer or other transferee of the relevant immovable property that registered in the immovable property registry as against a security right in the attachment that is registered only in the general security rights registry; and where the security right in the attachment is also registered in the immovable property registry, priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 87 and 88).

(c) Unsecured creditors of the grantor

8. One of the principal advantages of taking security is that it entitles the secured creditor to claim the value of the encumbered assets in preference to the claims of the grantor's unsecured creditors. Accordingly, the *Secured Transactions Guide* recommends that a security right has priority over the rights of an unsecured creditor provided that the secured creditor registers or otherwise makes its security right effective against third parties before the unsecured creditor obtains a judgement or provisional court order against the grantor and takes the steps necessary under other law of the enacting State to acquire rights in the encumbered assets (see *Secured Transactions Guide*, rec. 84). This approach enables unsecured creditors to determine the extent to which their debtors' assets may be encumbered in order to decide whether it is worthwhile to obtain a judgement and pursue judgement enforcement proceedings. This priority rule, however, is subject to an important caveat. Even if the secured creditor registers a notice of its security right or otherwise achieves third-party effectiveness after the unsecured creditor acquires rights in its debtor's encumbered assets, the secured creditor will have priority to the extent of credit that it advances before it has actual knowledge that the unsecured creditor has acquired rights in the encumbered assets or that it advances pursuant to a prior irrevocable commitment to extend credit to the grantor (see *Secured Transactions Guide*, chap. V, paras. 94-106, and rec. 84).

9. The *Secured Transactions Guide* discusses but does not make any recommendation with respect to the steps that an unsecured creditor must take to acquire rights in its debtor's assets so as to potentially prevail over a secured creditor that has failed to achieve third-party effectiveness at all or in time (see *Secured Transactions Guide*, chap. V, paras. 94-106). This is left to the

judgement enforcement and execution law of the enacting State. In some States, an unsecured creditor acquires rights in its debtor's assets only once the judgement enforcement process is completed by seizure and sale and the judgement creditor's rights attach to the proceeds of the sale. In other States, an unsecured creditor upon obtaining judgement can obtain the equivalent of a general security right in the judgement debtor's present and future movable assets simply by registering a notice of the judgement in the general security rights registry. Accordingly, States enacting the general recommendations of the *Secured Transactions Guide* will need to take into account their existing law on this issue and decide on the most appropriate approach.

(d) The insolvency representative

10. Modern insolvency laws generally respect the priority to which secured creditors are entitled under other law in the event that insolvency proceedings are commenced against the grantor. This is the approach recommended in the *Secured Transactions Guide* (see *Secured Transactions Guide*, rec. 239) in line with the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"). It follows that a secured creditor generally will have priority over the claims of an insolvent grantor's unsecured creditors, provided that it registered or otherwise satisfied the third-party effectiveness requirements of secured transactions law before the commencement of the insolvency proceedings. Conversely, the failure of the secured creditor to register a notice or otherwise make its security right effective against third parties before the commencement of the insolvency proceedings generally results in the secured creditor being effectively demoted to the status of an unsecured creditor. This approach encourages timely registration or the taking of other third-party effectiveness steps by secured creditors. It also enables the grantor's insolvency representative to determine efficiently which of the grantor's assets may have been effectively encumbered.

11. Timely registration does not, however, protect a secured creditor from challenges on the basis of general insolvency law policies, such as rules avoiding preferential or fraudulent transfers and rules giving priority to certain protected classes of creditors (see *Secured Transactions Guide*, chap. XII, and rec. 239; see also *Insolvency Guide*, recs. 88 and 188).

12. A security right that was effective against third parties at the time of the commencement of the insolvency proceedings might lapse thereafter, for example, because it was made effective against third parties by registration and the period of effectiveness of the registration is due to expire. To address this risk, the *Secured Transactions Guide* recommends that a secured creditor should be entitled to take any action required by the secured transactions law to preserve the effectiveness of its security right against third parties even after the commencement of insolvency proceedings (see *Secured Transactions Guide*, rec. 238). This recommendation is designed to ensure that a secured creditor is not denied the ability to maintain its priority status as a result of the automatic stay typically imposed on enforcement action by creditors upon the commencement of insolvency proceedings.

13. Where the insolvency proceeding takes the form of a reorganization, modern insolvency laws generally authorize the insolvent grantor to create a security right to obtain post-commencement finance (see *Insolvency Guide*, rec. 65). Under the *Insolvency Guide*, such a security right does not have priority over any existing

secured creditors unless agreed to by them or authorized by the court with the appropriate protections for them. When post-commencement finance is provided, the rules of the secured transactions law governing the third-party effectiveness of security rights will apply.

(e) Preferential claims

14. For various policy reasons, a State's secured transactions law, insolvency law or both may sometimes award preferential priority status over the claims of secured creditors to specified categories of unsecured creditors. Typical examples include the claims of the enacting State for taxes and of employees for unpaid wages or other employment benefits. In addition, in the insolvency context, some States set aside a specified portion of the value of encumbered assets, particularly business assets, in favour of unsecured creditors in preference to the secured creditor. The *Secured Transactions Guide* discusses preferential claims and recommends that, to the extent an enacting State decides to maintain any, they should be limited in both type and amount and prescribed in the secured transactions law and the insolvency law, as the case may be, in a clear and specific way (see *Secured Transactions Guide*, chap. V, paras. 90-93, and chap. XII, paras. 59-63, and recs. 83 and 239). The reason why the *Secured Transactions Guide* follows this approach is twofold; on the one hand, the *Secured Transactions Guide* is mindful of the social policies enacting States may wish to pursue with preferential claims; on the other hand, the *Secured Transactions Guide* recognizes that preferential claims may have an impact on the cost and availability of credit.

15. In some States, preferential claims may be registered in the general security rights registry although in those States, the same registration and priority rules that apply to security rights may not necessarily apply to preferential claims. The *Secured Transactions Guide* discusses but does not make any recommendation with respect to whether preferential claims should have to be registered and what the priority implications of registration should be (see *Secured Transactions Guide*, chap. V, para. 90).

6. Broad transactional scope of the registry

(a) Outright assignments

16. As already explained (see A/CN.9/WG.VI/WP.52, paras. 27-29), the secured transactions law contemplated by the *Secured Transactions Guide* is comprehensive in scope, covering all transactions that in substance function to secure an obligation regardless of the formal character of the secured creditor's property right, the type of encumbered asset, the nature of the secured obligation or the status of the parties (see *Secured Transactions Guide*, chap. I, paras. 101-112, and recs. 2 and 10).

17. In addition to applying to all secured transactions defined in the functional, integrated and comprehensive sense just outlined, the *Secured Transactions Guide* recommends that the secured transactions law should also apply, at least to some extent, to outright assignments of receivables. However, bringing outright assignments within the scope of the secured transactions law does not mean that these transactions are re-characterized as secured transactions. Rather, it is intended to ensure that an outright assignee of receivables is subject to the same rules relating to creation, third-party effectiveness and priority (but generally not enforcement) as

the holder of a security right in receivables. It also ensures that the outright assignee has the same rights and obligations vis-à-vis the debtor of the receivable as a secured creditor (see *Secured Transactions Guide*, chap. I, paras. 25-31, and recs. 3 and 167).

18. Under this approach, an assignee generally will have to register a notice of its right in the security rights registry for the assignment to be effective against third parties; and priority among the rights of successive competing assignees or secured creditors that have acquired rights in the same receivables from the same assignor/grantor will be determined by the order of registration (see *Secured Transactions Guide*, chap. III, para. 43). The reason for this approach is that outright assignments of receivables not only perform a financing function but also create the same problem of information inadequacy for third parties as security rights in receivables. Unless a notice is registered in the security rights registry as a condition of third-party effectiveness, a potential secured creditor or assignee or other third party would have no efficient means of verifying whether the receivables owed to a business have already been assigned or, if assigned, whether the assignment is an outright assignment or an assignment for security purposes. While inquiries could be made of the debtors of the receivables, this is not practically feasible if the debtors of the receivables have not been notified of the assignment or the transaction covers present and future receivables generally.

(b) Additional non-security transactions

19. True long-term leases and consignment sales of movable assets do not operate to secure the acquisition price of assets and consequently do not qualify as security rights so as to fall within the secured transactions law contemplated by the *Secured Transactions Guide*. However, they create the same publicity problems for third parties as non-possessory security rights since they necessarily involve a separation of a property right (the ownership of the lessor or consignor) from actual possession (which is with the lessee or consignee). To address this concern, some States expand the scope of their secured transactions regime (other than enforcement) as it applies to acquisition security rights to these types of transaction. In addition to ensuring adequate publicity to third parties, this approach also diminishes the risk of litigation concerning whether a transaction in the form of a lease or a consignment is actually a secured transaction and thus ineffective if a notice with respect to it is not registered or subordinate in priority if the rules governing the special priority given to acquisition security rights do not apply. The *Secured Transactions Guide* discusses but makes no recommendation on this matter (see *Secured Transactions Guide*, chap. III, para. 44). It may be noted, however, that, if a lessor or a consignor is concerned about the risk to its third-party effectiveness or priority status where its right is characterized as a security right, it can always register a precautionary notice so as to avoid any challenges to the effectiveness of its rights against third parties.

7. Conflict-of-laws considerations

20. In situations where a secured transaction is connected to more than one State, secured creditors and third parties need clear guidance as to which State's law applies to the transactions. Under the conflict-of-laws approach recommended in the *Secured Transactions Guide*, the applicable law depends on the nature of the

encumbered assets. For example, the law applicable to the creation, third-party effectiveness and priority of a security right in tangible assets is generally the law of the State in which the encumbered asset is located (see *Secured Transactions Guide*, rec. 203). This means that, where a secured creditor wishes to make its security right effective against third parties by registration, it must register a notice of its security right in the registry of the State where the encumbered asset is located. It follows that, where the encumbered assets are located in multiple States, multiple registrations will generally be necessary. With respect to security rights in intangible assets and mobile assets that are ordinarily used in multiple jurisdictions, the applicable law is the law of the State in which the grantor is located (see *Secured Transactions Guide*, rec. 208). As a result, the secured creditor must register a notice of its security right in the registry of the State where the grantor is located if it wishes to achieve third-party effectiveness by registration.

21. The rules outlined above are the general baseline rules. the *Secured Transactions Guide* recommends different specialized conflict-of-laws rules for security rights in specific types of asset. These types of asset include: (a) assets rights in which are subject to a specialized registration regime; (b) receivables arising from a transaction relating to immovable property; (c) rights to the payment of funds credited to bank accounts; (d) rights to receive the proceeds under an independent undertaking; and (e) intellectual property rights (see *Secured Transactions Guide*, recs. 204-207, 209-215 and 248). For example, where the encumbered asset is an intellectual property right, the applicable law is primarily the law of the State under which the intellectual property is protected, although a security right that is created and made effective against third parties only under the law of the State in which the grantor is located may still be effective against the grantor's insolvency representative and judgement creditors (see *Supplement*, rec. 248).

8. Notice registration

22. Most States have established registries for recording title and encumbrances on title on immovable property. Many States have also established similar title registries for a limited number of high-value movable assets, such as ships and aircraft. It is essential to the successful implementation of the kind of general security rights registry contemplated by the *Secured Transactions Guide* that its very different characteristics be well understood by those responsible for its design and operation, as well as by its potential clientele.

23. First, unlike the typical land, ship or aircraft registry, the general security rights registry contemplated by the *Secured Transactions Guide* does not purport to record the existence or transfer of title to the encumbered asset described in the notice or to guarantee that the person named as grantor in the notice is the true owner. It simply provides a record of potentially existing security rights on whatever property right the grantor has or may acquire in the assets described in the notice as a result of off-record transactions or events (see *Secured Transactions Guide*, chap. IV, paras. 10-14).

24. Second, title registries typically require registrants to file or tender for scrutiny the underlying documentation. This is because registration generally is considered to constitute evidence or at least presumptive evidence of title and any property rights affecting title.

25. While, the security rights registries in some States also require submission of the underlying security documentation, the *Secured Transactions Guide* recommends that States adopt a notice registration rather than a document registration system (see *Secured Transactions Guide*, recs. 54, subpara. (b), and 57). A notice registration system does not require the actual security documentation to be registered or even tendered for scrutiny by registry staff. All that need be registered is a notice that provides the basic information necessary to alert a searcher that a security right may exist in the assets described in the notice. It follows that registration does not mean that the security right to which the notice refers necessarily exists; only that one may exist at the time of registration or may come into existence later. As already explained (see A/CN.9/WG.VI/WP.52, paras. 30 and 36), registration of a notice is irrelevant to the creation of a security right; it simply makes any security right created by an off-record security agreement between the parties effective against third parties provided the other requirements for creation outlined earlier are satisfied (see *Secured Transactions Guide*, recs. 32, 33 and 67).

26. The *Secured Transactions Guide* recommends notice registration rather than document registration because notice registration:

(a) Reduces transaction costs for registrants (as they do not need to register or provide evidence of the security documentation in order to register) and third-party searchers (as they do not need to peruse what may be voluminous security documentation to determine if a security right may exist in the relevant assets);

(b) Reduces the administrative and archival burden on registry system operators;

(c) Reduces the risk of registration error (since the less information that must be submitted, the lower the risk of error); and

(d) Enhances privacy and confidentiality for secured creditors and grantors (the less the information that must be registered, the less the information that is available to searchers).

27. As registration in a notice registration system does not necessarily mean that a security right actually exists, third parties with a competing property right in the encumbered assets will normally wish to demand proof of the existence of an effective security agreement between the parties and the scope of the assets covered by it. The same is true even where the alleged security right has been made effective against third parties by some other method, such as a transfer of possession, since possession by the putative secured creditor may be for a purpose other than security.

28. Some States provide a procedure whereby a third party with a property right in the encumbered asset may demand this information directly from the person named as a secured creditor in a registration or who is otherwise claiming this status. The same right is extended to unsecured creditors of the grantor so as to enable them to assess whether it is worthwhile to undertake the expense of obtaining a judgement and pursuing enforcement against the debtor's assets. While the *Secured Transactions Guide* does not make a recommendation on this matter, it is always open to the debtor to request the secured creditor to send the relevant information directly to a third party. However, the debtor or the secured creditor may not be

cooperative in which event the third party will need to seek a judicial order under other law.

29. Even in States that allow third parties to demand verification of the existence of a security right and its scope directly from the secured creditor, this right does not apply to potential buyers or potential secured creditors. They can protect themselves simply by refusing to buy or extend secured credit unless the registration relating to the security right is cancelled or the putative secured creditor is willing to undertake to them that it is not asserting and will not assert in the future a security right in the asset in which they are interested.

30. The grantor may also need to obtain up-to-date information about the scope and value of the security right claimed by its secured creditor and a copy of any written security agreement under which the security right is claimed. In some States, the grantor is entitled to demand this information free of charge although limits are usually placed on the frequency with which requests may be made so as to discourage demands that are unjustified or intended to harass.

31. A notice registered in the registry record contains minimum information about a security right that may not even exist at the time of registration and the amount of the secured obligation or the encumbered assets may change from time to time (see *Secured Transactions Guide*, rec. 57, A/CN.9/WG.VI/WP.52/Add.4, paras. 1-23, and draft Registry Guide, rec. 21). Thus, in certain circumstances, the grantor may need to request additional information about the security right. While the *Secured Transactions Guide* does not take a position on this issue, in some States, secured transaction law provides that the grantor is entitled to request the person identified in the notice as the secured creditor to provide to the searcher additional information about the security right. This information includes: (a) a list of the assets in which the person identified as the secured creditor is claiming a security right; and (b) the current amount of the obligation secured by the security right to which the registration relates, including the amount needed to pay off the secured obligation. The ability of a third party to obtain information from the secured creditor takes account of the fact that registration does not create or evidence the creation of a security right but merely signals that a security right may exist in a particular asset. Whether the security right has been created, and the scope of the assets which it covers, depends on off-record evidence. Consequently, prospective buyers and secured creditors and other third parties with whom the grantor is dealing may wish to have independent verification directly from the person identified in the notice as the secured creditor as to whether it is in fact currently claiming a security right in an asset in which they are interested under an existing security agreement with the named grantor. In some States, the grantor is entitled to one request free of charge every few months. For additional requests for information, the secured creditor may charge a fee. This approach protects the secured creditor from having to respond to frequent requests of the grantor that may not be justified or be intended to harass.

9. The role of registration and its legal consequences

(a) Creation, third-party effectiveness and registration

32. As already mentioned (see A/CN.9.WG.VI/WP.52, paras. 30 and 36), the *Secured Transactions Guide* recommends that registration should not be an element of the creation of a security right (see *Secured Transactions Guide*, rec. 33). Rather

the security right takes effect and becomes enforceable between the grantor and the secured creditor as soon as a security agreement is concluded (see *Secured Transactions Guide*, recs. 13-15). Registration is purely a precondition to the third-party effectiveness of the security right. The only sanction for a secured creditor's failure to register a notice of its security right is that the security right will not be effective against third parties (unless another method of third-party effectiveness is followed).

(b) Registration and enforcement

33. Some legal regimes require secured creditors to register in the general security rights registry a notice that they have initiated or propose to initiate an enforcement action. The goal of this approach is to enable the registry to notify third parties that have registered a competing right in the encumbered assets in the registry of the details of the pending enforcement. The *Secured Transactions Guide* does not recommend this approach. Instead, the *Secured Transactions Guide* recommends that the enforcing secured creditor should be required to search the registry and send out the required notices to interested third parties (including competing claimants) of the particular enforcement remedy that it seeks to exercise (see *Secured Transactions Guide*, rec. 151). Such notification will provide these third parties with an opportunity (should they choose to avail themselves of it) to remedy the default that has given rise to the enforcement proceeding.

10. Coordination with specialized movable property registries

34. Where specialized registries exist and permit the registration of security rights in movable assets with third-party effects (as is the case with the international registries under the Convention on International Interests in Mobile Equipment and its Protocols), modern secured transactions regimes must deal with matters related to the coordination of registrations in the two types of registry. The *Secured Transactions Guide* and the *Supplement* discuss coordination of registries in detail (see the *Secured Transactions Guide*, chap. III, paras. 75-82, chap. IV, para. 117; and the *Supplement*, paras. 135-140).

35. For example, the *Secured Transactions Guide* provides that a security right in an asset subject to specialized registration may be made effective against third parties by registration in the general security rights registry or in the specialized registry. It addresses the issue of coordination between the two types of registry through appropriate priority rules, giving priority to a security right, a notice of which is registered in the relevant specialized registry, over a security right in the same asset, a notice of which is registered in the general security rights registry, irrespective of the time of registration (see *Secured Transactions Guide*, recs. 43 and 77, subpara. (a)).

36. The *Secured Transactions Guide* also discusses other ways of coordinating registries, including the automatic forwarding of information registered in one registry to another registry and the implementation of common gateways to the various relevant registries. This approach raises complexities with respect to the design of the general security rights registry where the specialized registry organizes registrations by reference to the asset as opposed to the grantor-based indexing system used in the general security rights registry (see *Secured*

Transactions Guide, chap. III, paras. 77-81; see also A/CN.9/WG.VI/WP.52/Add.2, paras. 30-35).

11. Coordination with immovable property registries

37. Immovable property registries exist in most, if not in all, States. Typically, the general security rights registry is separate from the immovable property registry owing to differences as to what is registered (that is, document or notice), the requirements for the description of the encumbered asset (that is, specific or generic), indexing structures (that is, asset-based or debtor-based indices; see also A/CN.9/WG.VI/WP.52/Add.2, paras. 30-35) and legal consequences of registration.

38. However, some coordination of the two types of registry may be necessary with respect to assets, rights in which may be registered in either type of registry. Thus, a State implementing a general security rights registry will need to provide potential secured creditors and third-party financiers with guidance as to where notices relating to security rights in attachments to immovable property should be registered. The *Secured Transactions Guide* recommends that such registrations may be made either in the general security rights registry or in the immovable property registry (see *Secured Transactions Guide*, rec. 43). The choice between the two types of registration has priority consequences. In this regard, the *Secured Transactions Guide* recommends that an encumbrance registered in the immovable property registry has priority as against a security right a notice of which was registered only in the security rights registry (see *Secured Transactions Guide*, rec. 87). The *Secured Transactions Guide* also recommends that the security right in an attachment to immovable property will be ineffective against a buyer (or other third party) that acquires a right in the immovable property unless a notice with respect to the security right is registered in the immovable property registry in advance of the sale (see *Secured Transactions Guide*, rec. 88).

39. It should also be noted that the asset description requirements as to notices relating to security rights in an attachment to immovable property may differ depending on whether the notice is to be registered in the security rights registry or in the immovable property registry. The *Secured Transactions Guide* recommends that an attachment to immovable property, just like any other encumbered asset, should be described in a manner that reasonably allows its identification when registering a notice in the security rights registry (see *Secured Transactions Guide*, rec. 57, subpara. (b)). Thus, a description of the tangible asset that is or will be attached without a description of the immovable property is sufficient for the purposes of registering such a notice in the security rights registry. In contrast, registering such a document or notice in the immovable property registry will generally require that the immovable property to which the tangible asset is or will be attached be described sufficiently under the law of immovable property. Such description must be sufficient to allow the indexing of the notice in the immovable property registry.

I. Establishment and functions of the security rights registry

A. General remarks

1. Establishment of the security rights registry

40. As already mentioned, chapter IV of the *Secured Transactions Guide* contains commentary and recommendations on many aspects related to the establishment of a security rights registry and the registration and search process. The recommendations in chapter IV cover both legal issues that are typically dealt with in the principal secured transactions law and design and operational issues that are typically addressed in a supplementary body of administrative rules, referred to in the draft Registry Guide as the “regulation”. This approach enables the rules relating to the registration and search functions of the registry to be more easily revised from time to time to accommodate technological improvements and the like. As already elaborated (see A/WG.VI/WP.52, paras. 35-40), the *Secured Transactions Guide* clarifies that the purpose of the security rights registry is to provide: (a) a method by which a security right may be made effective against third parties; (b) an efficient point of reference for determining the ordered of priority of security rights with respect to which a notice has been registered; and (c) an objective source of information for third parties (see *Secured Transactions Guide*, chap. IV, purpose). Typically, the opening provisions of the regulation provide for the establishment of the registry and reiterate briefly that, in line with its purpose as set out in the law, the purpose of the registry is to receive, store and make available to the public, information relating to security rights in movable assets (see draft Registry Guide, rec. 1).

2. Appointment of the registrar

41. The appointment of the person that is to supervise and administer the operation of the registry (the “registrar”) is another of the matters that is usually dealt with in the initial provisions of the regulation. The regulation typically identifies, either directly or by reference to the relevant law, the authority that is empowered to appoint the registrar, determine his or her duties and generally supervise the registrar in the exercise of those duties. To ensure flexibility in the administration of the registry, the term registrar should be understood as referring either to a single person or to a group of persons appointed and supervised by the registrar to perform his or her duties (see draft Registry Guide, rec. 2).

3. Functions of the registry

42. The opening provisions of the regulation might also include a provision that lists the various functions of the registry that are dealt with in detail in the later provisions of the regulation with a cross-reference to the relevant provision of the regulation in which these functions are addressed. This is the approach recommended in the draft Registry Guide (see draft Registry Guide, rec. 3). The advantage of this approach is clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the regulation. The possible disadvantage is that the list may not be comprehensive or may be read as implying unintended limitations on the detailed provisions of the regulation to which

cross-reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies.

4. Additional implementation considerations

43. It is critical that the technical staff responsible for the design and implementation of the registry are fully apprised of the legal and practical objectives that it is designed to fulfil, as well as of the practical needs of the registry personnel and of potential registry users. Consequently, it is necessary at the very outset of the design and implementation process to constitute a team that reflects technological, legal and administrative expertise, as well as user perspectives.

44. It will also be necessary at an early stage in the registry design and implementation process to determine whether the registry is to be operated in-house by a governmental agency or in partnership with a private sector firm with demonstrated technical experience and financial accountability. While the day-to-day operation of the registry may be delegated to a private entity, the enacting State should always retain the responsibility to ensure that the registry is operated in accordance with the applicable legal framework (see *Secured Transactions Guide*, chap. IV, para. 47, and rec. 55, subpara. (a)). Accordingly, for the purposes of establishing public trust in the registry and preventing commercialization and fraudulent use of information in the registry record, the enacting State should retain ownership of the registry record and, when necessary, the registry infrastructure.

45. The design team will need to plan the storage capacity of the registry record. This assessment will depend in part on whether the registry is intended to cover consumer as well as business secured financing transactions. If this is the case, a much greater volume of registrations can be anticipated and thus the storage capacity should be increased. Capacity planning will need to take into account the potential for additional applications and features to be added to the system. For example, designers will need to take into account the need to expand the registry database at a later point to accommodate the registration of judgements or non-consensual security rights or the addition of linkages to other governmental records such as the State's corporate registry or its other movable or immovable registries. Capacity planning will depend as well on whether registered information is stored in a computer database or a paper record. Ensuring sufficient storage capacity is less of an issue if the record is in electronic form since recent technological developments have greatly decreased storage costs (the *Secured Transactions Guide* recommends that the registry be electronic "if possible"; see rec. 54, subpara. (j), and paras. 48-55 below).

5. Registry terms and conditions of use

46. As already mentioned, registry-related matters are typically dealt with in the secured transactions law and the registry regulation. They may also be addressed in the registry "terms and conditions of use". The registry terms and conditions of use are the terms and conditions of the contract that is entered into by people who file, modify or delete notices, on the one hand, and the contract governing the terms of access for searchers, on the other. For example, the registry terms and conditions of use may offer the opportunity to a regular user of the registry to open an account. Such an account could offer practical benefits such as quick access and a simplified

mechanism for the payment of any fees. In addition, the registry terms and conditions of use should address the issues of the security and confidentiality of information and user data (such as, for example, user name and password, or other modern security technique).

47. Some registry systems, upon request, make available to users additional services. These services include, for example, the following: (a) search audit, which provides information as to how a search was performed with the exact and similar match list indicating which similar matches were requested as a follow-up search; (b) transaction inquiry, which allows a user to track by his or her name or account information as to his or her transactions that occurred during a specified period of time; (c) secured creditor searches, which allow a searcher to search by secured creditor identifier; (d) advance search, which provides the ability to recover and make available all active and inactive registrations on the bases of a specified search criterion; (e) verification statement reprint, which provides reprints of a verification relating to a specific transaction; and (f) statistical reports.

6. Electronic or paper-based registry

48. The *Secured Transactions Guide* recommends that, if possible, the registry record should be electronic in the sense that information in notices is stored in electronic form in a computer database (see *Secured Transactions Guide*, chap. IV, paras. 38-41 and 43, and rec. 54, subpara. (j)(i)). An electronic registry record is the most efficient and practical means of enabling enacting States to implement the recommendation of the *Secured Transactions Guide* that the registry record must be centralized and consolidated to include all registrations made under the secured transactions law of the enacting State (see *Secured Transactions Guide*, chap. IV, paras. 21-24, and rec. 54, subpara. (e)).

49. The *Secured Transactions Guide* further recommends that, if possible, the registry should be electronic in the sense of permitting the direct electronic submission of notices and search requests by users over the Internet or via direct networking systems as an alternative to the submission of paper registration notices and search requests (see *Secured Transactions Guide*, chap. IV, paras. 23-26 and 43 and rec. 54, subpara. (j)(ii)). This approach is the most effective means of implementing the recommendation of the *Secured Transactions Guide* that the system should be designed to minimize the risk of human error (see *Secured Transactions Guide*, chap. IV, rec. 54, subpara. (j)(iii)-(iv)) since it eliminates the need for registry staff to enter the information contained in a paper notice or search request into the registry record and the risk of error associated with the transcription task.

50. Direct electronic registration and searching also contributes to a speedier registration and search process. When information is submitted to the registry in paper form, registrants must wait until the registry staff has entered the information into the registry record and the information is searchable by third parties before the registration becomes legally effective. Search requests transmitted by paper, fax or telephone also give rise to delays since searchers must wait until the registry staff member carries out the search on their behalf and transmits the results.

51. In addition to eliminating these delays and reducing the risk of human error, a registry system in which registrants and searchers have the option to electronically

enter the information directly into the registry record offers the following other advantages:

- (a) A very significant reduction in the staffing and other day-to-day costs of operating the registry;
- (b) Reduced opportunity for fraudulent or corrupt conduct on the part of registry personnel;
- (c) A corresponding reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter registration information or search criteria at all, or to enter it accurately; and
- (d) User access to the registration and searching services outside of normal business hours.

52. If this approach is implemented, the registry should be designed to permit registry users to submit a registration and conduct searches from any private computer facility, as well as from computer facilities made available to the public at branch offices of the registry or other locations. In addition, owing to the reduced costs of direct electronic access, the conditions governing access to the services of the registry should permit third-party private sector service providers to carry out registrations and searches on behalf of their clientele.

53. If the registry record is computerized, the hardware and software specifications should be robust and employ features that minimize the risk of data corruption, technical error and security breach. Even in a paper-based registry, measures should be taken to ensure the security and integrity of the registry record but this is more efficiently and easily accomplished if the registry record is in electronic form. In addition to database control programmes, software will also need to be developed to manage user communications, user accounts, payment of fees and financial accounting, computer-to-computer communication and the gathering of statistical data.

54. The necessary hardware and software needs will need to be evaluated and a decision made as to whether it is appropriate to develop the software in-house by the registry implementation team or purchase it from private suppliers. In making that determination, the team will need to investigate whether an off-the-shelf product is available that can easily be adapted to the needs of the implementing State. It is important that the developer/provider of the software is aware of the specifications for the hardware to be supplied by a third-party vendor, and vice versa.

55. Consideration should also be given to whether the registry should be designed to provide an electronic interface with other governmental databases. For example, in some States, registrants can search the company or commercial registry in the course of effecting a registration to verify and automatically input grantor or secured creditor identifier information (for a discussion of electronic matching of names, see A/CN.9/WG.VI/WP.52/Add.3, para. 10).

B. Recommendations 1-3

[*Note to the Working Group: The Working Group may wish to consider recommendations 1-3, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, recommendations 1-3 are not inserted here at this stage but will be inserted in the final text.*]

II. Access to the registry services

A. General remarks

1. Public access

56. The *Secured Transactions Guide* recommends that any person may register a notice of a (potentially existing) security right or search the publicly available registry record (not the archives; see *Secured Transactions Guide*, chap. IV, paras. 25-30 and rec. 54, subparas. (f) and (g)). This approach is in line with one of the key objectives of the *Secured Transactions Guide* which is to enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry (see *Secured Transactions Guide*, chap. IV, para. 25, and rec. 1, subpara. (f)). Because of the importance of the principle of public access to the registry services, it should be restated in the regulation (see draft Registry Guide, rec. 5).

57. Public access is facilitated to the extent that users with access to computers and the Internet are able to submit notices and conduct searches electronically without the need for the assistance or intervention of registry personnel. As already discussed (see A/CN.9/WG.VI/WP.52/Add.1, paras. 48-55), registration of paper forms is associated with cost, delay and potential for error and liability for the registry. In any case, even if the registry system permits or requires the use of paper forms, the registry record should be computerized and made accessible remotely by the Internet. In addition, public access to the registry's registration services is facilitated to the extent that the registry does not establish unnecessary conditions to access by registrants (see A/CN.9/WG.VI/WP.52/Add.2, paras. 1 and 2), nor requires verification of the identity of a registrant, evidence of existence of authorization for registration or conduct any scrutiny of the content of the notice (see A/CN.9/WG.VI/WP.52/Add.2, paras. 3-7).

58. Citing privacy concerns, some States require searchers to indicate that they have justifiable reasons for conducting a search. To facilitate access to the registry's search services, the *Secured Transactions Guide* recommends that the registry may not require a searcher to give reasons for the search (see *Secured Transactions Guide*, rec. 54, subpara. (g)). The privacy of the grantor is sufficiently protected by a regime that requires only a limited amount of information about the relevant security agreement to be included in a notice. The privacy of the secured creditor is sufficiently protected by the registry not allowing third-party searches according to the secured creditor identifier and by permitting the secured creditor to enter the name and address of a representative as the secured creditor in the notice, as well as by the limited amount of transaction information required. In addition, requiring

searchers to give reasons for a search would undermine the efficiency and functionality of the search process, as the registry would have to scrutinize the reasons given and determine that they are sufficient to justify a search. Moreover, depending on the exact reasons required, open access to information in the registry as part of an efficient and transparent market may be impeded, at least to the extent that some parties dealing with the grantor may not have the information available to other parties.

2. Operating days and hours of the registry

59. The approach to the operating days and hours of the registry recommended in the *Secured Transactions Guide* depends on the extent to which the registry is designed to permit direct electronic registration and searching by users or requires their in-person attendance at a physical office of the registry. In the former case, the registry should be accessible continuously except for brief periods to undertake scheduled maintenance; in the latter case, it should operate during reliable and consistent hours compatible with the needs of the potential registry users (see *Secured Transactions Guide*, chap. IV, para. 42, and rec. 54, subpara. (1)). In view of the importance of this issue to users, it should be addressed in the regulation or in administrative guidelines published by the registry (see draft Registry Guide, rec. 5).

60. Where the registry provides services through a physical office, the minimum operating days and hours should be the usual business days and hours in the enacting State. To the extent that the registry requires or permits the registration of paper notices or the submission of paper search requests, the time for receiving the paper notices, information in which will be entered in the registry record and made available to searchers on the same business day, may be set independently from the business hours. For example, the regulation or administrative guidelines of the registry may stipulate that, while the registry office is open between 09:00 and 17:00, all forms must be received by an earlier time (e.g. 16:30) so as to ensure that the registry staff has sufficient time to enter the information on notices into the registry record or conduct the search. Alternatively, the office might receive paper notices during all business hours, but set a “cut off” time, after which information in notices received may not be entered into the registry record until the next business day.

61. The registry regulation or administrative guidelines could also enumerate in an exhaustive or indicative way the circumstances in which access to the registry services may temporarily be suspended. An exhaustive list would provide more certainty but there is a risk that it may not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of the registry services might include any event that makes it impossible or impractical to provide users with access to the registry services (for example, where the registry provides users with direct electronic access to its services, force majeure, due, for example, to fire, flood, earthquake, war, or a breakdown in Internet or network access).

(A/CN.9/WG.VI/WP.52/Add.2) (Original: English)

**Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-second session****[Original: English]****ADDENDUM****Contents**

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II. Access to the registry services (*continued*)

A. General remarks (*continued*)

3. Access to registration and search services

1. The *Secured Transactions Guide* recommends that the registry must accept a notice if: (a) it is presented in the authorized medium of communication (that is, in the prescribed paper or electronic form, as the case may be); (b) it is accompanied by the authorized fee, if any; and (c) provides the grantor identifier and the other information required to be included in the notice (see *Secured Transactions Guide*, rec. 54, subpara. (c)). In addition, as a measure of protection against the risk of unauthorized registrations, the *Secured Transactions Guide* recommends that the registry must request and maintain a record of the identity of the registrant (see *Secured Transactions Guide*, rec. 55, subpara. (b)).

2. To implement these recommendations, the regulation should provide that a person is entitled to have access to the registration services of the registry, if that person: (a) uses the prescribed form of notice; (b) provides its identity in the manner prescribed by the registry; and (c) has paid, or made arrangements to pay, any fees (see draft Registry Guide, rec. 6). For a person to have access to the search services of the registry, the regulation should provide that it is sufficient if the searcher: (a) uses the prescribed search form (including having entered search criteria into the relevant fields of the search form); and (b) has paid or made arrangements to pay the prescribed search fees, if any (see draft Registry Guide, rec. 7). There is no need for the registry to request and maintain a record of the identity of the searcher since, unlike an unauthorized registration, a search of the registry does not create any risk of prejudice to a grantor named in a notice (as to privacy concerns, see para. 3 below). It should be noted that the search relates to the registry record accessible to the public through the interface that is just a gateway to the database that contains the data, and not the archived information, that is, information in a registered notices removed from the publicly accessible record upon expiry of its period of effectiveness or upon registration of a cancellation office (see paras. 51-53 below and draft Registry Guide, rec. 18).

4. Verification of identity, evidence of authorization or scrutiny of the content of the notice not required

3. As already mentioned (see paras. 1 and 2 above), the *Secured Transactions Guide* recommends that the registry must request and maintain a record of the identity of the registrant (see *Secured Transactions Guide*, chap. IV, para. 48, and rec. 55, subpara. (b)). To facilitate the registration process, the required identification should be minimal (for example, a State-issued identification card, driver's licence or passport) and should be built into the access or payment process. For example, frequent users, such as financial institutions, automobile dealers, lawyers and other intermediaries acting for registrants and searchers, should have the option of setting up a user account with the registry that permits automatic charging of fees and provides them with special secure access codes for entering information and conducting searches.

4. In addition, the *Secured Transactions Guide* recommends that registration of a notice should be ineffective unless authorized by the grantor in writing. However, authorization may be given before or after registration, and a written security agreement is sufficient to constitute authorization (see *Secured Transactions Guide*, chap. IV, para. 106, and rec. 71). Moreover, to avoid overburdening the registration process with unnecessary formalities that could result in delays and costs, the *Secured Transactions Guide* recommends that the registry may not verify the identity of the registrant, or require evidence of the existence of authorization for registration of the notice, or conduct further scrutiny of the content of the notice (see *Secured Transactions Guide*, rec. 54, subpara. (d)). In view of the importance of these recommendations, the regulation may reiterate them (see draft Registry Guide, rec. 8). Accordingly, the function of the registry is to do what is set forth in the recommendations just mentioned. The determination of whether or not the registrant had authority to register a notice is outside the scope of the mandate of the registry. The same applies to amendments and cancellations that must be authorized by the secured creditor, whose rights they may affect. In this connection, it should be noted that, with few exceptions, all amendments may affect the rights of and thus require the authorization of the secured creditor as well. Typically, only two amendments, the addition of a grantor and of encumbered assets, require only the grantor's authorization.

5. Where the system is designed to allow notices to be directly registered electronically, there are effective methods to prevent fraudulent registrations, amendments or cancellations. For example, a secured creditor could be assigned a user identification number to use when effecting a registration. No amendments to or cancellation of a registered notice would be possible unless that number were used. If the secured creditor failed to preserve the confidentiality of that number, it should have no basis for a complaint about unauthorized cancellations or amendments. However, if the secured creditor were careful, it would be virtually impossible for the registration to be changed in any way without the involvement of the secured creditor.

6. However, where the registry system is designed to permit or require notices to be registered in paper form, there is little that the secured creditor can do to prevent an unauthorized amendment or cancellation from being registered fraudulently or without authority. In any case, in order to protect secured creditors, the *Secured Transactions Guide* recommends that a copy of all amendments and cancellations effected to a registered notice be sent to the registrant, that is, the secured creditor named in a notice (see *Secured Transactions Guide*, rec. 55, subpara. (d)). Registry systems sometimes build in "fail safe" mechanisms that provide secured creditors with the opportunity to reinstate or correct a registered notice that was amended or cancelled inadvertently or without authority within a short period after the registration of the amendment or cancellation notice. In States that adopt this approach, reinstatement within the specified period is effective as against third parties other than those that acquire a right in the encumbered asset during the period after registration of the amendment or cancellation notice and before the reinstatement or correction is registered. In other States, all registrations are retained on the registry record available to the public for a certain period of time, while the question whether or not the cancellation is effective is determined outside the registry system.

7. Once a registrant obtains access to the registry services and fills in all the required fields of the notice, the registry has no right to reject the notice. This does not mean that the registered notice will necessarily achieve its objective of making the security right to which it relates effective against third parties. This result depends on the satisfaction of the requirements for the creation of a security right in the secured transactions law that are not a matter of the registry record (conclusion of an effective security agreement, the existence on the part of the grantor of rights in the designated encumbered assets, and the existence of an outstanding obligation owed to the secured creditor or its commitment to extend credit). In addition, for the registered notice to achieve its objective, the registrant must also satisfy the requirements in the regulation and the secured transactions law for registering a notice (all the information required to be included in the notice has to be entered in the appropriate fields in the notice). All these matters are the responsibility of the registrant. If the registry had to scrutinize the notice and confirm its completeness, accuracy and legal sufficiency, the result would be delay, cost and potential for error, a result that would run counter to the kind of efficient registry envisaged in the *Secured Transactions Guide*.

5. Rejection of a registration or search request

8. As already mentioned (see para. 7 above), the fact that a registrant or searcher gained access to the registry services does not necessarily mean that a notice will be automatically accepted or a search result will automatically be produced. The *Secured Transactions Guide* recommends that a notice must contain certain information, such as the identifier and address of the grantor and the secured creditor, a description of the encumbered assets and, if the secured transactions law requires it, a statement as to the period of effectiveness of the registered notice and the maximum amount for which the security right may be enforced (see *Secured Transactions Guide*, chap. IV, paras. 92-97, and rec. 57).

9. In view of the importance of these requirements, the regulation should provide that the registry is permitted to reject registration of a notice only if it does not contain in a legible way the information required in the designated fields (for the information required in an initial amendment or cancellation notice, see A/CN.9/WG.VI/WP.52/Add.3, paras. 1 and 2, A/CN.9/WG.VI/WP.52/Add.4, para. 4, and draft Registry Guide recs. 21, 28 and 30). In addition, the regulation should provide that the registry may reject a search request only if it does not provide in a legible manner the search criterion in the designated field. Moreover, the regulation should clarify that the registry must provide grounds for such a rejection of a registration or search request immediately or as soon as practicable (in the case of other registries) (see draft Registry Guide, rec. 9).

10. It should be noted that the registry may reject non-conforming notices and search requests submitted in paper form, while in a registry system that allows a notice or search request to be entered electronically, the registry system will be designed so as to reject automatically non-conforming requests. In addition, while in the case of notice submitted in paper form the grounds for rejection will be communicated as soon as practicable, in the case of an electronic registry, the system should be designed to enable them to be immediately displayed on the electronic screen to the user.

B. Recommendations 4-9

[*Note to the Working Group: The Working Group may wish to consider recommendations 4-9, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.*]

III. Registration

A. General remarks

1. Time of effectiveness of registered notice

11. The *Secured Transactions Guide* recommends that the registration of a notice or an amendment becomes effective when the information contained in the notice or the amendment is entered into the registry record so as to be available to searchers (see *Secured Transactions Guide*, chap. IV, paras. 102-105, and rec. 70).

12. In view of the importance of the effective time of registration for determining the third-party effectiveness and priority of a security right, the regulation could restate this recommendation (see draft Registry Guide, rec. 10, subpara. (a)). In particular, the regulation should provide that: (a) the effective time of registration (that is, the date and time when the notice became searchable) should be indicated on the registry record; and (b) the regulation should provide that a unique registration number must be assigned to an initial notice so that all subsequent amendment notices or a discharge notice are associated with that initial notice (see draft Registry Guide, rec. 10, subpara. (b); see also A/CN.9/WG.VI/WP.52, section B, terminology and interpretation, term “registration number”). In the unlikely but possible case where notices registered by competing secured creditors became searchable at the same date and time and, therefore, are assigned the same date and time of registration the secured transactions law could provide that, if there is even a slight time difference in the time the notices were received, priority should be resolved according to the exact sequence in which they were received or, if they were received at exactly the same time, they simply should have the same order of priority.

13. Where information in notices is entered into a computerized registry record, the registry software should be designed to ensure that the information becomes publicly searchable immediately or virtually immediately after it is entered. With modern advances in technology, this should not be a problem. As a result, any time lag between the entry of the information in a notice into the record and the time when the information will become available to searchers of the registry record will be all but eliminated. This is important because any time lag would create a priority risk for secured creditors as their rights would be subordinate to third-party rights acquired in the encumbered assets before the registration becomes effective by becoming publicly searchable. In systems that permit the direct electronic entry of a notice, registrants will have control over the timing and efficiency with which their registrations would become effective. However, to the extent there is a time lag (in particular in registry systems that permit or require notices to be submitted using a

paper form), before being confident in advancing funds, registrants should make an “advance registration” (see *Secured Transactions Guide*, chap. IV, paras. 98-101, and rec. 67). In addition, registrants should verify that: (a) the information in the notice has been entered by the registry staff into the registry record and is searchable; and (b) no notices of competing rights have been registered in the period between the submission of the paper notice and the time when the information became searchable.

14. To deal with the time lag problem associated with paper notices, the regulation could provide that the registry must enter the information in notices into the registry record in the order in which the paper notices were received by the registry (see draft Registry Guide, rec. 10, subpara. (c)). This approach would ensure that a notice received on 1 January at 08:00 would be entered and become available to searchers so as to be legally effective before a notice received by the registry on the same date at 08:01.

15. It should be noted that this recommendation would not necessarily protect a secured creditor that was the first to submit a paper notice in a hybrid registry that allows both paper and electronic submission of notices. Where, for instance, the paper notice is received at 08:00 am and is entered into the registry record by the registry staff and becomes searchable at 08:30, but a competing secured creditor enters a notice electronically at 08:05 and it becomes searchable at 08:10, the latter would have priority since its notice was the first to become searchable and therefore the first to be registered. In systems that adopt a hybrid approach, registrants who elect to use paper notices should be educated as to this risk.

16. In some legal systems, to deal with the time lag problem, search results are assigned a “currency date” indicating that the search result is designed to disclose only all registrations made as of the currency date and time (for example, a day before the search) and not as of the real time of the search. While this approach may not solve the problem, it provides warning to a prospective secured creditor that, after registering its security right, it would then have to conduct a second search to make sure no intervening notices have been registered before being confident in advancing funds. Prospective buyers and other third parties would similarly need to conduct a subsequent search before parting with value or otherwise acting in reliance on the registry record.

2. Period of effectiveness of registered notice

17. The *Secured Transactions Guide* recommends that an enacting State may adopt one of two approaches to the period of effectiveness (or duration) of a registered notice (see *Secured Transactions Guide*, chap. IV, paras. 87-91, and rec. 69).

18. Under option A, all registered notices are subject to a uniform statutory period of effectiveness. It follows that, where the secured transaction to which the registered notice relates has a longer duration, the secured creditor must ensure that the period of effectiveness is renewed before the expiry of the statutory period. This approach provides certainty as to the period of effectiveness of a registered notice, but limits the flexibility of the registrant to match the period of effectiveness of the registered notice to the likely duration of the secured financing relationship. Under option B, the registrant would be permitted to self-select the desired period of effectiveness with the option to renew the notice for an additional self-selected

period by registering an amendment notice. In such a case, the indication of the period in the notice would be a required component of the notice and without it a notice would be rejected. In legal systems that adopt the second approach, it may be desirable to base registration fees on a sliding tariff related to the duration selected by the registrant in order to discourage the selection of excessive terms that do not correspond to the expected duration of the underlying security agreements (with a cushion of extra time to allow for delays in payment of the secured obligation).

19. In view of the importance of this issue, the regulation should restate it (see draft Registry Guide, rec. 11, options A and B). In addition, the regulation could provide an option C, which is a hybrid of the first two options. Under this approach, the registrant would be entitled to select the period of effectiveness of the registered notice subject to a maximum temporal limit, so as to discourage the selection of excessive terms (see *Secured Transactions Guide*, chap. IV, para. 88, and draft Registry Guide, recommendation 11, option C).

20. If a State selects option A, it may wish to consider allowing the registrant to reduce the legal period of effectiveness of a registered notice if the anticipated duration of their security agreement is less than the specified statutory period of effectiveness of a registered notice. However, this approach would unnecessarily result in additional expense in the design of the registry, since the registrant would always be able and obligated, in any event, to cancel a registered notice if the secured obligation was satisfied and the security agreement was terminated before the expiry of its statutory period of effectiveness.

21. The requirement in options B and C for the registrant to indicate in the notice the period of effectiveness of the registered notice is a mandatory requirement with the result that a notice could be rejected if it did not indicate its period of effectiveness. States may wish to consider the possibility of designing the registry to automatically include a default period of effectiveness if the registrant failed to do so. A rule in the regulation implementing this approach could be drafted along the following lines: "When no period of time is indicated in the notice, the registration is effective for [a short period of time, such as 5 years, to be specified by the enacting State] years".

22. Where option B or C is selected by an enacting State, it would be desirable to design the registry in a way that permits the registrant to easily select and indicate in the notice the desired period without the risk of inadvertent error, for example, by limiting the choice to whole years from the date of registration. In order to ensure consistency between its secured transactions law and its registry regulation, the option a State decides to enact in its regulation should correspond to the option selected in its secured transactions law.

23. Whether a State enacts option A, B or C, the rules applying to the calculation of the period of effectiveness in national law will apply to the period of effectiveness of a registered notice, unless the secured transactions law provides otherwise. For example, national law may provide that where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day. In addition, it should be noted that where the law requires the registrant to enter the period of effectiveness of registration in a notice, the requirement is a mandatory requirement. This means that, if the period of

effectiveness of registration is not entered in a notice, the notice will likely be rejected.

24. Regardless of the approach an enacting State may take to determining the period of effectiveness of a registration, under the recommendations of the *Secured Transactions Guide*, the third-party effectiveness of a security right is lost once the period expires unless: (a) the security right is made effective against third parties prior to the lapse by some other permitted method for that type of encumbered asset (see *Secured Transactions Guide*, rec. 46); or (b) an amendment notice is registered extending the period of effectiveness of the registration. While the third-party effectiveness of that security right could be re-established by registering a new notice, the security right would take effect against third parties only from the time of the new registration and it would as a general rule be subordinate to prior registered secured creditors (see *Secured Transactions Guide*, recs. 47 and 96).

3. Time when a notice may be registered

25. The *Secured Transactions Guide* recommends that it should be possible for a notice to be registered before the creation of the security right or the conclusion of a security agreement; this is often referred to as “advance registration” (see *Secured Transactions Guide*, chap. IV, paras. 98-101, and rec. 67). This rule typically would be stated in the secured transactions law. Depending on the drafting conventions in the enacting State, it may be included in the regulation (see draft Registry Guide, rec. 12).

26. As already explained (see A/CN.9/WG.VI/WP.52/Add.1, paras. 32), registration does not create and is not necessary for the creation of a security right (see also *Secured Transactions Guide*, rec. 33). Consequently, until the security agreement is actually entered into and the other requirements for the creation of a security right are satisfied, the secured creditor may be defeated by a competing claimant, such as a buyer that acquires rights in the encumbered assets in the period between advance registration and the creation of the security right. However, registration will generally ensure that the secured creditor, once the security right is created, has priority over another secured creditor that registers subsequently, regardless of the order of creation of the competing security rights.

27. If the negotiations are aborted after the registration is effected or for some other reason no security agreement is ever entered into between the parties, the creditworthiness of the person named as grantor in the registration may be adversely affected by the existence of the registration unless it is cancelled. The *Secured Transactions Guide* recommends that the registrant (or, in the case of an electronic registry, the registry system) should be required to notify the person identified in the notice as the grantor in a timely manner about the registration of the notice (see *Secured Transactions Guide*, rec. 55, subpara. (c)). Generally, the registrant will be willing to cancel the registration either unilaterally or at the request of the person named as grantor in the notice if no security agreement has been concluded between the parties or if the security right to which the notice relates has been extinguished. However, in the event the registrant refuses or neglects to do so, the *Secured Transactions Guide* recommends a summary judicial or administrative procedure to enable the person identified in the notice as the grantor to compel the cancellation of the notice (see *Secured Transactions Guide*, rec. 72, subpara. (b)). The *Secured Transactions Guide* further recommends that, if a security agreement is entered into

after the registration of a notice but its terms do not correspond to the content of the registered notice, the person identified in the notice as the grantor may also use this procedure to compel the amendment of the notice (see *Secured Transactions Guide*, rec. 72, subpara. (a), recs. 54, subpara. (d), and 72, subparas. (b) and (c), as well as A/CN.9/WG.VI/WP.52/Add.4, paras. 28-30).

4. Sufficiency of a single notice

28. In a notice registration system of the kind contemplated by the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. IV, paras. 10-14, and rec. 57, as well as A/CN.9/WG.VI/WP.52/Add.1, paras. 22-31 and draft Registry Guide, rec. 21), there is no reason why a single notice should not be sufficient to give third-party effectiveness to present or future security rights arising under multiple security agreements between the same parties covering the assets described in the notice (see *Secured Transactions Guide*, rec. 68). Requiring a one-to-one relationship between each notice and each security agreement would generate unnecessary costs and undermine the ability of the secured creditor to flexibly respond to the grantor's evolving financing needs without having to fear a loss of the priority position it holds under the initial registration. Accordingly, the *Secured Transactions Guide* recommends that the registration of a single notice should be sufficient to achieve the third-party effectiveness of one or more than one security right, whether they exist at the time of registration or are created later and whether they arise from one or more than one security agreements between the same parties (see *Secured Transactions Guide*, rec. 68). This rule typically would be stated in the secured transactions law. However, depending on the drafting conventions in the enacting State, it may be included or reiterated in the regulation (see draft Registry Guide, rec. 13).

29. It should be emphasized that a registration achieves the third-party effectiveness of security rights arising under multiple security agreements only to the extent that the description of the encumbered assets in the notice corresponds to their description in any new or amended security agreement (see *Secured Transactions Guide*, rec. 63). Otherwise, the registration would not serve the function of alerting third-party searchers to the potential existence of a security right. Accordingly, to the extent that any security agreement concluded between the parties covers additional assets that were not described in the initial notice, a new notice or an amendment of the initial notice would be needed and the third-party effectiveness and priority of the security right in these additional assets would date only from the time of registration of the new notice or the amendment.

5. Indexing or other organization of information in the registry record

30. The *Secured Transactions Guide* recommends that the primary indexing criterion for the purposes of searching and retrieving notices registered in the security rights registry should be the identifier of the grantor (see *Secured Transactions Guide*, chap. IV, paras. 31-36, and rec. 54, subpara. (h)). To implement this recommendation, enacting States should elaborate on it in the regulation (see draft Registry Guide, rec. 14).

31. Although the *Secured Transactions Guide* refers to the indexing of information in the registry record, indexing as a technical matter is not the only mode of organizing information in a data base so as to make it searchable. Accordingly, the

term indexing in the context of the *Secured Transactions Guide* should be understood as referring to any method of organizing the information contained in notices entered into the registry record that ensures that the information may be retrieved by a search using the identifier of the grantor as the search criterion.

32. The recommendation of the *Secured Transactions Guide* that the grantor's identifier should be used as the primary indexing and searching criterion (see *Secured Transactions Guide*, chap. IV, paras. 31-36, and rec. 58) is based on two considerations. First, unlike immovable property, most categories of movable asset do not have a sufficiently unique identifier to enable useful asset-based searching. Indeed, in light of the flexibility in describing encumbered assets (see *Secured Transactions Guide*, recs. 14, subpara. (d), and 57), there are many ways to describe them that will suffice (e.g., listing them by specific item or by category, etc.). Second, taking security in future assets and circulating pools of assets, such as inventory and receivables, would be administratively impractical and prohibitively expensive if the secured creditor had to continuously update its notice to add a description of each new asset acquired by the grantor. A grantor-based searching system resolves these problems by enabling the secured creditor to make its security right effective against third parties by a single one-time registration covering security rights, whether they exist at the time of registration or are created thereafter (see *Secured Transactions Guide*, rec. 68).

33. In cases in which the encumbered asset has only one unique description, as compared to a registry system that is organized so as to permit searching according to the identifier of the asset, grantor-based indexing and searching has a drawback in a specific transactional context. Under the recommendations of the *Secured Transactions Guide*, unless the grantor sells or disposes of an encumbered asset in the ordinary course of business, the security right will generally follow the asset into the hands of the transferee (see *Secured Transactions Guide*, recs. 79 and 81). Yet the security right will not be disclosed on a search of the registry record against the identifier of the transferee, potentially prejudicing third parties that deal with the asset in the hands of the transferee and that may not be aware of the historical chain of title. Suppose, for example, that B, after granting a security right in its automobile in favour of A, sells the automobile to C, who in turn proposes to sell or grant security in it to D. Assuming D is unaware that C acquired the asset from the original grantor B, he or she will search the registry using only C's identifier. That search will not disclose the security right granted by B in favour of A because it was registered against the name of the original grantor B. This problem is often referred to as the "A-B-C-D problem" (on the question whether a secured creditor should be obligated to amend its registration to add the transferee as a new grantor, see A/CN.9/WG.VI/WP.52/Add.4 paras. 8-11).

34. In response to the so-called "A-B-C-D problem", some secured transactions laws provide for supplementary asset-based indexing and searching so as to enable a remote transferee in the position of D in the above-mentioned example to determine from a search of the publicly available registry record whether a security right has been granted by a predecessor in title to the person with whom D is dealing. Generally, asset-based indexing and searching is available only for specific categories of high-value and durable movable assets with a significant resale market and for which unique and reliable serial numbers or equivalent alphanumeric identifiers are available (for example, road vehicles, trailers, mobile homes,

aircraft frames and engines, railway rolling stock, boats and boat motors, hereinafter generally referred to as “serial number assets”). The motor vehicle market is a good example. Motor vehicles typically are of quite high value with a relatively significant resale market. Moreover, the automotive industry assigns a unique alphanumerical identifier, commonly referred to as a vehicle identification number, to identify individual motor vehicles according to a system based on standards issued by the International Organization for Standardization (ISO). Requiring registration of the vehicle identification number, and permitting searching by reference to that number, solves the so-called “A-B-C-D problem”, since a search by that number will disclose all security rights granted in the particular motor vehicle by any owner in the chain of title. Other types of assets for which certain regimes have adopted this type of “serial number” approach include trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors.

35. The *Secured Transactions Guide* discusses but makes no recommendation on the question of using the serial number or equivalent alphanumerical identifier of an asset as an indexing and search criterion (see *Secured Transactions Guide*, chap. IV, paras. 34-36). The main reasons for this approach are that a multiplicity of search criteria would complicate searches and create unnecessary burdens on searchers. In any case, a serial number or equivalent is not a feasible search criterion for most types of movable asset or for circulating pools of present and future assets, such as inventory and receivables. Accordingly, if a State does choose to implement a system that uses the serial number of an asset as a supplementary indexing and search criterion, it should be limited to the types of high-value asset described above. In addition, under the secured transactions law of States that have adopted this approach, serial number registration is required for the purposes of achieving third-party effectiveness and priority only as against those classes of competing claimants that are most potentially prejudiced by the so called “A-B-C-D problem” (notably, transferees of the encumbered assets). As against other classes of competing claimants, for example, the grantor’s judgment creditors or insolvency administrator, registration of a notice that does not include entry of the serial number in the designated field is still effective against third parties so long as the notice otherwise sufficiently describes the encumbered asset.

6. Integrity of the registry record

36. The *Secured Transactions Guide* recommends that, while the day-to-day operation of the registry may be delegated to a private authority, the State retains the responsibility to monitor the operation of the registry to ensure that it functions in conformity with the secured transactions law to meet the needs of its users (see *Secured Transactions Guide*, chap. IV, para. 47, and rec. 55, subpara. (a)). In addition, the *Secured Transactions Guide* recommends a number of other steps to ensure the integrity and security of the registry record. These steps include: (a) the obligation of the registry to request and maintain the identity of the registrant; (b) send promptly copies of any amendment or cancellation to the registrant; and (c) maintain back-up copies of the registry record (see *Secured Transactions Guide*, chap. IV, paras. 48-54, and rec. 54, subparas. (b)-(f)). In order to ensure the integrity of the registry record, the regulation should include rules implementing these recommendations.

37. Additional measures to ensure that the integrity of the registry record is preserved include the following. First, the regulation should provide that the registry staff should not alter information in, or remove information from, the registry record, except as specified in the law and the regulation (see draft Registry Guide, rec. 15). Second, the regulation should provide that information in a registered notice may be amended only by registration of an amendment notice in accordance with the regulation (see Registry Guide, rec. 17).

38. In addition, the potential for registry staff corruption should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any other information entered by a registrant; (b) eliminating any discretion on the part of registry staff to reject users' access to the registry services; (c) instituting financial controls that strictly limit staff access to cash payments of fees (for example, by requiring the payment of fees to be made to and confirmed by a bank or other financial institution); and (d) designing the registry system to ensure that the archived copy of cancelled registrations preserves the original data submitted.

39. In addition, it should be made clear to registry staff and registry users, *inter alia*, that the registry staff are not allowed to give legal advice on the legal requirements for effective registration and searching or on the legal effects of registrations and searches. Moreover, it should be clear that the registry staff are only responsible for ongoing monitoring of the way the registry is working (or not working) in practice, including gathering statistical data on the quantity and types of registrations and searches that are being made, in order to be in a position to suggest any necessary adjustments to the registration and search processes and the relevant regulation.

40. Furthermore, as already discussed (see A/CN.9/WG.VI/WP.48/Add.1, paras. 48-55), the registry should be designed, if possible, to enable registrants and searchers to submit information for registration and conduct a search directly and electronically as an alternative to having registry staff do this on their behalf (see *Secured Transactions Guide*, rec. 54, subpara. (j)). In such a purely electronic registry, the role of the registry staff should essentially be limited to managing and facilitating electronic access by users, processing fees and overseeing the operation and maintenance of the registry system. If this approach is adopted, the regulation should make it clear that users bear sole responsibility for any errors or omissions they make in the registration or search process and carry the burden of making the necessary corrections or amendments (see draft Registry Guide, rec. 8).

7. Liability of the registry

41. The enacting State will need to assess how responsibility for loss or damage due to any of the following causes is to be allocated: (a) incorrect or misleading advice or information or unjustified rejection of a registration or search request by the registry staff; and (b) delay or erroneous or incomplete registrations or search results caused by a system malfunction or failure. As already mentioned (see paras. 36-40 above), while in cases where the registry permits direct registration and searching by registry users the law recommended in the *Secured Transactions Guide* limits the responsibility of the registry to system malfunction, it generally leaves this matter to enacting States (see *Secured Transactions Guide*, rec. 56). In some States, part of the registration and search fees are put into a fund to cover possible

liability of the registry for loss or damage suffered by secured creditors or third-party searchers. In other States, there are other insurance schemes aimed at covering such liability of the registry. In yet other States where data are being entered into the registry record by registry staff and thus the risk of error and liability is too great, there may be no back-up compensation or a maximum amount of recovery for any single loss.

8. Copy of registered notice

42. In view of the importance of the effective registration of a notice to the third-party effectiveness and priority of a security right, it is essential for the registrant to obtain verification that information in the notice has been successfully entered into the registry record and the date and time thereof. Accordingly, the *Secured Transactions Guide* recommends that a registrant should be able to obtain a record of the registration as soon as the information contained in a notice is entered into the registry record (see *Secured Transactions Guide*, chap. IV, paras. 49-51, and rec. 55, subpara. (e)).

43. In addition, the registrant needs to be informed of any changes to a registered notice to be able to take prompt steps to protect its position in the event that an amendment or cancellation was erroneous. Accordingly, the *Secured Transactions Guide* further recommends that the registry must send promptly a copy of any changes to a registered notice to the person identified as the secured creditor in the notice (see *Secured Transactions Guide*, chap. IV, para. 52, and rec. 55, subpara. (d)). The regulation should include provisions implementing these recommendations (see draft Registry Guide, rec. 16).

44. Moreover, for the grantor, receipt of a copy of the registered notice or a verification statement is necessary to ensure that the information in the notice: (a) corresponds to the authorization provided by the grantor in the security or other agreement, if any; and (b) conforms to the scope of the grantor's authorization for registration. Accordingly, the *Secured Transactions Guide* recommends that the registrant is obligated to send a copy of the registered notice to the grantor (see *Secured Transactions Guide*, rec. 55, subpara. (c)). This recommendation should likewise be reflected in the regulation.

45. Placing the obligation on the registrant, rather than the registry, to send a copy of the notice to the grantor is intended to avoid creating an additional burden for the registry which could negatively affect its time- and cost-efficiency. On the assumption that in most cases registrations will be made in good faith and will be accurate, failure of the registrant to meet this obligation results only in nominal penalties and any proven damages resulting from the failure (see *Secured Transactions Guide*, chap. IV, para. 51, and rec. 55, subpara. (c)).

46. In the interests of efficiency, the registry should be designed, if possible, so as to automatically generate an electronic record of the registration and send it electronically or by, for example, electronic mail attachment, to the registrant. If the registry needs to send paper copies to the registrant by mail and the registrant has to forward the copy to the grantor also by mail, delays and problems are likely to arise.

9. Amendment of information in a registered notice

47. The *Secured Transactions Guide* recommends that a registrant may amend information in a registered notice by registering an amendment notice at any time (see *Secured Transactions Guide*, chap. IV, paras. 110-116, and rec. 73). The *Secured Transactions Guide* also recommends that a grantor may, in certain circumstances, seek an amendment through a judicial or administrative process (see *Secured Transactions Guide*, chap. IV, paras. 107 and 108, and rec. 72). In view of the importance of these recommendations, the regulation may restate them and, in addition, set out the information that an amendment notice should contain (see draft Registry Guide, rec. 17).

48. A notice may not reflect, or may no longer reflect, an existing or contemplated financing relationship between the secured creditor and the grantor identified in the registration. This may happen because, after the registration, the negotiations between the parties broke down, the parties agreed to add or delete encumbered assets, or the financing relationship to which the registered notice relates came to an end. In such a case, the continued presence of the information on the registry record will limit the ability of the person identified as grantor to sell or create a new security right in the assets described in the registered notice. This is due to the fact that a prospective buyer or secured creditor will be reluctant to enter into any dealings with the person identified as the grantor unless and until the existing notice is cancelled.

49. While an amendment by the secured creditor would require appropriate authorization by the grantor, an amendment due to the assignment of the secured obligation, subordination or change of address of the secured creditor or its representative should not require authorization by the grantor. Typically, the grantor would authorize registration of an initial notice as well as any amendment in a single authorization document. This single authorization would not require the secured creditor to request individual authorizations for individual amendments (such as, for example, to extend the period of effectiveness of a registered notice).

50. It should be noted that an amendment will change the substance of the registry record through another notice, but it will never change the information of the initial notice, which will remain searchable in the publicly available registry record and, upon expiry of the period of effectiveness or cancellation of the notice, retrievable in the registry archives (see paras. 51-53 below).

10. Removal of information from the publicly available registry record and archival of such information

51. The *Secured Transactions Guide* recommends that information contained in a notice should be removed from the publicly available record once the period of effectiveness of the relevant registered notice expires or a cancellation notice is registered; such information must then be archived (see *Secured Transactions Guide*, chap. IV, para. 109, and rec. 74). The regulation should include rules implementing these recommendations (see draft Registry Guide, recs. 18 and 19).

52. In particular, the regulation should make it clear that information removed from the publicly available registry record must be archived so as to be capable of being retrieved for a period established at the discretion of enacting States (for example, at least twenty years). The archival period may be influenced by the length

of the period within which claims may be submitted under a loan agreement. For example, in some legal systems, no action may be brought later than fifteen years from the date on which the act that would be the basis of a claim occurred. In those systems, the registry regulation provides that information in all registered notices must be kept in the registry archives for fifteen years; and while it is possible that the fifteen year period can be extended through acknowledgment by the debtor of the debt, the registry is not obligated to keep the information in its archives beyond the initial limitation period. It should be noted that retrieval of archived information may be necessary for various purposes, such as, for example, for the purpose of establishing priority in the case of prolonged court or insolvency proceedings, or for the purposes of tax or money-laundering legislation. In many States, information in expired or cancelled notices may be retained in the registry record accessible to the public with an indication that it has expired or has been cancelled.

53. In other States, where information submitted to the registry is entered in the registry record by the registry, the registry may correct errors that it made in the process of entering information in the registry record. This is intended to ensure that the registry may correct errors made in entering into the record information submitted in a paper form (correctness of the information on the form being the responsibility of the registrant), but may not scrutinize and correct information entered by a registrant electronically, as this would run counter to the *Secured Transactions Guide* (see *Secured Transactions Guide*, rec. 54, subpara. (d), which is intended to limit the role of the registry and accordingly the scope of error and liability for error). The registry may effectuate the change correcting its error by registering a correction form that identifies the clerk making the corrections and the corrections made. Enacting States that may wish to allow such corrections by the registry will need to provide rules on the legal consequences of errors made by the registry in entering information in the registry record and in particular whether a “correction” may change the order of priority.

11. Language of a notice

54. The *Secured Transactions Guide* discusses but makes no recommendation with regard to the language of a notice (see *Secured Transactions Guide*, chap. IV, paras. 44-46). In view of the importance of the matter, it should be addressed in the regulation (see draft Registry Guide, rec. 20).

55. Two issues arise in this regard. First, the language in which information in a notice should be expressed and, second, the set of characters in which the information should be entered into the notice. The regulation should specify the language but need not deal with the permissible set of characters as long as they are publicized to users (for example, on the registry’s website). This would allow the registry to revise the set of characters from time to time.

56. The language to be used to enter information in the registry typically would be the official language or languages of the State under whose authority the registry is maintained, but could also include any other language specified by that State. In any case, search results should be displayed in the language in which the information was entered in the registry record. In addition, where the grantor’s name is the relevant identifier and the correct name is in a set of characters other than that used by the registry, the registry could be designed to adjust or transliterate some characters in the grantor’s name to conform to the characters used by the registry.

The same applies to secured creditor's name, the description of the encumbered assets or other information in the notice if, for example, the language used in the foreign State of the manufacturer has to be used in the notice. The characters to be transliterated and the form to which they will be transliterated may need to be made public (for example, on the registry's website).

57. Where the grantor is a legal person and the law under which it is constituted allows the use of alternative linguistic versions of its name, the regulation should specify that all linguistic versions of the name must be entered as separate grantor identifiers to the extent that this is compatible with the specified language of the registry. This is necessary to protect third parties that may be dealing or have dealt with the grantor under any one of the alternative versions of its name and would therefore search the registry using that version.

58. A way to mitigate the various problems that might arise from the fact that the identifier of the grantor is expressed in a language other than that used by the registry would be to use personal identity card numbers as the identifier of the grantor in lieu of the name of grantor (for a discussion of this matter, see A/CN.9/WG.VI/WP.52, paras. 11 and 12).

B. Recommendations 10-20

[Note to the Working Group: The Working Group may wish to consider recommendations 10-20, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

(A/CN.9/WG.VI/WP.52/Add.3) (Original: English)

Note by the Secretariat on a draft Technical Legislative Guide on the Implementation of a Security Rights Registry, submitted to the Working Group on Security Interests at its twenty-second session**[Original: English]****ADDENDUM****Contents**

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IV. Registration information**A. General remarks****1. Information required in an initial notice**

1. The *Secured Transactions Guide* recommends that the following information and only the following information needs to be provided in an initial notice for the registration to be effective: (a) the identifier and address of the grantor; (b) the identifier and address of the secured creditor or its representative; (c) a description of the encumbered asset; (d) the duration of the registration, if the enacting State chooses the option in its secured transactions law of allowing the registrant to select the period of effectiveness of the notice; and (e) the maximum monetary amount for which the secured creditor may enforce the security right, if the enacting State chooses to require this information in its secured transactions law (see *Secured Transactions Guide*, chap. IV, paras. 65-97, and rec. 57). The regulation should restate and supplement this recommendation (see draft Registry Guide, rec. 21). The following paragraphs discuss each of the elements of the required content of a notice.

2. As already discussed (see A/CN.9/WG.VI/WP.52/Add.2, paras. 1-2, 7 and 9), the registrant must enter the required information in the designated field or space in the prescribed form of notice (see draft Registry Guide recs. 9 and 21). If the registrant enters, for example, the identifier of the grantor in the secured creditor

field, this would not be a ground for the registry to reject the notice. However, the registration of the notice may be ineffective with the result that the security right to which it relates is not made effective against third parties. However, this would not be a ground for the rejection of the notice. In addition, the identifiers of the grantor and the secured creditor should be established on the basis of current and official documents, and should be their identifiers at the time of registration. Moreover, their addresses should be their current addresses known to the registrant at the time of registration.

(a) Grantor information

(i) General

3. As already explained (see A/CN.9/WGVI/WP.52/Ad.2, paras. 38-43), the *Secured Transactions Guide* recommends that information contained in notices should be indexed by reference to the grantor's identifier. In order to ensure that a search of the registry discloses all security rights that may have been granted by a person, the *Secured Transactions Guide* also provides explicit guidance on what constitutes the correct identifier of the grantor (see *Secured Transactions Guide*, recs. 58-60). The regulation should provide detailed guidance so as to ensure that a registrant can be confident that its registration will be legally effective and searchers can confidently rely on a search result (see draft Registry Guide, recs. 22-24).

4. It is not uncommon for a person to create a security right in its assets to secure an obligation owed by a third-party debtor (including a third-party guarantor of the obligation owed by the grantor). Since the function of registration is to disclose the possible existence of a security right in the assets described in the notice, the regulation should make it clear that the information required is the identifier and address of the grantor that owns, or has rights in, the encumbered assets, and not the information of the third-party debtor of the secured obligation (or a mere guarantor of the obligation owed by the debtor).

5. In addition, where there is more than one grantor, the regulation should specify that their identifiers and addresses must be entered in the designated field or space on the notice separately for each grantor. This is necessary since the identifier of the grantor is the search criterion by which notices are retrieved by searchers (see A/CN.9/WG.VI/WP.52/Add.4, paras. 31-36). To facilitate the registration process, the prescribed form of notice should be designed so as to enable the identifiers and addresses of multiple grantors to be entered separately on the same notice. While the registrant could achieve the same result by registering separate notices for each grantor, this is a more cumbersome process since the registrant will need to re-enter all the other information required on a notice on each separate notice.

(ii) Natural persons versus legal persons

6. The *Secured Transactions Guide* provides separate recommendations with respect to determining the identifier of the grantor depending on whether the grantor is a natural or a legal person or other entity (see *Secured Transactions Guide*, recs. 59-60). It follows that notices will be indexed or otherwise organized in the registry record according to distinct criteria depending on the category of grantor.

7. This approach has implications for the registration and search process. In order to ensure that the information in a notice is properly entered in the registry record so as to be retrievable by a searcher, the regulation should make it clear that a registrant must enter the identifier and address of the grantor in the fields designated for entering information relating to that category of grantor. To achieve this result, the prescribed form of notice, as well as the form of search request, should provide separate and distinct fields for entering the identifier and address of grantors in each category (see forms in A.CN.9/WG.VI/WP.52/Add.6).

(iii) *Grantor identifier for natural persons*

8. The *Secured Transactions Guide* recommends that, if the grantor is a natural person, the identifier of the grantor for the purposes of an effective registration should be the name of the grantor as it appears in a specified official document (see *Secured Transactions Guide*, rec. 59). In order to implement this recommendation, the regulation should specify the types of official document that the enacting State regards as authoritative sources of the grantor's name. The following table illustrates the type of approach that might be taken, although each enacting State will need to determine in accordance with its own naming conventions what types of official document or other source are most appropriate (see draft Registry Guide, rec. 22).

| Grantor status | Grantor identifier |
|--|---|
| Born in enacting State and birth registered in enacting State | Name on birth certificate or equivalent official document |
| Born in enacting State but birth not registered in enacting State | (1) Name on current passport (2) If no passport, name on equivalent official document such as an identification card or driver's licence |
| Not born in enacting State but naturalized citizen of enacting State | Name on citizenship certificate |
| Not born in enacting State and not a citizen of enacting State | (1) Name on current passport issued by the State of which the grantor is a citizen (2) If no current foreign passport, name on birth certificate or equivalent official document issued at grantor's birth place |
| None of the above | Name on any two official documents issued by the enacting State, if those names are the same (for example, a social security, health insurance or tax card) |

9. It is equally important to have clear rules specifying what components of the name in the official document are required to be entered in the prescribed notice (for example, family name, followed by the first given name, followed by the second given name) and to provide separate designated fields in the prescribed notice for entering each component. In deciding what components are required, the enacting State should take into account local naming conventions as well as the

extent to which locally issued official documents specify the different components of the name. Guidance should also be provided for exceptional situations. For example, where the grantor's name consists of a single word, the regulation should provide that that word should be entered in the family name field and the registry system should be designed so as not to reject notices that have nothing entered in the given name field (see draft Registry Guide, rec. 22, option A).

10. The enacting State may wish to consider whether there should be electronic matching of names entered in registered notices against names in other databases. In this regard, two issues should be considered. The first issue is the responsibility of the registry. The registry would be responsible for ensuring that the database to which it has connected is current, complete and accurate. Otherwise, it would be providing a disservice and exposing itself to liability. The second issue is the legal effect of offering matching services. One option would be for the regulation to provide that a matched record is legally sufficient to identify the grantor. Under this approach, electronic matching would shift the legal responsibility to correctly identify the grantor from the registrant to the registry, thereby exposing the registry to potential liability. The other option would be to provide that this is just a service without any legal effect and it is the responsibility of the registrant who relies on electronic matching to ensure that the grantor identifier in the external data base is correct. This latter approach more closely accords with the recommendations of the *Secured Transactions Guide*.

11. In some States, many persons may have the same name, with the result that a search may disclose multiple grantors all having the same name. To accommodate this scenario, the *Secured Transactions Guide* recommends that, where necessary, information in addition to the name of the grantor (such as the grantor's birth date or personal identification or other card number issued by the enacting State) must be included in the notice to uniquely identify the grantor (see *Secured Transactions Guide*, rec. 59). A State wishing to implement this additional recommendation should specify in the regulation the type of additional information, as well as whether it must be included for the registration to be effective or whether inclusion is at the option of the registrant (see draft Registry Guide, rec. 22, option B).

12. Whether an enacting State should provide for the inclusion in a notice of an identity card or other official card number issued by that State as additional information depends on three principal considerations. First, whether the registry system under which the identity card numbers are issued is sufficiently universal and reliable to ensure that each natural person is assigned a permanent unique number. Second, whether the public policy of the enacting State permits the public disclosure of the identity card or other card number that it assigns to its citizens and/or residents. Third, whether there is a reliable documentary record or other source by which third-party searchers can objectively verify whether a particular number relates to the particular grantor. If these three conditions are met, the use of State-issued identity card or other official card numbers would be an ideal way to uniquely identify grantors. However, as mentioned above, the approach recommended in the *Secured Transactions Guide* is that additional information, whether in the form of an identity card number or otherwise, may be required only where necessary to uniquely identify a grantor (see *Secured Transactions Guide*, rec. 59) and only as a requirement in addition to entering the name of the grantor (see draft Registry Guide, option B).

13. In view of the conflict-of-laws recommendations of the *Secured Transactions Guide* (such as, for example, recommendation 203, which provides that the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State in which the tangible asset is located), the law of the enacting State (including its registry regulation) could apply to a security right created by a foreign grantor. Thus, the regulation requires the entry of a State-issued identity card or other official card number to uniquely identify a grantor, it will still be necessary for the regulation to address cases where the grantor is not a citizen or resident of the enacting State, or, for any other reason, has not been issued a number. The enacting State might, for example, provide in the regulation that the number of the grantor's foreign passport or the number in some other foreign official document is a sufficient substitute.

(iv) *Grantor identifier for legal persons*

14. For grantors that are legal persons, the *Secured Transactions Guide* recommends that the correct identifier for the purposes of effective registration is the name that appears in the document constituting the legal person (see *Secured Transactions Guide*, rec. 60). The regulation should restate and supplement this rule. In particular, the regulation should be drafted to make it clear that the relevant constituting document includes any type of instrument (whether it be a private contract, a statute or a decree) that is the legal source of the grantor's status as a legal person according to the law under which it was constituted (see draft Registry Guide, rec. 23).

15. Virtually all States maintain a public commercial or corporate register for recording information about legal persons constituted under the law of that State including their names. In many States, upon registration in that record, a unique and reliable registration number is assigned to the legal person. If the enacting State is concerned that multiple legal persons may share a common name, the regulation could specify the inclusion of that number in the notice as additional information to be used to uniquely identify the grantor (see Registry Guide, rec. 23, option B).

16. The name of a grantor that is a legal person typically includes generic abbreviations (such as S.A., "Ltd", "Inc", "Incorp", "Corp", "Co") or terms (such as Société Anonyme, "Limited", "Incorporated", "Corporation", "Company") indicative of the type of body corporate or other legal person. The regulation should make it clear whether these abbreviations or terms are an optional component of the grantor's identifier in the sense that a search with or without them, or using an erroneous version of them, would still retrieve the relevant registration. The optional approach would protect registrants that do not enter the correct generic abbreviation or term or fail to enter it at altogether. However, it could reduce transparency for third-party searchers since a search result would disclose all grantors that are legal persons, regardless of their type, that share the same specific name.

17. Depending on the law applicable to the constitution of the grantor, the document or other instrument constituting it as a legal person may contain inconsistent variations of the name (for example, referring to it in different places as "The ABC inc." or "ABC Inc." or "ABC"). Ideally, the regulation would provide guidance on which part of the constituting document is to be treated as the authoritative source of the grantor's name for registration purposes. Supplementary

rules would need to be developed to accommodate cases where the legal person was constituted in a foreign State, in particular, whether the name or registration number that appears on the public record of a foreign State may be used as the identifier of the legal person in the enacting State.

(v) *Special cases*

18. The regulation will also need to set out additional guidelines on the required grantor identifier where the grantor does not fit into either the natural person or the legal person categories (see draft Registry Guide, rec. 24). The issue here is not whether the grantor has the legal capacity to create a security right, but rather how its identifier should be entered in a notice. The following table sets out examples of the types of situation that will need to be addressed, together with examples of possible identifiers. Enacting States may wish to consider selecting and adapting these examples to their own laws.

| Grantor status | Grantor identifier |
|---|---|
| Insolvency estate acting through an insolvency representative | Name of the insolvent person, entered in accordance with the rules applicable for grantors who are natural or legal persons, as the case may be, with the specification in a separate designated field that the grantor is insolvent |
| Syndicate or joint venture | Name of the syndicate or joint venture as stated in any document constituting it, entered in the field designated for entering the identifier of a legal person |
| Trustee or representative of an estate | Name of the trustee or the representative of the, entered estate in accordance with the rules applicable for grantors who are natural or legal persons, as the case may be, with the specification in a separate field that the grantor is acting for a trust or is the representative of an estate |
| Other entity | Name of the entity as designated in any document constituting it, entered in accordance with the rules applicable for grantors who are legal persons |

19. In the case of sole proprietorships, even though the business may be operated under a different business name and style than that of the proprietor, the regulation should provide that the grantor's identifier is the name of the proprietor entered in accordance with the rules applicable for grantors who are natural persons. The name of the sole proprietorship is unreliable and may be changed at will by the proprietor. However, the name of the sole proprietorship may be entered as an additional grantor in the notice.

20. As noted above, systems for electronic registration of notices should be designed to allow registrants to select from a category field with the appropriate designation (for example, insolvency estate, syndicate or joint venture, trust or estate, etc.) instead of entering the designation in the name field of the grantor.

Alternatively, the notice may include a field or item in which the registrant must enter the appropriate designation.

(vi) *Address of the grantor*

21. Under the *Secured Transactions Guide*, the address of the grantor is part of the required content of the notice (see *Secured Transactions Guide*, rec. 57, subpara. (a)). This approach helps to uniquely identify the grantor where necessary as, for example, where the grantor's name is common (see *Secured Transactions Guide*, rec. 59). The grantor's address is relevant for the purpose of sending copies of registered notices to the grantor (see *Secured Transactions Guide*, recommendation 55, subparas. (c) and (d)) and enables third-party searchers to contact the grantor for further information. Accordingly, the registrant should enter the current known address of the grantor. However, the grantor's address is not part of the grantor's identifier in the sense of being a search criterion. The regulation should restate and, where necessary, supplement these recommendations. In addition, the registry system should be designed to prompt registrants to enter an address into a field separate from the one for the grantor identifier.

22. Some States do not require entry of the grantor's address where personal security concerns necessitate that an individual's address details not be disclosed in a publicly accessible record. Where this exception is recognized, the regulation may specify the entry of a post office box or similar non-residential mailing address. Alternatively, interested parties could contact the secured creditor (whose address must be entered in the notice) to obtain further information about the grantor.

23. The grantor's address plays less of a role in systems in which the grantor identifier is required to include additional information designed to uniquely identify the grantor (for example, a birth date or State-issued identity card number) as compared to systems in which the required identifier is only the grantor's name with the result that a search may disclose multiple security rights granted by different grantors that share the same name (see paras. 11 and 12 above).

2. Secured creditor information

24. The *Secured Transactions Guide* recommends that the identifier of the secured creditor or the secured creditor's representative, along with its address, be included in the notice submitted to the registry (see *Secured Transactions Guide*, rec. 57, subpara. (a)). The regulation should restate and, where necessary, supplement this recommendation (see draft Registry Guide, rec. 25).

25. The regulation should specify that the same identifier rules that apply to the grantor should apply also to the secured creditor or its representative. However, as explained below (see para. 46), since the identifier of the secured creditor or its representative is not a search criterion, strict accuracy is not as essential to the effectiveness of the registration. Accordingly, even if the regulation requires additional identifier information to be entered in order to uniquely identify the grantor (for example, birth date or a personal identification number), there is no need to extend this requirement to the secured creditor.

26. The regulation should make it clear that the registrant, who may be the secured creditor or its representative, may enter in the notice the identifier of the secured creditor or that of a trustee, agent or other representative. This approach is intended

to facilitate, for example, syndicated lending, since only the identifier of the lead bank or its nominee need be entered in a notice. It is also intended to protect the privacy of the secured creditor. The rights of the grantor are not affected since the grantor is in a direct relationship with the secured creditor (or the lead bank in a syndicated loan agreement) and already knows the secured creditor's identity. The rights of third parties are not affected either as long as the person identified in the notice as the secured creditor is in fact authorized to act on behalf of the actual secured creditor in any communication or dispute connected to the security right.

3. Description of encumbered assets

(a) General

27. The *Secured Transactions Guide* recommends that a description of the encumbered assets covered by the security right to which the registration relates should be a required component of an effective notice (see *Secured Transactions Guide*, rec. 57, subpara. (b)). This approach enables third parties dealing with a person's assets (such as prospective secured creditors, buyers, judgement creditors and the insolvency representative of that person) to determine which assets of that person may be encumbered by a security right. The *Secured Transactions Guide* also recommends that a description of the encumbered assets should generally be considered sufficient, for the purposes of both an effective security agreement and effective registration, as long as it reasonably allows identification of the encumbered assets (see *Secured Transactions Guide*, recs. 14, subpara. (d), and 63). Depending on the nature of the encumbered asset, the description may be specific or generic. For example, if the encumbered asset is a specific painting, the description in the notice would need to specify the title of the painting, the name of the painter and the year the painting was created. On the other hand, if the encumbered assets are generic categories of assets, such as all the inventory of an art gallery, it would be sufficient to describe them as "all paintings", "all works of art" or "all of the grantor's movable assets".

28. The regulation should restate and, where necessary, supplement this recommendation (see the draft Registry Guide, rec. 26). In particular, the regulation should explicitly state that the description of encumbered assets in a notice may be specific or generic as long as it reasonably allows their identification. The regulation should also clarify that a description that refers to all assets within a generic category or to all assets of a grantor is assumed to cover future assets within the specified category to which the grantor acquires rights during the duration of effectiveness of the notice. If the prescribed form of notice limits the number of characters that may be entered in the field for describing the encumbered assets and additional space is needed (for example, to identify the encumbered assets in more detail), the registry system should be designed to allow additional information to be provided in the form of an attachment or schedule to the notice. This is generally necessary only where the notice is in paper as opposed to electronic form, since the provision of sufficient space does not pose a practical problem in the latter case.

(b) Description of "serial number" assets

29. As already discussed (see A/CN.9/WG.VI/WP.52/Add.2, paras. 33-35), the *Secured Transactions Guide* discusses but makes no recommendation on the use of the serial number or other unique alphanumeric identifier constitute a separate

identifier for the purposes of registration and searching (see *Secured Transactions Guide*, chap. IV, paras. 34-36).

30. However, it would not be inconsistent with the *Secured Transactions Guide* for an enacting State in its secured transactions law to require a registrant to enter the serial number of specified categories of encumbered assets in a separate designated field, provided that the number reasonably allowed their identification (see *Secured Transactions Guide*, recs. 14, subpara. (d), 57, subpara. (b), and 63). If this approach is taken, it should be limited to high-value assets for which there is a significant resale market, since it would limit the ability of a secured creditor to make a security right fully effective against third parties in the grantor's future serial number assets through a single registration. The secured creditor would need to effect a new registration or amend the description of the encumbered assets in its existing registration to enter the serial number of each new asset as it is acquired by the grantor.

31. If the enacting State decides to adopt this approach, the regulation should make it clear that the entry of a serial number description in the designated field is not required where the relevant assets are held by the grantor as inventory. In the case of inventory, the entry of a generic description in the general field designated for entering a description of the encumbered assets is sufficient. This is because the so called "A-B-C-D problem"; see A/CN.9/WG.VI/WP.52/Add.2, para. 43) does not arise in the case of inventory, since buyers that acquire inventory from the original grantor in the ordinary course of the grantor's business take the inventory free of the security right in any event (see *Secured Transactions Guide*, rec. 81, subpara. (a)).

(c) Description of proceeds

32. The *Secured Transactions Guide* recommends that a security right should automatically extend to any identifiable assets received in respect of the encumbered assets, unless otherwise agreed by the parties to the security agreement (see *Secured Transactions Guide*, Introduction, sect. B, "proceeds", and rec. 19). Where the security right in the original encumbered assets was made effective against third parties by registration, the question arises as to whether the secured creditor needs to amend the description of the encumbered assets in the initial notice to include a description of the proceeds in order to ensure that its security right in the proceeds is effective against third parties.

33. When the proceeds consist of cash proceeds (for example, money or a right to payment), the *Secured Transactions Guide* recommends the automatic continuation of the third-party effectiveness of a prior registered security right in the original encumbered assets into the proceeds. The same is true where the proceeds are of a type that is already covered by the description of the original encumbered assets in the registered notice (for example, the description covers "all tangible assets" and the grantor trades in one item of equipment for another; see *Secured Transactions Guide*, rec. 39).

34. However, where the proceeds are not cash proceeds and are not otherwise encompassed by the description of the encumbered assets in the existing notice, the secured creditor must amend its registration to add a description of the proceeds within a short period of time after the proceeds arise in order to preserve the third-party effectiveness and priority of its security right in the proceeds from

the date of the initial registration (see *Secured Transactions Guide*, rec. 40). An amendment is necessary because a third party otherwise would not be able to identify which categories of asset in the grantor's possession might constitute the relevant proceeds.

(d) Description of encumbered attachments to immovable property

35. Like any other type of encumbered asset, a tangible asset that is or will be an attachment to immovable property needs to be described in a notice registered in the general security rights registry in a manner that reasonably allows its identification (see *Secured Transactions Guide*, recs. 14, subpara. (d), 57, subpara. (b), and 63)). While a generic description of the asset may be sufficient for this purpose, the registrant may also need to register in the immovable property registry in order to ensure that its security right is effective against third parties that acquire and register a right in the relevant immovable property. In an immovable property registry, registrations are normally indexed or otherwise organized by reference to the specific parcel of land as opposed to the identifier of the grantor. Thus, if the notice is to be capable of also being registered in the immovable property registry, the description of the asset in the notice must include a reference to the specific immovable property identifier. In addition, the rules governing registrations in the immovable property registry may need to be revised to permit the registration of notices and the generic description of encumbered assets (see *Secured Transactions Guide*, chap. III, para. 104). Moreover, if the grantor of the security right in the asset is not the owner of the related immovable property, the notice may also need to identify the owner of the asset if such identification is necessary for the indexing of the notice in the immovable property registry.

4. Period of effectiveness of registered notice

36. As already discussed (A/CN.9/WG.VI.WP.52/Add.2 paras. 25-32), if a State chooses in its secured transactions law the option of allowing registrants to self-select the period of effectiveness of a registered notice, the regulation should reflect this approach (see *Secured Transactions Guide*, rec. 69, and draft Registry Guide, recs. 11 and 21, subpara. (a)(iv)). In addition, the registry system should be designed so as to permit the registrant to easily select and indicate in the notice the desired period without the risk of inadvertent error (for example, by limiting the choice to whole years from the date of registration).

5. Maximum amount for which the security right may be enforced

37. The *Secured Transactions Guide* anticipates that, to facilitate subsequent lending against the residual value of the encumbered asset, some States may require an indication in the notice of the maximum monetary amount for which the security right may be enforced (see *Secured Transactions Guide*, chap. IV, paras. 92-97, and rec. 57, subpara. (d); for a corresponding indication of that amount in the security agreement, see rec. 14, subpara. (d)).

38. The aim of this approach is illustrated by the following example. An enterprise has an asset with an estimated market value of \$100,000. The enterprise applies for a revolving line of credit facility to a maximum amount of up to \$50,000 (including capital, interest and costs). The creditor is willing to extend the loan on the condition that it obtains a security right in the asset. The grantor is agreeable but

since the maximum loan amount specified in the security agreement and in the notice is only \$50,000 and the asset has a value of \$100,000, the grantor may wish to reserve the ability to obtain another secured loan from another creditor later by giving a security right in the same asset relying on the residual value of the asset. Ordinarily, the first-to-register priority rule would deter this subsequent creditor from giving a loan for fear that the first lender could later extend loans beyond the initial \$50,000 for which it would have priority under the general first-to-register rule. By imposing a requirement to specify the maximum value for which the security right may be enforced, the subsequent creditor in this example can be assured that the first-registered secured creditor cannot enforce its security right for an amount greater than \$50,000 (including capital, interest and costs), leaving the residual value available to satisfy its own claim should the grantor default.

39. In those States that adopt this option, the regulation should make it clear that the maximum amount and the relevant currency must be entered in the designated field of the notice. Each State has to determine whether the amount may be entered in numbers, letters or both. Possibly, the registry could be designed to accept letters or digits in all fields, except the fields for the maximum amount and the duration of registration in which only digits should be accepted. Some States allow the registrant to indicate or select from a menu the relevant currency in which the loan has been made. In those States, the legal consequences of a difference in the maximum amount specified in the notice and the amount actually owed need to be addressed. If the maximum amount specified in the notice is higher than the amount actually owed at the time of enforcement, the secured creditor is entitled to enforce its security right only up to the amount actually owed. In the contrary case where the maximum amount specified in the notice is lower than the amount actually owed, the secured creditor can enforce its security right only up to the maximum amount specified in the notice (and has the remedies of an unsecured creditor for the outstanding balance). However, if there is no other competing claimant, the secured creditor would be able to enforce its security right up to the amount actually owed.

40. At the same time, the *Secured Transactions Guide* recognizes that an equally valid approach is to avoid stating in the notice such a maximum amount so as to facilitate the extension of credit by the initial secured creditor. This approach is based on the assumptions that: (a) the first-registered secured creditor is either the optimal long-term financing source or will be more likely to extend financing, especially to small, start-up businesses, if it knows that it will retain its priority with respect to any financing to be provided to the grantor in the future; (b) the grantor will not have sufficient bargaining power to require the first-registered secured creditor to enter a realistic maximum amount in the notice (instead the secured creditor will insist that an inflated amount be included to cover all possible future extensions of credit and the grantor will not usually be in a position to refuse); and (c) a subsequent creditor to whom the grantor applies for financing may be able to negotiate a subordination agreement with the first-registered security creditor for credit extended on the basis of the current amount of residual value in the encumbered asset. In States that adopt this approach, the regulation would not include a rule requiring inclusion of the maximum amount in the registered notice (see draft Registry Guide, rec. 21, subpara. (a)(v)).

41. Thus, the *Secured Transactions Guide* acknowledges that both approaches have merit and recommends that States adopt the policy that is most consistent with

efficient financing practices in each State and, in particular, with the credit market practices that underlie each approach. As already mentioned, the regulation should adopt an approach that corresponds to the approach taken in the secured transactions law of the enacting State.

6. Incorrect or insufficient information

(a) Grantor information

42. The *Secured Transactions Guide* recommends that registration of a notice is effective only if it provides the grantor's correct identifier or, in the case of an incorrect statement, if the notice would be retrieved by a search of the registry record under the correct identifier (see *Secured Transactions Guide*, chap. IV, paras. 66-77, and rec. 58). The regulation should restate this recommendation (see draft Registry Guide, rec. 27, subpara. (a)).

43. As a result, an error in the grantor's identifier submitted by the registrant could render an initial notice or a notice that amends the grantor identifier ineffective, with the result that the third-party effectiveness of the security right would not be achieved. The test should not be based on whether the error appears to be minor or trivial in the abstract, but whether it would cause the information in the registry record not to be retrieved by a search of the registry record under the grantor's correct identifier. This is because the grantor's identifier is the search criterion for retrieving information submitted in a notice and entered in the registry record. The test is an objective one, since: (a) even if a searcher knew that a security existed and had been registered, the search would still be ineffective if the relevant notice could not be retrieved by a search of the registry record under the correct grantor identifier; and (b) the registration is ineffective regardless of whether a person challenging the effectiveness of the registration suffered any actual prejudice as a result of the error.

44. The *Secured Transactions Guide* does not include a recommendation as to the impact of an error in additional grantor information that does not constitute the grantor's identifier, for example, an error in the address of the grantor or in the grantor's birth date (unless this additional information is necessary to uniquely identify the grantor, in which case, what has already been mentioned above about an error in the grantor's identifier applies to such additional information). Guidance on this issue should be included in the regulation (see draft Registry Guide, rec. 27, subpara. (b)). By analogy to the general test recommended in the *Secured Transactions Guide* for errors in the entry of secured creditor information, the regulation should specify that an error in the additional grantor information that does not constitute an identifier does not render a registered notice ineffective unless it would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64). For example, if the search result discloses numerous grantors, all having the same name as the person in whom the searcher is interested, but the error in the additional grantor information is so acute as to make a reasonable searcher believe that the grantor named in the notice is not the relevant person, a notice indicating that grantor may be found to be ineffective.

45. In addition, the *Secured Transactions Guide* does not deal with the situation where a notice lists more than one grantor but an error occurs in the identifier of only one of the grantors listed in the notice. In this case, by analogy to the

recommendation of the *Secured Transactions Guide* with respect to an error in the description of only some of the encumbered assets (see *Secured Transactions Guide*, rec. 65), the regulation should provide that such an error would not render the registered notice ineffective with respect to the other grantors that were sufficiently identified (see draft Registry Guide, rec. 27, subpara. (c)). In line with the *Secured Transactions Guide*, the same rule should be restated in the regulation for notices that describe multiple encumbered assets but an error is made in the description of only one or some of them (see draft Registry Guide, rec. 27, subpara. (c)).

(b) Secured creditor information

46. As the secured creditor information is not an indexing or search criterion, the *Secured Transactions Guide* recommends that an error by the registrant in the identifier or address of the secured creditor or its representative renders the registration ineffective only if it would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64). For example, if the secured creditor is identified in the notice as bank AAA, and the search of the registry returns a result that names a different person as the secured creditor, the registered notice may not be ineffective (bank AAA may have changed its name, merged with another bank or been sold). Still, substantial accuracy is always important, since searchers rely on the identifier and address information of the secured creditor or its representative in the registry record for the purposes of sending notices under the secured transactions law (such as a notice of an extrajudicial disposition of an encumbered asset; see *Secured Transactions Guide*, recs. 149-151). Moreover, the grantor may need to rely on this information to submit a written request to the secured creditor for the cancellation or the amendment of a certain notice (*Secured Transactions Guide*, rec. 72, subpara. (a)).

(c) Asset description

(i) General

47. Under the *Secured Transactions Guide*, a registrant's failure to include an asset or certain type of asset in a notice means that the third-party effectiveness of the security right in any omitted asset or type of asset may not be achieved. However, the *Secured Transactions Guide* recommends that a minor error in the description of the encumbered asset does not render the registered notice ineffective unless it would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64). In addition, under the *Secured Transactions Guide*, a registrant's failure to meet the "seriously misleading" test means that the registration is ineffective only to the extent of the erroneously described or omitted assets and the security right continues to be effective against third parties with respect to other assets that were sufficiently described (see *Secured Transactions Guide*, rec. 65). The regulation should include corresponding recommendations (see draft Registry Guide, rec. 27, subparas. (b) and (c)).

(ii) Serial number assets

48. As already mentioned, serial number assets may need to be described in a notice by reference to the serial number and the type of asset, if this is necessary to allow their reasonable identification (see *Secured Transactions Guide*, recs. 14, subpara. (d), 57, subpara. (d), and 63). If that is the case, an error in the serial

number and type of asset should be treated in the same way as any other error in the description of the asset. This generally means that a minor error in the serial number does not render the registered notice ineffective unless it would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64 and draft Registry Guide, rec. 27, subpara. (b)).

49. As also already mentioned (see A/CN.9/WG.VI/WP.52/Add.2, paras. 33-35), in States that adopt a secured transactions law that requires the serial number of specified assets to be entered and indexed as a separate search criterion in order for the security right to be fully effective and take priority over specified classes of third-party competing claimants, an analogy could be made to the recommendation of the *Secured Transactions Guide* applicable to the incorrect or insufficient grantor identifier in the notice. Accordingly, a notice with the incorrect serial number would only be effective if it could be retrieved by a search of the registry record under the correct serial number (see *Secured Transactions Guide*, rec. 58).

50. In legal systems that adopt this latter approach, the regulation will also need to address the consequences of an error in the entry of one but not both the grantor identifier and the serial number. The regulation should provide that both would need to be entered correctly in the notice for the registration of that notice to be effective. As a result, should there be an error in either the grantor identifier or the serial number resulting in the notice not being retrievable by a search using the correct grantor identifier or the correct serial number, the registration of that notice would be ineffective or result in lower priority for the relevant security right as against certain classes of competing claimants specified in the secured transactions law (e.g. transferees or lessees of the encumbered assets from the original grantor).

(iii) *Period of effectiveness of registration*

51. The *Secured Transactions Guide* recommends that an incorrect statement in the notice as to the period of effectiveness of the registration should not render the registration ineffective (see *Secured Transactions Guide*, rec. 66). The regulation should include a corresponding recommendation (see draft Registry Guide, rec. 27, subpara. (e)). However, this recommendation is subject to the important caveat that protection should be given to third parties that relied on such a statement (for the protection of the grantor against an unauthorized statement in the notice of the maximum amount, see paras. 55 and 56 below).

52. Accordingly, where the registrant enters a longer duration than intended, the protection of third parties is not as relevant as they would not be prejudiced by relying on the incorrect statement. The registered notice will still alert them to the possibility that a security right may exist and that they can take steps to protect themselves against that risk. As there would be nothing on the registry record to indicate that the secured creditor intended to enter a shorter term, third-party searchers would not in any way be misled by the secured creditor's error in entering a longer term. Consequently, the error in the period of effectiveness of the registered notice should not render the registration ineffective. However, in cases where the security right referred to in the notice has, in fact, been extinguished (for example, by payment of the secured obligation and termination of any credit commitment), the grantor would be able to request the secured creditor to amend or cancel the notice to reflect the correct duration. If the secured creditor failed to do so within a number of days specified in the secured transactions law after receipt of the

grantor's written request, the grantor could seek the amendment or cancellation of the notice through a summary judicial or administrative procedure (see *Secured Transactions Guide*, rec. 72, subparas. (a) and (b)).

53. However, where the statutory period of effectiveness or the period that the registrant entered is shorter than the actually intended period of effectiveness, the registration will lapse at the end of the specified period and the security right will no longer be effective against third parties, unless it was made effective prior to the lapse by some other method (see *Secured Transactions Guide*, rec. 46). As mentioned, while the secured creditor can re-establish third-party effectiveness by registering a new notice, its security right will take effect against third parties only from the time of the new registration (see *Secured Transactions Guide*, recs. 47 and 96).

(iv) *Maximum monetary amount and impact of error*

54. For States that elect to require the maximum amount for which the security right may be enforced to be entered in the notice, the *Secured Transactions Guide* recommends that an incorrect statement in the registered notice of the maximum amount should not render the notice ineffective (see *Secured Transactions Guide*, rec. 66). The regulation should include a corresponding recommendation (see draft Registry Guide, rec. 27, subpara. (e)).

55. However, this is subject to the caveat that third parties that relied on the incorrect statement of the maximum monetary amount in the registered notice should be protected. Thus, where the maximum amount indicated in the notice is greater than the maximum amount agreed in the security agreement or the amount actually owed, there is no need to protect a third party since its decision to advance funds normally will be based on the amount indicated in the notice. It should be noted that the grantor would also be protected in this situation since it could request the secured creditor or, if the secured creditor failed to act in a timely manner, a judicial or administrative body through a summary proceeding, to amend the notice to correct the amount so that the grantor could obtain financing against the residual value of the encumbered asset (see *Secured Transactions Guide*, rec. 72).

56. However, where the maximum amount indicated in the notice is less than the maximum amount agreed to in the security agreement or the amount actually owed, a third party that relied on the maximum amount specified in the notice (in advancing secured credit on the assumption that it could enforce its security right against any residual value in the asset in excess of the amount indicated in the notice) should be protected. Similarly, a judgement creditor, who took enforcement action in the belief that the excess value of the asset above that stated in the notice would be available to satisfy its judgement claim, should also be protected. The way to protect the interests of third parties is to limit the right of the secured creditor to enforce its security right as against the third party up to the maximum amount erroneously stated by the secured creditor in the registered notice (as to the rights of the creditor to claim the amount actually owed, see para. 39 above).

B. Recommendations 21-27

[Note to the Working Group: The Working Group may wish to consider recommendations 21-27, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted in here at this stage but will be inserted in the final text.]

(A/CN.9/WG.VI/WP.52/Add.4) (Original: English)

Note by the Secretariat on a draft Technical Legislative Guide on the Implementation of a Security Rights Registry, submitted to the Working Group on Security Interests at its twenty-second session**[Original: English]****ADDENDUM****Contents**

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V. Amendment and cancellation information**A. General remarks****1. Voluntary amendment****(a) General**

1. Information entered in the registry record may need to be changed to reflect a change in the relationship between the secured creditor and the grantor. This is typically done by way of an amendment that indicates the changes to the information contained in the registered notice (with the exception of errors made by the registry in entering the information in the registry record, once a notice is registered there is no means to edit a notice and all changes must be in the form of a subsequent amendment notice; see *Secured Transactions Guide*, rec. 72). An amendment may be necessary, for example, in order to add, change or delete

information in a registered notice or to renew the period of the effectiveness of a registered notice.

2. Normally, an amendment is not effected by deleting the currently registered information and replacing it with the new information. Instead, an amendment is added to the information in the initial registered notice so that the searcher is able to find and examine both the originally registered information as well as the information subsequently registered. Neither registrants nor registrars are able to replace any information from the registry record, and registry systems should be designed accordingly.

3. A secured creditor should be in a position to amend a notice, to the extent appropriate, at any time. While some amendments would require an authorization by the grantor, other amendments such as an amendment to reflect an assignment of the secured obligation, subordination or change of address of the secured creditor or its representative should not require authorization by the grantor. Typically, the grantor would authorize registration of an initial notice as well as any amendment in a single authorization document. This single authorization would not require the secured creditor to request additional authorization for individual amendments (such as, for example, to extend the period of effectiveness of the registration). This is the approach recommended in the *Secured Transactions Guide* (see *Secured Transactions Guide*, recs. 71 and 73).

4. To effect an amendment, a registrant must provide in the designated field in the amendment notice certain information, that is, the registration number of the notice to which the amendment relates, and the additional or changed information as the case may be (see draft Registry Guide, rec. 28, subpara. (a)). Each amendment notice should be assigned by the registry a date and time of registration (see draft Registry Guide, rec. 10). The enacting State may wish to consider whether the registry system should be designed to allow the registrant to amend only a single item in a single amendment notice (e.g., change the grantor's identifier) or multiple items with one amendment notice (e.g., add a new grantor and delete some encumbered assets; see draft Registry Guide, rec. 28, subpara. (e)). The former approach may be simpler, while the latter may be more cost-efficient. In any case, it should be clear that, if there is first an assignment of the secured obligation and a notice with the new secured creditor identified is registered, and then there is a change to the encumbered assets, only the assignee will have the power to change the encumbered assets. Furthermore, as with the information provided in the initial notice, the information in an amendment notice submitted by the registrant is not subject to verification or substantive change by those administering the registry, as the registry merely serves as a repository of information received by it. Similarly, the legal consequences of an amendment are determined by the substantive rules of the secured transactions law.

(b) Change in grantor identifier

5. A change in the identifier of the grantor indicated in the registered notice (for example, as a result of a subsequent name change) may undermine the publicity function of registration from the perspective of third parties that deal with the grantor after the identifier has changed. As already mentioned the grantor's identifier is the principal indexing and search criterion, with the result that a search using the grantor's new name will not disclose a security right registered against the

old name. In a registry system that uses a State-issued identity card number as the grantor identifier in lieu of the name, it is less likely that this problem will arise since the identity card number is typically permanent and not subject to change.

6. To address this problem, the regulation should provide that the secured creditor is entitled to register an amendment notice to add the new grantor identifier. While failure to submit an amendment should not make the security right generally or retroactively ineffective against third parties, third parties that deal with the grantor after the change in its identifier and before the amendment notice is registered should be protected. Accordingly, the applicable rules should provide that, if the secured creditor is entitled to register an amendment notice to add the new grantor identifier but does not register the amendment notice within a specified short “grace period” (for example, 15 days) after the identifier has changed, its security right would be ineffective against buyers, lessees, licensees and other secured creditors that acquire rights in the encumbered asset after the change in the grantor identifier and before the amendment is registered. This is the approach recommended in the *Secured Transactions Guide* (see *Secured Transactions Guide*, rec. 61). Normally, this rule would be stated in the secured transactions law. The law should specify when the grace period begins to run, whether it is the date of change or when the secured creditor acquired actual knowledge of the change. Although the *Secured Transactions Guide* recommends the first approach, some States adopt the latter with the result that the security right remains effective against intervening third parties that acquire rights in the encumbered assets before the secured creditor finds out about the change. Guidance should also be provided on what constitutes a change of identifier in the context, in particular, of corporate amalgamations and the effect of not making an amendment in the wake of the amalgamation.

7. The regulation should make it clear that the registrant should enter the grantor’s new identifier in the field designated in the amendment notice for adding an additional grantor, without deleting the old grantor information. As a result, a search under either the old or the new grantor identifier would reveal the registered notice. As the amendment notice would be assigned a date and time, and linked in the registry record with the initial notice, this approach would be simple to implement and cause no confusion.

(c) Transfer of an encumbered asset

8. When the grantor transfers, leases or licences an encumbered asset, the security right will generally follow the asset into the hands of the transferee (see *Secured Transactions Guide*, rec. 79). This creates a problem analogous to a post-registration change in the identifier of the grantor, since a search of the registry according to the transferee’s, lessee’s or licensee’s identifier will not disclose the security right registered against the identifier of the grantor (the transferor, lessor or licensor). Accordingly, to protect third parties that deal with the encumbered asset in the hands of the transferee, the registry system should enable the secured creditor to submit an amendment notice (or a new notice) to record the identifier and address of the transferee, lessee or licensee as a new additional grantor.

9. The *Secured Transactions Guide* discusses but makes no recommendation with respect to the impact of a transfer on the effectiveness of a security right against third parties that acquire rights in the assets from the transferee other than that a

State should address it in its law (see *Secured Transactions Guide* chap. IV, paras. 78-80, and rec. 62).

10. Some States provide that a registration remains effective without any amendment to indicate the identifier of the transferee as a new grantor. Other States, however, adopt a rule equivalent to that applicable to a change in the identifier of the grantor (see *Secured Transactions Guide*, rec. 61, and paras. 5-7 above). Under this approach, failure to amend the registration to add the identifier of the transferee as a new additional grantor does not make the security right ineffective against third parties generally. However, if the secured creditor does not register the amendment within a short “grace period” (for example, 15 days) after the transfer, its security right is ineffective against buyers, lessees, licensees and other secured creditors that deal with the encumbered asset after the transfer and before the amendment is registered. Other States adopt a similar approach subject to the important caveat that the grace period given to the secured creditor to register the amendment begins to run only after the secured creditor acquires actual knowledge of the transfer. In still other States, such an amendment is purely optional and failure to amend does not affect the third-party effectiveness or priority of the security right (see *Secured Transactions Guide*, chap. IV, paras. 78-80).

11. If the enacting State selects the first or the second approach, it would need to include in its regulation a provision enabling a secured creditor to register an amendment notice to add a new grantor (see draft Registry Guide, rec. 28, subpara. (a)). Secured creditors should understand that the original grantor information should not be deleted since deletion would terminate the effectiveness of the security right against the original grantor with the result that the security right would then also be ineffective against the transferee.

(d) Subordination of priority

12. Under the *Secured Transactions Guide*, a secured creditor with priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant (see *Secured Transactions Guide*, rec. 94). Since third parties are not prejudiced by the subordination, there is no requirement that the subordinating secured creditor or the beneficiary of the subordination (assuming one or both have registered a notice with respect to their rights in the registry) amend the registered notice to reflect the change in their respective priority positions. However, in some cases, they may wish to do so. Accordingly, the registry should be designed so as to accommodate the registration of an amendment notice to reflect a subordination.

(e) Assignment of the secured obligation and transfer of the security right

13. A secured creditor may assign the secured obligation. As in most legal systems, the *Secured Transactions Guide* recommends that, as an accessory right, the security right follows the secured obligation, with the result that the assignee of the obligation in effect will be the new secured creditor (see *Secured Transactions Guide*, recs. 25 and 48). Under the approach recommended in the *Secured Transactions Guide*, an amendment to the initial notice to add the assignee as a new secured creditor is not required in the sense of it being necessary to preserve the effectiveness of the registration (see *Secured Transactions Guide*, rec. 75). As the identifier of the secured creditor is not an indexing and search criterion, searchers

will not be materially misled by the change in the identity of the secured creditor. However, the original secured creditor (assignor) will usually not wish to have to continue to deal with requests for information from searchers and the new secured creditor (assignee) will wish to ensure that it receives any notifications or other communications relating to its security right.

14. Consequently, the original secured creditor or the new secured creditor with the consent of the original secured creditor should be permitted to register an amendment notice to add the identifier and address of the new secured creditor. If the new secured creditor fails to register an amendment notice, the original secured creditor will retain the power to alter the record by submitting an amendment notice (see *Secured Transactions Guide*, chap. IV, para. 111). In any case, the registry system should be designed so that a search result will disclose whether an amendment notice was registered by the original or the new secured creditor.

15. Another issue relevant to the assignment of the secured obligation is the duty of the secured creditor to disclose the identity of the assignee upon a request by the grantor. If a notice about the assignment of the secured obligation is registered, under the law recommended in the *Secured Transactions Guide*, the registrant is obligated to forward a copy of that notice to the grantor (see *Secured Transactions Guide*, rec. 55, subpara. (c)). However, whether such a notice is registered or not, the secured creditor has an obligation to disclose the assignment and the identity of the assignee to the grantor upon request. In any case, this disclosure is not a registry function but an obligation imposed by the substantive law and effectuated outside the registry system.

(f) Addition of newly encumbered assets

16. After the conclusion of the original security agreement, the grantor may agree to grant a security right in additional assets not already described in the registered notice. To accommodate this possibility, the secured transactions law and the regulation should enable the secured creditor to amend the initial notice so as to add the description of the newly encumbered assets. While the secured creditor could achieve the same result by registering a new notice with respect to the new assets, the registration of an amendment notice would typically be more efficient and would ensure that the duration of the effectiveness of the registration is the same for both the original and the additional assets. Regardless of which method is chosen, the security right in the newly encumbered assets becomes effective against third parties only as of the time of registration of the amendment notice or the new notice as the case may be (see *Secured Transactions Guide*, rec. 70). The reason for this approach is that a search of the registry record by third parties prior to registration of the amendment notice or the new notice would not disclose that a security right has been granted in the newly encumbered assets.

17. After the grantor has partially satisfied the secured obligation, it may be entitled to have some of the encumbered assets released from the security right pursuant to the security agreement. The secured creditor may then become obligated to amend the registered notice to delete the relevant encumbered assets. The amendment notice becomes effective as of the time of its registration (see *Secured Transactions Guide*, rec. 70).

(g) Deletion of encumbered assets

18. The secured creditor may wish to delete encumbered assets from the description in the initial notice for a variety of reasons. For example, the grantor may have repaid a portion of the obligation secured by the security right on condition that the security right be extinguished against specified assets; or the description in the initial notice may have been overly broad and the grantor may have issued a demand to the secured creditor to amend the initial notice to reflect the true scope of the encumbered assets subject to the security right to which the notice relates. Accordingly, the registry system should be designed to accommodate the entry of an amendment notice to delete the encumbered assets described in the amendment notice.

(h) Change of description of encumbered assets

19. In addition, during the time the security agreement remains effective, some encumbered assets described in the initially registered notice may have changed some of its characteristics. For instance, the initial registered notice may have described the encumbered assets as “all cherry wood black furniture” but subsequent to the registration the grantor repainted the furniture in brown. The description included in the initially registered notice thus no longer corresponds to the reality and, in order to avoid issues as to whether the description remains reasonable, the secured creditor may want to amend it. This amendment is not in the nature of adding new assets with the consequence of a new priority date as would be the case of amendment notices that add new assets. As a result, the registry system should be designed to allow the registrant to provide the new description of encumbered assets and indicate in the amendment notice that the nature of this amendment is a “change”.

(i) Extension of the period of effectiveness of a registration

20. After a notice is registered and before its period of effectiveness expires, a registrant may need to extend this period. The rules applicable to registration should confirm that the period of effectiveness of a registered notice may be extended by the registration of an amendment notice at any time before the expiry of the period of effectiveness of the registered notice (see *Secured Transactions Guide*, rec. 69). If the registration of a new notice were instead required, this would undermine the secured creditor’s original priority status and the continuity of the effectiveness of its security right against third parties, since the new notice would take effect against third parties only from the time of its registration.

21. As already discussed (see A/CN.9/WG.VI/WP.52/Add.3, para. 36), there are several approaches that States can take with respect to the period of effectiveness of a registered notice. In States where the period of effectiveness is established by law, the extension should be for an additional period equal to the statutory period. In States that permit the registrant to self-select the period of effectiveness, the registrant should also be permitted to select the length of the extension period, subject to any applicable maximum limit, if the State imposes a limit on this option. Under this latter approach, a registrant who, for example, selected a five year term for the initial registered notice should be allowed to select three or seven years for the period of the extension. In States that do not set any limit to the period of

effectiveness, there would be no need for an extension and a registered notice would continue to be effective until it was cancelled.

(j) Global amendment

22. The identifier or address, or both, of a secured creditor may change as a result of a merger or other change of name or address. While the identifier of the secured creditor should not be a general search criterion (see para. 36 below), the registry should be designed to permit the retrieval of information according to the identifier of the secured creditor (see *Secured Transactions Guide*, chap. IV, para. 29). This feature would enable the secured creditor information in all notices associated with that particular secured creditor to be efficiently amended through a single global amendment. The registry system could be designed to allow a global amendment to be made either by registry staff at the request of the secured creditor or by the secured creditor directly (see draft Registry Guide, rec. 29). In either case, to protect the secured creditor from potentially erroneous or fraudulent amendments, the registry should be able to request and verify the identity of any registrant that seeks to effect a global amendment. A single global amendment would be particularly useful in certain case such as a merger or a change of the name of the secured creditor. In any case, the identifier of the secured creditor should not be a general search criterion (see para. 36 below).

2. Voluntary cancellation

23. As in the case of an amendment, the *Secured Transactions Guide* recommends that a secured creditor should be able to cancel a notice, to the extent appropriate, at any time (*Secured Transactions Guide*, rec. 73). A cancellation should not require authorization by the grantor, as it has no effect or only a beneficial effect on the grantor. Unlike an amendment, a cancellation is effected by adding the cancellation notice to the registry record and removing the registered information from the publicly available record. Information thus removed is archived for a long period of time in a manner that enables the information to be retrieved (see A/CN.9/WG.VI/WP.52/Add.2, paras. 51-53, and draft Registry Guide, rec. 19).

24. The only information that a registrant should be required to enter in the designated field of the cancellation notice is the registration number assigned to the initial notice by the registry and permanently associated with that notice and any related subsequent notice (see draft Registry Guide, rec. 30). The grantor identifier should not have to be included in a cancellation notice. The reason is that the registrant will have obtained access to the registry (for example, with his/her user identification and password), and have the relevant registration number.

25. The regulation should provide that a cancellation notice submitted by one of the creditors identified in the notice does not affect the rights of the other secured creditor. It has the effect of an amendment that deletes one or more secured creditors. In such a case, only a cancellation by all secured creditors results in the removal of the information in the registered notice from the publicly available registry record and the archival of that information (see A/CN.9/WG.VI/WP.52, section B terminology and interpretation).

[Note to the Working Group: The Working Group may wish to consider whether the matter discussed in para. 25 should be explicitly addressed in the recommendations.]

3. Correction of erroneous lapse or cancellation

26. In the event that a secured creditor fails to extend the duration of a registration in a timely fashion or inadvertently registers a cancellation notice, the secured creditor may register a new initial notice of its security right, thereby re-establishing third-party effectiveness. However, under the law recommended in the *Secured Transactions Guide*, the third-party effectiveness and priority status of the security right dates only from the time of the new registration (see *Secured Transactions Guide* rec. 47). The secured creditor will suffer a loss of priority as against all competing claimants, including those against whom it had priority, under the first-to-register rule, prior to the lapse or cancellation (see *Secured Transactions Guide*, rec. 96).

27. Some States adopt a more lenient approach. The secured creditor is given a short grace period after the lapse or cancellation to revive its registration so as to restore the third-party effectiveness and priority status of its security right as of the date of the initial registration. However, to protect intervening third parties, the secured transactions law in States that adopt this approach provides that the security right is ineffective against or subordinate to competing claimants that acquired rights in the encumbered assets or advanced funds to the grantor after the lapse or cancellation and before the new registration.

4. Compulsory amendment or cancellation

28. The ability of a grantor to obtain financing is potentially prejudiced by the existence of a registered notice that does not accurately reflect its financing relationship with the person named as the secured creditor in the notice. Accordingly, the secured transactions law or the regulation should provide that a registrant is obliged to register an amendment or cancellation notice where: (a) the registration of an initial or amendment notice has not been authorized by the grantor at all or to the extent described in the notice; (b) authorization has been withdrawn and no security agreement has been concluded; (c) the security agreement has been revised in a way that makes the information contained in the registered notice inaccurate; or (d) the security right to which the registered notice relates has been extinguished by payment or otherwise and there is no commitment to extend further credit (see draft Registry Guide, rec. 31, subpara. (a), which sets out a substantive law rule that was not included in the *Secured Transactions Guide*).

29. If the registrant does not comply with that obligation on its own, in the circumstances just described, the secured transactions law or the regulation should provide that the secured creditor is obliged to register an amendment or cancellation notice within a short period of time after receiving a written request from the grantor (see *Secured Transactions Guide*, rec. 72, subpara. (a), and draft Registry Guide, rec. 31, subpara. (c)). In the event that cooperation is still not forthcoming, a speedy and inexpensive judicial or administrative procedure should be established to enable the grantor to seek cancellation or amendment of the notice (see *Secured Transactions Guide*, rec. 72, subpara. (b), and draft Registry Guide, rec. 31, subpara. (e)).

30. Depending on the option chosen by an enacting State in its secured transactions law or regulation, a compulsory amendment or cancellation could be registered either by the registry staff or by a specified judicial or administrative officer vested with the authority to do so by the enacting State. In either case, the relevant judicial or administrative order may need to be attached to the amendment or cancellation notice presented by the person seeking the cancellation or amendment (see draft Registry Guide, rec. 31, subpara. (g)). A requirement that the order be attached to the notice would, on the one hand, provide more transparency and certainty, but, on the other hand, require the registry system to build this function which may increase the cost of the registry system.

[Note to the Working Group: The Working Group may wish to note that, depending on its decision as to the requirement for the attachment of the order to the notice which appears in square brackets in recommendation 31, subpara. (g), the text of paragraph 30 may need to be revised.]

B. Recommendations 28-31

[Note to the Working Group: The Working Group may wish to consider recommendations 28-31, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

VI. Searches

A. General remarks

1. Search criteria

31. As already discussed (see A/CN.9/WG.VI/WP.52/Add.1, paras. 56-59), the *Secured Transactions Guide* recommends that the security rights registry must be publicly accessible and a searcher should not be required to give any reasons for the search (see *Secured Transactions Guide*, rec. 54, subparas. (f) and (g), and draft Registry Guide, rec. 4). Under the *Secured Transactions Guide*, privacy concerns are more effectively dealt with by requiring grantor authorization for a registration and by establishing a summary judicial or administrative procedure to enable grantors to cancel or amend unauthorized or erroneous notices quickly and inexpensively (see paras. 28-30 above).

32. The *Secured Transactions Guide* requires the registry to request and maintain the identity of a registrant as a pre-condition to effecting a registration (see *Secured Transactions Guide*, rec. 55, subpara. (b)), but does not include a similar recommendation with respect to a searcher. The reason for this difference is that an unauthorized registration has the potential to prejudice the ability of the person named as a grantor in a registered notice to obtain access to credit. Requesting and maintaining the identity of the registrant enables that person to determine to whom a demand to amend or cancel an unauthorized registration should be made. Since a search of the registry record cannot alter or change or add to the information in the registry record, no similar concern arises. Accordingly, the registry should not be

obligated to request or maintain the identity of the searcher except for the purposes of collecting search fees, if any (protection of the registry database from hackers should be ensured without complicating legitimate searches). Thus, a person should be entitled to search the registry record simply by using the prescribed search form and paying the search fees, if any (see draft Registry Guide, rec. 7).

33. As already explained (A/CN.9/WG.VI/WP.52/Add.1, paras. 38-40), under the approach recommended in the *Secured Transactions Guide*, information in the registry record must be indexed or otherwise be organized so as to be searchable by reference to the identifier of the grantor and as such, the identifier of the grantor is the principal criterion by which such information may be searched and retrieved by searchers. However, a searcher may rely on the accuracy of a search result only if the searcher used the correct grantor identifier in searching. The regulation should follow the same approach (see draft Registry Guide, rec. 32, subpara. (a)).

34. The registry should also be designed to allow notices to be searched and retrieved by reference to the unique registration number assigned by the registry to the initial notice and permanently associated with that notice and any related subsequent notice (see draft Registry Guide, rec. 32, subpara. (b)). While not generally useful to third parties as a search criterion (as third parties will not have the information), registration numbers give secured creditors an alternative search criterion to quickly and efficiently retrieve a registration for the purposes of entering an amendment or cancellation.

35. As already discussed (see A/CN.9/WG.VI/WP.52/Add.1, para. 43), the *Secured Transactions Guide* discusses but makes no recommendation on the use of the serial number of an asset as a supplementary search criterion with respect to assets that have a high resale value and a unique serial number or other alphanumerical identifier (see *Secured Transactions Guide*, chap. IV, paras. 34-36).

36. As already mentioned (see para. 22 above), a secured creditor should be able, either directly or through the registry staff to efficiently amend its identifier or address information in all registrations associated with that secured creditor through a single global amendment. However, the identifier of the secured creditor should not be a search criterion for searching by the public generally. The identifier of the secured creditor has limited relevance to the legal objectives of the registry system. Moreover, to allow public searching may violate the reasonable expectations of secured creditors; for example, because of the risk that a credit provider may undertake a search based on the secured creditor identifier to obtain the client lists of its competitors (see *Secured Transactions Guide*, chap. IV, para. 81).

2. Search results

37. A search result should either indicate that no registered notice was retrieved against the specified search criterion or otherwise list all registered notices that match the search criterion entered along with the full details of the information as it appears in the registry record (see draft Registry Guide, rec. 33, subpara. (a)). Whether the result will reflect information that matches the search criterion exactly or also include close matches is a matter of the design of the registry (see draft Registry Guide, rec. 33, subpara. (b)).

38. Where a State decides to implement a search functionality that also discloses close matches and the information provided in notices is stored in an electronic

database, the search logic will need to be programmed so as to return close matches to the grantor identifier entered by the searcher. In such a system, a registration may be considered effective even though the registrant had made a minor error in entering the correct grantor identifier (see A/CN.9/WG.VI/WP.52/Add.3, paras. 42-45). This is because a searcher entering the correct grantor identifier would still be able to retrieve the registration (with the error) and consider it likely that the grantor whose identifier appears on the search result as an inexact but close match is nonetheless the relevant grantor. Whether this is the case depends on such factors as whether: (a) a reasonable searcher would be able to readily identify the grantor by referring to additional information, such as address, birth date or identification number; (b) the list of inexact matches is not so lengthy as to prevent the searcher from efficiently determining whether the grantor which it is interested in is included in the list; and (c) the rules for determining “close” matches are objective and transparent so that a searcher will be able to rely on the search result.

39. The indexing and search logic for grantor identifiers may also be programmed so as to ignore all punctuation, special characters and case differences and to ignore selected words or abbreviations that do not make an identifier unique (such as articles of speech and indicia of the type of enterprise such as “company”, “partnership” “LLC” and “SA”). Where this is the case, an error in the entry of this type of information will not render the registration ineffective since the registration will still be retrieved despite the error.

40. The exact match logic also reduces the need for the courts to determine whether the error in the grantor’s identifier is insignificant and whether the notice that contains the incorrect identifier is a “close enough” match. In other words, the court will have to determine whether the searcher should have reviewed some or all matches on page 1 of the search result, whether the matches on page 2 should have been consulted.

41. The regulation should also provide that the registry should issue a search certificate upon request by a searcher and payment of the relevant fee, if any. A search certificate should in principle be admissible as evidence in court that a notice as registered, or not, at a certain date and time. All these issues should be addressed in the registration rules (see draft Registry Guide, rec. 33, subpara. (c)). Whether a search result or certificate is admissible in a court of the enacting State and, if so, what its evidentiary value is are matters for the procedural law of the enacting State.

B. Recommendations 32 and 33

[Note to the Working Group: The Working Group may wish to consider recommendations 32 and 33, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

VII. Registration and search fees

A. General remarks

42. The *Secured Transactions Guide* recommends that registration and search fees should not be set to raise revenue but rather to recover the cost of establishing and operating the registry (see *Secured Transactions Guide*, chap. IV, para. 37, and rec. 54, subpara. (i)). When the *Secured Transactions Guide* refers to the registration fee, it means the entire fee that the registrant is charged, no matter what it is called (e.g. transaction tax or a registration fee) or whether it is imposed by the regulation or a separate decree. The reason for this approach is that excessive fees and transaction taxes will significantly deter utilization of the registry, thereby undermining the overall success of the enacting State's secured transactions law. Nonetheless, in assessing the level of revenue needed to achieve cost-recovery, account should be taken of the need to fund the operation of the registry, including: (a) salaries of registry staff; (b) replacement of hardware; (c) upgrading of software; (d) ongoing staff training; and (e) promotional activities and training on the registry operations for the users.

43. The registry regulation should follow the same approach (see draft Registry Guide, rec. 34). The relatively low start-up cost of an electronic security rights registry should be recoverable out of service fees within a relatively short period of time. In addition, the operation costs can be kept low, especially if the registry record is computerized and direct electronic registration and searching is available. Moreover, if the registry is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is up and running.

44. The enacting State may wish to consider a list of options ranging from charging a different fee for paper-based registrations, searches and search certificates to charging no fee at all. In some States, where the registry is established and managed by the State, in the interest of encouraging registration of financing transactions, the State charges no fee for registration or searching. Such an approach encourages registration and searching even for low-value and other transactions that might have otherwise been entered into on an unsecured basis. This means, however, that registration is subsidized with taxpayer money.

45. As already discussed, (see A/CN.9/WG.VI/WP.52/Add.2. para. 18), the enacting State may wish to consider whether registration fees should be set on a per transaction basis or based on a sliding tariff related to the period of effectiveness of registered notices (in systems that permit registrants to self-select that period). The latter approach has the advantage of discouraging registrants from selecting an inflated term out of an excess of caution. Whatever approach is adopted, fees should not be related to the maximum amount specified for which the security right can be enforced (in systems that require this information to be included) since this would discourage registration.

46. In addition, the enacting State may wish to consider whether any fees to be charged should be set out in the regulation or in another administrative act that may be easier to revise. Listing the registration fees in an administrative act has the

advantage that it provides the flexibility to the registry to adjust the fees to correspond to the cost of operating the system, such as when it is no longer necessary to charge the fee to recoup the cost of the initial investment. However, this approach has the disadvantage that this relatively low burden may be abused by the registry to unjustifiably adjust the fees upwards.

47. Moreover, the enacting State may wish to consider that, in a hybrid system, it may be reasonable to charge higher fees to process paper-based notices and search requests because they must be processed by the registry staff. Charging of higher fees will also encourage the user community to eventually transition to using the electronic registration and search functionalities.

48. The enacting State may also wish to provide for user account agreements to facilitate efficient user access to the registry services and payment of registry fees by frequent users.

B. Recommendation 34

[Note to the Working Group: The Working Group may wish to consider recommendation 34, as reproduced in document A/CN.9/WG.VI/WP.52/Add.5. The Working Group may also wish to note that, for reasons of economy, this recommendation is not inserted here at this stage but will be inserted in the final text.]

(A/CN.9/WG.VI/WP.52/Add.5) (Original: English)

Note by the Secretariat on a draft Technical Legislative Guide on the Implementation of a Security Rights Registry, submitted to the Working Group on Security Interests at its twenty-second session**[Original: English]****ADDENDUM****Contents**

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Annex I**Terminology and recommendations****Terminology***

(a) “Address” means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; (iii) an electronic address; or (iv) an address that is equivalent to (i), (ii) or (iii);

(b) “Amendment” means the act of adding, deleting or modifying information contained in a registered notice, [by the one and only registrant or, if there is more than one registrant, some of them,] as well as the result thereof;

(c) “Cancellation” means the act of deleting all information contained in a registered notice [by the one and only registrant or, if there is more than one registrant, all of them];

* Section B of the Introduction to the *Secured Transactions Guide* on terminology and interpretation applies also to the draft Registry Guide, supplemented by the terminology and interpretation section of the Introduction to the draft Registry Guide.

- (d) “Grantor” means the person identified in the notice as the grantor;
- (e) “Law” means the law governing security rights in movable assets;
- (f) “Notice” means a communication in writing (paper or electronic) and includes an initial notice, an amendment notice or a cancellation notice;¹
- (g) “Registrant” means the person identified in the notice as the secured creditor;
- (h) “Registrar” means the person designated pursuant to the law and the regulation to supervise and administer the operation of the registry;
- (i) “Registration” means the entry of information contained in a notice into the registry database;
- (j) “Registration number” means a unique number allocated to an initial registered notice by the registry and permanently associated with that notice [and any related subsequent notice];
- (k) “Registry record” means the information in all registered notices that is stored electronically in the registry database and includes the record that is publically available and the archives;
- (l) “Regulation” is the body of rules implementing the provisions of the law with regard to the registry.

Recommendations

I. Registry and registrar

Recommendation 1: The registry

The regulation should provide that the registry is established for the purposes of receiving, storing and making accessible to the public information relating to security rights in movable assets.

Recommendation 2: Appointment of the registrar

The regulation should provide that [the entity or person identified by the enacting State or authorized by the law of the enacting State] designates the registrar, determines the registrar’s duties and monitors the registrar’s performance.

Recommendation 3: Functions of the registry

The regulation should provide that the functions of the registry include:

- (a) Providing access to the registry services according to recommendations 4, 6, 7 and 8;
- (b) Publicizing the means of access to, and the opening days and hours of, the registry according to recommendation 5;

¹ See term “notice” in the Introduction, section B, terminology and interpretation of the *Secured Transactions Guide*.

- (c) Providing the grounds for rejection of a registration or a search request according to recommendation 9;
- (d) Entering the information contained in a notice into the registry database, assigning a registration number to the initial notice and recording the date and time of each registration, according to recommendation 10;
- (e) Indexing or otherwise organizing the information in the registry record so as to make it searchable according to recommendation 14;
- (f) Providing registrants with a copy of the registered notice according to recommendation 16;
- (g) Entering the information contained in an amendment notice into the registry database according to recommendation 17;
- (h) Removing the information contained in a registered notice from the [publicly available registry record] upon expiry of its period of effectiveness or registration of a cancellation notice according to recommendation 18; and
- (i) Archiving information removed from the publicly available registry record according to recommendation 19.

[Note to the Working Group: The Working Group may wish to consider whether the cross-references to the relevant recommendations are necessary in recommendation 3. On the one hand, such cross-references may be useful for the reader. On the other hand, the purpose of recommendation 3 may not be to serve as a list of the contents of the regulation but as a summary of the registry's functions, which case the cross-references may not be necessary.]

II. Access to the registry services

Recommendation 4: Public access to the registry services

The regulation should provide that any person is entitled to have access to the services provided by the registry.

Recommendation 5: Operating days and hours of the registry

The regulation should provide that:

- (a) If access to the services of the registry is provided through a physical office:
 - (i) Each office of the registry must be open to the public during the days and hours [to be specified by the enacting State]; and
 - (ii) Information about registry office locations and their respective opening days and hours must be widely publicized on the registry's website, if any, or otherwise, and the opening days and hours of each office should be posted at that office;
- (b) If access to the services of the registry is provided through electronic means of communication, access to the services provided by the registry must be available at all times; and

- (c) Notwithstanding subparagraphs (a) and (b) of this recommendation:
 - (i) The registry may suspend access to the services provided by the registry in whole or in part; and
 - (ii) Notification of the suspension and its expected duration must be published in advance when feasible and otherwise as soon as reasonably possible on the registry's website, if any, or otherwise, and, if the registry provides access to its services through physical offices, the notification must be posted at each office.

Recommendation 6: Access to registration services

The regulation should provide that any person is entitled to register a notice if that person:

- (a) Uses the form of a notice prescribed by the registry;
- (b) Provides its identity in the manner prescribed by the registry; and
- (c) Has paid, or made arrangements to pay, any fee prescribed by the registry.

Recommendation 7: Access to searching services

The regulation should provide that any person is entitled to search the publicly available registry record, if that person uses the form prescribed by the registry for a search and has paid, or made arrangements to pay any fee prescribed by the registry.

Recommendation 8: Verification of identity, evidence of authorization or scrutiny of the contents of the notice not required

The regulation should provide that:

- (a) The registry requires and maintains the identity of the registrant but does not require verification of the registrant's identity;
- (b) The registry does not require evidence of the existence of authorization for registration of a notice; and
- (c) The registry does not conduct other scrutiny of the content of the notice. In particular, it is not the responsibility of the registry to ensure that the information in a notice is entered in the designated field and is complete, accurate and legally sufficient.

[Note to the Working Group: The Working Group may wish to note that, as a drafting matter, the former recommendation 19 (A/CN.9/WG.VI/WP.50/Add.1) has been merged with recommendation 8 as these recommendations seem to be dealing with the same issue. The Working Group may wish to consider whether the new recommendation 8 should be retained as is. The Working Group may also wish to consider whether the second sentence of subparagraph (c) ("In particular ... sufficient") should be retained in subparagraph (c) of this recommendation or moved to the commentary.]

Recommendation 9: Rejection of a registration or search request

The regulation should provide that:

- (a) The registration of a notice may be rejected if the notice fails to provide, in a legible manner, the information required by recommendation 21, in the case of an initial notice, recommendation 28, in the case of an amendment notice, or recommendation 30, in the case of a cancellation notice;
- (b) A search request may be rejected if it fails to provide in a legible manner a search criterion required by recommendation 32; and
- (c) The registry must provide the grounds for the rejection of a notice or search request immediately or as soon as practicable.

III. Registration

Recommendation 10: Time of effectiveness of registered notice

The regulation should provide that:

- (a) The registration of a notice is effective from the date and time when the information in the notice is entered into the registry database so as to be available to searchers of the publicly available registry record;
- (b) The registry maintains a record of the date and time when each notice is entered into the registry database so as to be available to searchers of the publicly available registry record, and assigns a registration number to an initial notice, by which the initial notice and any subsequent notices are identified; and
- (c) The registry enters into the registry database and indexes or otherwise organizes information in a registered notice so as to make it available to searchers of the publicly available registry record immediately or within [a short period of time to be specified by the enacting State] and in the order it was received.

Recommendation 11: Period of effectiveness of registered notice

The regulation should provide that:

Option A

- (a) A registration is effective for [enacting State to insert the period of time specified in its law].
- (b) The period of effectiveness of a registration may be extended for an additional period of time equal to the initial period specified in the law at any time before it expires. The new period starts when the current period expires.

Option B

- (a) A registration is effective for the period of time indicated in the initial notice.
- (b) The period of effectiveness of a registration may be extended or reduced for the period of time indicated in an amendment notice at any time before it

expires. In the case of an extension, the new period starts when the current period expires.

Option C

(a) A registration is effective for the period of time indicated in the initial notice, not exceeding [a long period of time, such as, for example, twenty years, to be specified by the enacting State].

(b) The period of effectiveness of a registration may be extended or reduced for the period of time indicated in an amendment notice not exceeding [a long period of time, such as, for example, twenty years, to be specified by the enacting State] at any time before the period of effectiveness of the registration expires. In the case of an extension, the new period starts when the current period expires.

Recommendation 12: Time when a notice may be registered

The regulation should provide that a notice may be registered before or after the creation of the security right or the conclusion of the security agreement.

Recommendation 13: Sufficiency of a single notice

The regulation should provide that a registration of a single notice is sufficient to achieve third-party effectiveness of one or more than one security right in the asset described in the notice, whether they exist at the time of registration or are created thereafter, and whether they arise from one or more than one security agreement between the same parties.

Recommendation 14: Indexing or other organization of information in the registry record

The regulation should provide that:

(a) The registry indexes or otherwise organizes information in an initial notice in the publicly available registry record so as to make it searchable according to the grantor identifier;

(b) The registry indexes or otherwise organizes information in an amendment notice in the publicly available registry record so as to make it searchable together with the initial notice; and

(c) The registry indexes or otherwise organizes information in a cancellation notice in the registry archives so as to make it retrievable according to recommendation 19 together with the initial notice as amended.

Recommendation 15: Integrity of the registry record

The regulation should provide that, except as provided in recommendations 17 and 18, the registry does not amend information in or remove information from the registry record.

Recommendation 16: Copy of registered notice

The regulation should provide that:

(a) The registry must promptly transmit a copy of a registered notice to each registrant at the address set forth in the notice, indicating the date and time when it became effective and the registration number; and

(b) The registrant must send a copy of a registered notice to each grantor at the address set forth in the notice or at the current address known to the registrant within [a short period of time, such as thirty days, to be specified by the enacting State] after the registrant has received a copy of the registered notice.

[Note to the Working Group: The Working Group may wish to note that, as a drafting matter, the former recommendation 31 (A/CN.9/WG.VI/WP.50/Add.2) has been placed right after recommendation 15, as the Secured Transactions Guide deals with the matter of copy of registered notices as a matter of integrity of the registry record. In any case, copy of registered notice is not a matter that belongs in a section dealing with cancellation and amendment, unless it refers only to a copy of an amendment or cancellation notice, but even in that case, the matter is one relating more to the integrity of the registry record. The Working Group may wish to consider whether the new recommendation 16 should be retained in this place in the text.]

Recommendation 17: Amendment of information in the registry record

The regulation should provide that information in a registered notice may be amended only by registration of an amendment notice in accordance with recommendations 28, 29 or 31.

Recommendation 18: Removal of information from the registry record

The regulation should provide that information in a registered notice is removed from the publicly available registry record upon the expiry of its period of effectiveness or upon registration of a cancellation notice in accordance with recommendations 30 or 31.

Recommendation 19: Archival of information removed from the registry record

The regulation should provide that information removed from the publicly available registry record is archived for a period of at least [a long period of time, such as, for example, twenty years, to be specified by the enacting State] in a manner that enables the information to be retrieved.

Recommendation 20: Language of a notice

The regulation should provide that the information in a notice should be expressed in [the language or languages to be specified by the enacting State]. The registry should specify and make publicly available the character set to be used.

IV. Registration information

Recommendation 21: Information required in an initial notice

The regulation should provide that:

(a) The initial notice must contain the following information in the designated field:

(i) The identifier and address of the grantor in accordance with recommendations 22-24;

(ii) The identifier and address of the secured creditor or its representative in accordance with recommendation 25;

(iii) A description of the encumbered assets in accordance with recommendations 26 and 27;

[(iv) The period of effectiveness of the registration in accordance with recommendation 11;² and

(v) The maximum monetary amount for which the security right may be enforced];³ and

(b) If there is more than one grantor or secured creditor, the registrant must enter the required information in the designated field separately for each grantor or secured creditor, either in the same notice or in different notices.

Recommendation 22: Grantor identifier (natural person)

The regulation should provide that, if the grantor is a natural person:

(a) The grantor identifier is:

Option A

the name of the grantor;

Option B

the name of the grantor and [any other information to be specified by the enacting State to uniquely identify the grantor, such as the grantor's birth date or any personal identification or other number assigned to the grantor by the enacting State];

(b) Where the grantor's name includes a family name and one or more given names, the name of the grantor consists of the grantor's family name and the grantor's first and second given names, and each component of the name must be entered in the designated field;

² If the enacting State has chosen option B or C in recommendation 11 (see *Secured Transactions Guide*, rec. 69).

³ If the secured transactions law of the enacting State requires it (see *Secured Transactions Guide*, rec. 57, subpara. (d)).

(c) Where the grantor's name consists of only one word, the name of the grantor consists of that word and it must be entered in field designated for the family name;

(d) The name of the grantor is determined as follows:

(i) If the grantor was born and the grantor's birth is registered in [the enacting State] with a government agency responsible for the registration of births, the name of the grantor is the name as stated in the grantor's birth certificate or equivalent document issued by the government agency;

(ii) If the grantor was born but the grantor's birth is not registered in [the enacting State], the name of the grantor is the name as stated in a valid passport issued to the grantor [by the enacting State];

(iii) If neither subparagraph (d)(i) nor subparagraph (d)(ii) of this recommendation applies, the [the enacting State should specify the type of official document, such as an identification card or driver's licence, issued to the grantor by the enacting State, that it considers appropriate];

(iv) If neither subparagraph (d)(i), nor subparagraph (d)(ii), nor subparagraph (d)(iii) of this recommendation applies but the grantor is a citizen of [the enacting State], the name of the grantor is the name as stated in the grantor's certificate of citizenship;

(v) If neither subparagraph (d)(i), nor subparagraph (d)(ii), nor subparagraph (d)(iii), nor subparagraph (d)(iv) of this recommendation applies, the name of the grantor is the name as stated in a valid passport issued by the State of which the grantor is a citizen and, if the grantor does not have a valid passport, the name of the grantor is the name as stated in the birth certificate or equivalent document issued to the grantor by the government agency responsible for the registration of births at the place where the grantor was born;

(vi) In a case not falling within subparagraphs (d)(i) to (v) of this recommendation, the name of the grantor is the name as stated in any two of the following valid official documents [the enacting State to specify documents other than the ones specified in subparagraph (d)(iii) of this recommendation, such as a social security, health insurance or tax card, issued to the grantor by the enacting State].

Recommendation 23: Grantor identifier (legal person)

The regulation should provide that, if the grantor is a legal person, the grantor identifier is

Option A

the name of the grantor that is specified as its name in the most recent [document, law or decree to be specified in the enacting State] constituting the legal person.

Option B

the name of the grantor that is specified as its name in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person,

and [another identifier to be specified by the enacting State to uniquely identify the grantor, such as a registration or other number].

[Recommendation 24: Grantor identifier (special cases)]

The regulation should provide that:

(a) If the encumbered assets are subject to insolvency proceedings, the grantor identifier is the name of the insolvent person in accordance with recommendation 22 or 23, with the specification in a separate field that the grantor is in insolvency proceedings;

(b) If the grantor is a syndicate or joint venture, the grantor identifier is the name of the syndicate or joint venture designated in the most recent [document, law or decree to be specified by the enacting State] constituting it [and any additional information specified by the enacting State to uniquely identify the grantor] in accordance with recommendation 22 or 23;

(c) [If the grantor is a trust or an estate, the grantor identifier is the name of the trust or the estate in accordance with recommendation 22 or 23, with the specification in a separate field that the grantor is a trust or estate.]

(d) If the grantor is an entity other than one already referred to in the preceding rules, the grantor identifier is the name of the entity as designated in the most recent [document, law or decree to be specified by the enacting State] constituting it [and any additional information specified by the enacting State to uniquely identify the grantor] in accordance with recommendation 22 or 23.]

[Note to the Working Group: The Working Group may wish to note that, pursuant to its decision (see A/CN.9/743, para. 47), recommendation 24 appears within square brackets to indicate that its goal is to set out examples of special cases for enacting States to select and adapt to their own laws, as the treatment of these cases differed from State to State.]

Recommendation 25: Secured creditor identifier

The regulation should provide that:

(a) If the secured creditor or its representative is a natural person, the identifier is the name of the secured creditor or its representative in accordance with recommendation 22;

(b) If the secured creditor or its representative is a legal person, the identifier is the name of the secured creditor or its representative in accordance with recommendation 23; and

(c) If the secured creditor or its representative is a kind of person referred to in recommendation 24, the identifier is the name of the person in accordance with recommendation 24.

Recommendation 26: Description of encumbered assets

The regulation should provide that:

- (a) When the encumbered assets are described in an initial or amendment notice, they should be described in the designated field of the notice in a manner that reasonably allows their identification; and
- (b) Unless otherwise provided in the law, a generic description that refers to all assets within a generic category of movable assets includes all of the grantor's present and future assets within the specified category;
- (c) Unless otherwise provided in the law, a generic description that refers to the grantor's movable assets includes all of the grantor's present and future movable assets.

Recommendation 27: Incorrect or insufficient information

The regulation should provide that:

- (a) An initial notice, or an amendment notice that amends the grantor's identifier or adds a grantor, is effective only if it provides the grantor's correct identifier as set forth in recommendations 22-24 or, in the case of an incorrect identifier, if the notice would be retrieved by a search of the registry record using the grantor's correct identifier;
- (b) Except as provided in subparagraph (a) of this recommendation, an incorrect or insufficient statement of the information required to be provided in a registered notice does not render it ineffective, unless it seriously misleads a reasonable searcher;
- (c) An incorrect identifier of a grantor in a registered notice does not render it ineffective with respect to other grantors sufficiently identified in the notice;
- (d) An insufficient description of encumbered assets in a registered notice does not render it ineffective with respect to other encumbered assets sufficiently described in the notice; and
- (e) An incorrect statement in the registered notice with respect to the period of effectiveness of registration and the maximum amount secured does not render it ineffective, while third parties that relied on such incorrect statement should be protected].

[Note to the Working Group: The Working Group may wish to consider whether subparagraph (e) of this recommendation, which has been added to reflect the principle enshrined in recommendation 66 of the Secured Transactions Guide, should be retained.]

V. Amendment and cancellation information

Recommendation 28: Information required in an amendment notice

The regulation should provide that:

(a) The following information is required to be entered in the designated field of an amendment notice:

(i) The registration number of the registered notice to which the amendment relates;

(ii) If information is to be added, the additional information in the manner provided by this regulation for entering information of that kind; and

(iii) If information is to be changed, the changed information in the manner provided by this regulation for entering information of that kind;

[(b) An amendment notice that discloses a transfer of the encumbered assets should add the identifier and address of the transferee as a grantor in accordance with recommendations 22-24 and its address. An amendment that discloses a transfer that relates to only part of the encumbered assets must indicate the identifier and address of the transferee as a grantor in accordance with recommendations 22-24 and describe the part of the encumbered assets transferred in accordance with recommendation 26;]

(c) An amendment notice that discloses an assignment of the secured obligation must indicate the identifier and address of the assignee as a secured creditor in accordance with recommendation 25 and, in the case of a partial assignment, describe the encumbered assets to which the partial assignment relates in the designated field; and

(d) An amendment notice may relate to

Option A

a single item of information in a notice.

Option B

one or multiple items of information in a notice.

[Note to the Working Group: The Working Group may wish to consider whether a change addressed in subpara. (iii) of recommendation 28 encompasses deletion of information or whether a separate subparagraph should be included to address deletions. In this regard, the Working Group may wish to note that changes and deletions may have different third-party effectiveness consequences.]

Recommendation 29: Global amendment of secured creditor information in multiple notices

The regulation should provide that a registrant named in multiple registered notices may amend or request the registry to amend the secured creditor information with a single global amendment.

[Note to the Working Group: The Working Group may wish to consider whether both options (an amendment by the registrant and by the registry at the request of the registrant) should be offered in recommendation 29, or just one of them, and, if so, which one. A registry could be designed to accommodate both options but this would be done at some cost.]

Recommendation 30: Information required in a cancellation notice

The regulation should provide that a cancellation notice should include in the designated field the registration number.

Recommendation 31: Compulsory amendment or cancellation

The regulation should provide that:

- (a) A registrant is obliged to register an amendment or cancellation notice if:
 - (i) The registration of an initial or amendment notice has not been authorized by the grantor at all or to the extent described in the notice;
 - (ii) Authorization has been withdrawn and no security agreement has been concluded;
 - (iii) The security agreement has been revised in a way that makes the information contained in the registered notice inaccurate; or
 - (iv) The security right to which the registered notice relates has been extinguished by payment or otherwise and there is no commitment to extend further credit;
- (b) In the case of subparagraph (a)(ii) to (a)(iv) of this recommendation, the registrant may charge any fee agreed upon with the grantor;
- (c) Each registrant is obliged to register to the registry an amendment or cancellation notice to the extent appropriate, not later than [a short period of time, such as 15 days, to be specified by the enacting State] after the registrant's receipt of a written request by the grantor if any circumstance described in subparagraph (a) of this recommendation has occurred and the registrant has not complied;
- (d) No fee or expense may be charged or accepted by the registrant for compliance with the obligation addressed in subparagraph (c) of this recommendation;
- (e) If the registrant does not comply within the time period provided in subparagraph (c) of this recommendation, the grantor is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure;
- (f) The grantor is entitled to seek a cancellation or amendment through a summary judicial or administrative procedure even before expiry of the period provided in subparagraph (c) of this recommendation, provided that there are appropriate mechanisms to protect the registrant; and
- (g) The amendment or cancellation notice is registered by

Option A

the registry promptly upon receipt of the notice [with the relevant judicial or administrative order attached].

Option B

a judicial or administrative officer promptly upon receipt of the notice [with the relevant judicial or administrative order attached].

[Note to the Working Group: The Working Group may wish to note with respect to subparagraph (a) that, while obliging the secured creditor to ensure that registrations are up to date may be good policy, the Secured Transactions Guide makes no recommendation on this matter other than that the secured creditor should be obliged to register an amendment or cancellation notice only at request of the grantor. Be that as it may, the Working Group may wish to consider that this is a substantive law matter that should be addressed in the commentary rather than in the recommendations for a registry regulation. In addition, the Working Group may wish to note that subparagraphs (b) and (d) deal with matters that are typically addressed in the security agreement and the law applicable to obligations. Thus, the Working Group may wish to consider whether those matters too should be rather discussed only in the commentary.]

VI. Searches

Recommendation 32: Search criteria

The regulation should provide that the criterion by which a search of the publicly available registry record may be conducted is:

- (a) The grantor identifier; or
- (b) The registration number.

Recommendation 33: Search results

The regulation should provide that:

- (a) The registry provides a search result that indicates the date and time when the search was performed and either sets forth all information in each registered notice that matches the specified search criterion or indicates that no registered notice matched the search criterion;
- (b) A search result reflects information in the registry record that matches exactly the search criterion except [the enacting State to specify any exceptions];
- (c) Upon request made by searcher, the registry issues an official search certificate indicating the search result.

VII. Fees

Recommendation 34: Fees for registry services

The regulation should provide that:

Option A

(a) [Subject to subparagraph (b) of this recommendation,] the following fees are payable for registry services:

- (i) Registrations:
 - a. Paper-based [...];
 - b. Electronic [...];
- (ii) Searches:
 - a. Paper-based [...];
 - b. Electronic [...];
- (iii) Certificates:
 - a. Paper-based [...];
 - b. Electronic;

(b) The registry may enter into an agreement with a person that satisfies all registry terms and conditions and establish a registry user account to facilitate the payment of fees.

Option B

The [the enacting State to specify an administrative authority] may determine the fees and methods of payment for the purposes of the regulations by decree.

Option C

The [registry] [search] [electronic search] services are free of charge.

ADDENDUM

¹ Note to the Working Group: The Working Group may wish to note that this field is designed to be used in States that elect option B of rec. 22, subpara. (a), of the draft Registry Guide, i.e., a State that elects to require or permit the registration of additional grantor identifier information such as, for example, the grantor's birthdate or an identification number or other number assigned by the State to its residents or citizens. While the form should set out the precise type

ADDRESS.....
and/or E-Mail Address².....

2. LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR
INFORMATION]

ADDRESS.....
and/or E-Mail Address

3. INDICATE IF THE GRANTOR IS³

..... an insolvent person

..... a syndicate or joint venture

..... a named trust or estate

..... an entity other than those mentioned above

4. ADDITIONAL GRANTOR (if applicable)

(a) NATURAL PERSON

NAME:/...../...../

Family Name

First Given Name

Second Given Name

IDENTIFICATION NUMBER [if issued by the enacting State].....

ADDRESS

and/or E-Mail Address

(b) LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR INFORMATION]

.....

of additional identifier information that is either required or that may be entered, this will depend on the choice made by each enacting State.

² Note to the Working Group: The Working Group may wish to consider the function of listing the address. If the function is to help searchers distinguish among various grantors named, for example, "John Smith," the grantor's e-mail address will not be helpful, since people have many e-mail addresses and listing one of them will not necessarily help searchers distinguish one John Smith from another. If, on the other hand, the intent is to provide a way for interested parties to contact the grantor, this provides a method (see rec. 54, subpara. (c); but the registrant should have the e-mail of the grantor anyway). The grantor's e-mail could be used though if a State requires the registry to give notice to the grantor if the secured creditor makes changes to the registered notice.

³ Note to the Working Group: The Working Group may wish to note that this part reflects the special cases dealt with in recommendation 24.

ADDRESS
and/or E-Mail Address

(c) INDICATE IF THE GRANTOR IS

.....an insolvent person
..... a syndicate or joint venture
..... a named trust or estate
..... an entity other than those mentioned above

B. SECURED CREDITOR INFORMATION

1. NATURAL PERSON

...../...../...../
Family Name First Given Name Second Given Name
ADDRESS
and/or E-Mail Address

2. LEGAL PERSON OR OTHER ENTITY

NAME.....
ADDRESS.....
and/or E-Mail Address.....

3. ADDITIONAL SECURED CREDITOR (if applicable)

(a) NATURAL PERSON

NAME:...../...../...../
Family Name First Given Name Second Given Name
ADDRESS.....
and/or E-Mail Address.....

(b) LEGAL PERSON OR OTHER ENTITY

NAME
ADDRESS
and/or E-Mail Address

C. DESCRIPTION OF ENCUMBERED ASSETS

.....

[D. PERIOD OF EFFECTIVENESS OF REGISTRATION(dd) (mm) (yyyy)]*⁴

[E. MAXIMUM AMOUNT FOR WHICH SECURITY RIGHT IS ENFORCEABLE]⁵

.....*

[F. ADDITIONAL INFORMATION]

.....

[REGISTRY USER INFORMATION FOR ACCESS PURPOSES].....

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF AMENDMENT NOTICE

(FORM B)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

SELECT [ONE] [ONE OR MORE]⁶ OF THE FOLLOWING:

- Add or delete a grantor or change/edit grantor information
- Add or delete a secured creditor or change/edit secured creditor information
- Add or delete an encumbered asset or change/edit the description of encumbered assets (including adding or deleting items or kinds of encumbered assets and adding a description of assets that are proceeds of the original encumbered assets)
- Extend the period of effectiveness of registration (if the enacting State has specified a universal period of effectiveness of registration or a maximum initial registration period)]
- [Extend or reduce the period of effectiveness of registration (if the enacting State permits secured creditors to specify the period of effectiveness of the registration)]
- [Change the maximum amount for which the security right is enforceable (if the enacting State permits it)]

⁴ If the enacting State has chosen option B or C in recommendation 11 (see *Secured Transactions Guide*, rec. 69).

⁵ If the secured transactions law of the enacting State requires it (see *Secured Transactions Guide*, rec. 57, subpara. (d)).

⁶ Note to the Working Group: The Working Group may wish to consider which of the two alternatives (one amendment per notice or multiple amendments per notice) should be retained. The Working Group may wish to note that in any case it should be clear that, if there is first an assignment of the secured obligation and a notice with the new secured creditor identified is registered, and then there is a change to the encumbered assets, only the assignee will have the power to change the encumbered assets.

- Edit secured creditor information in all such notices with a single global amendment
- Add, change or delete information pursuant to a judicial or administrative order

[.....(dd).....(mm).....(yyyy).....(hour)* of registration of amendment notice — DO NOT COMPLETE
— REGISTRY SYSTEM GENERATED]

A. REGISTRATION NO.

B. ADD GRANTOR

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

[ADDITIONAL GRANTOR INFORMATION]

ADDRESS.....

and/or E-Mail Address

2. LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR INFORMATION]

ADDRESS.....

and/or E-Mail Address

3. INDICATE IF THE GRANTOR IS

..... an insolvent person

..... a syndicate or joint venture

..... a named trust or estate

..... an entity other than those mentioned above

C. DELETE GRANTOR

1. NATURAL PERSON

NAME:

...../...../...../

Family Name

First Given Name

Second Given Name

[ADDITIONAL GRANTOR INFORMATION]

ADDRESS.....

and/or E-Mail Address.....

* In digits.

2. LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR INFORMATION]

ADDRESS

and/or E-Mail Address

3. INDICATE IF THE GRANTOR IS

..... an insolvent person

..... a syndicate or joint venture

..... a named trust or estate

..... an entity other than those mentioned above

D. CHANGE OF GRANTOR INFORMATION

1. NATURAL PERSON

NAME:...../...../...../

Family Name

First Given Name

Second Given Name

[ADDITIONAL GRANTOR INFORMATION]

ADDRESS.....

and/or E-Mail Address

2. LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR INFORMATION]

ADDRESS.....

and/or E-Mail Address

3. INDICATE IF THE GRANTOR IS

..... an insolvent person

..... a syndicate or joint venture

..... a named trust or estate

..... an entity other than those mentioned above

E. ADD SECURED CREDITOR

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

ADDRESS.....

and/or E-Mail Address

2. LEGAL PERSON OR OTHER ENTITY

NAME.....

ADDRESS.....

and/or E-Mail Address.....

F. DELETE SECURED CREDITOR

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

ADDRESS.....

and/or E-Mail Address

2. LEGAL PERSON OR OTHER ENTITY

NAME

ADDRESS.....

and/or E-Mail Address.....

G. CHANGE SECURED CREDITOR INFORMATION

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

ADDRESS.....

and/or E-Mail Address

2. LEGAL PERSON OR OTHER ENTITY

NAME.....

ADDRESS.....

and/or E-Mail Address

H. CHANGE DESCRIPTION OF ENCUMBERED ASSETS

.....

.....

I. EXTEND PERIOD OF EFFECTIVENESS OF REGISTRATION (if the enacting State has specified a universal registration term or a maximum initial registration term (enter extended period)*

[J. **EXTEND OR REDUCE PERIOD OF EFFECTIVENESS OF REGISTRATION** (if the enacting State permits secured creditors to specify the duration of the registration) ____ (dd) ____ (mm) ____ (yyyy)*]

[K. **CHANGE MAXIMUM AMOUNT FOR WHICH SECURITY RIGHT IS ENFORCEABLE**] *

L. **ADD OR DELETE INFORMATION PURSUANT TO A REQUEST BY THE GRANTOR OR AN ORDER OF A JUDICIAL OR ADMINISTRATIVE AUTHORITY**

.....

[REGISTRY USER INFORMATION FOR ACCESS PURPOSES]

[PERSON SUBMITTING AN AMENDMENT NOTICE PURSUANT TO A JUDICIAL OR ADMINISTRATIVE ORDER]

NAME OF PERSON

TITLE

NAME OF JUDICIAL OR ADMINISTRATIVE AUTHORITY

ADDRESS

and/or E-Mail Address

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF CANCELLATION NOTICE

(FORM C)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[.....(dd)....(mm).....(yyyy).....(hour)* of registration of cancellation notice — DO NOT COMPLETE — REGISTRY SYSTEM GENERATED]

REGISTRATION NO.

[REGISTRY USER INFORMATION FOR ACCESS PURPOSES]

[PERSON SUBMITTING A CANCELLATION NOTICE PURSUANT TO A JUDICIAL OR ADMINISTRATIVE ORDER]

NAME OF PERSON

TITLE

NAME OF JUDICIAL OR ADMINISTRATIVE AUTHORITY

ADDRESS

and/or E-Mail Address

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF SEARCH REQUEST FORM

(FORM D)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[.....(dd).....(mm).....(yyyy).....(hour)* of search request — DO NOT COMPLETE — REGISTRY SYSTEM GENERATED]

[REGISTRATION NO.]

A. GRANTOR INFORMATION

1. NATURAL PERSON

...../...../...../

| | | |
|-------------|------------------|--------|
| Family Name | First Given Name | Second |
| Given Name | | |

[ADDITIONAL GRANTOR INFORMATION]

.....

2. LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR INFORMATION]

.....

3. INDICATE IF THE GRANTOR IS

..... an insolvent person

..... a syndicate or joint venture

..... a named trust or estate

..... an entity other than those mentioned above

4. ADDITIONAL GRANTOR (if applicable)

(a) NATURAL PERSON

* In digits.

NAME:...../...../...../

Family Name

First Given Name

Second Given Name

[ADDITIONAL GRANTOR INFORMATION]

(b) LEGAL PERSON OR OTHER ENTITY

NAME

[ADDITIONAL GRANTOR IDENTIFIER]

(c) INDICATE IF THE GRANTOR IS

..... an insolvent person

..... a syndicate or joint venture

..... a named trust or estate

..... an entity other than those mentioned above

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF REJECTION OF A SEARCH RESULT

(FORM E)

[.....(dd)....(mm).....(yyyy).....(hour)* of search result — DO NOT COMPLETE — REGISTRY SYSTEM GENERATED]

A. The search was performed on (dd)/..... (mm)/..... (yyyy).*

B. The following security rights were found:

C. No security rights were found.

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF REJECTION OF A REGISTRATION OR SEARCH REQUEST

(FORM F)

A. The registration request is rejected because:

1. In the case of an initial notice, it failed to provide in a legible manner in the designated field:

- (a) The identifier and address of the grantor,
- (b) The identifier and address of the secured creditor or its representative,
- (c) The description of the encumbered assets,
- (d) [The period of effectiveness of the registration],

* In digits.

(e) [The maximum monetary amount for which the security right may be enforced].

2. In the case of an amendment notice, it failed to provide in a legible manner in the designated field:

(a) The registration number of the registered notice to which the amendment relates,

(b) If information is to be added, the additional information,

(c) If information is to be changed, the changed information.

3. In the case of a cancellation notice, it failed to provide in a legible manner in the designated field the registration number.

B. The search request is rejected because it failed to provide in a legible manner in the designated field:

1. The grantor identifier.

2. The registration number.

C. Report of the Working Group on Security Interests on the work of its twenty-third session (New York, 8-12 April 2013)

(A/CN.9/767)

[Original: English]

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I. Introduction

1. At its present session, Working Group VI (Security Interests) continued its work on the preparation of a text on the registration of security rights in movable assets, pursuant to a decision taken by the Commission at its forty-third session

(New York, 21 June-9 July 2010).¹ The Commission's decision was based on its understanding that such a text would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries.²

2. At its eighteenth session (Vienna, 8-12 November 2010), the Working Group began its work by considering a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Add.1 and 2). At that session, the Working Group adopted the working assumption that the text would take the form of a guide that should be consistent with the UNCITRAL Legislative Guide on Secured Transactions (the "*Secured Transactions Guide*") and take into account the approaches taken in modern security rights registration systems, national and international (A/CN.9/714, para. 13). Having agreed that the *Secured Transactions Guide* was consistent with the guiding principles of UNCITRAL texts on e-commerce, the Working Group also considered certain issues arising from the use of electronic communications in security rights registries to ensure that, like the *Secured Transactions Guide*, the text on registration would also be consistent with those principles (A/CN.9/714, paras. 34-47).

3. At its nineteenth session (New York, 11-15 April 2011), the Working Group considered a note by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.46 and Add.1 to 3). At that session, differing views were expressed as to the form and content of the text to be prepared (A/CN.9/719, paras. 13-14), as well as with respect to the question whether the text should include model regulations or recommendations (A/CN.9/719, para. 46).

4. At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission emphasized the significance of the Working Group's work in particular in view of efforts undertaken by States towards establishing a registry, as well as the potential beneficial impact of such a registry on the availability and the cost of credit. With respect to the form and content of the text to be prepared, the Commission agreed that the mandate of the Working Group, leaving the specific form and content of the text to the Working Group, did not need to be modified. It was further agreed that, in any case, the Commission would make a final decision once the Working Group had completed its work and submitted the text to the Commission.³

5. At its twentieth session (Vienna, 12-16 December 2011), the Working Group continued its work based on a note by the Secretariat entitled "Draft Security Rights Registry Guide" (A/CN.9/WG.VI/WP.48/Add.3). The Working Group agreed that, as to the form of the text, it should be a guide (the "draft Registry Guide") with commentary and recommendations along the lines of the *Secured Transactions Guide* (A/CN.9/740, para. 18). In addition, it was agreed that, where the draft Registry Guide offered options, examples of model regulations could be included in an annex to the draft Registry Guide. As to the presentation of the text, it was agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the *Secured Transactions Guide*,

¹ *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 268.

² *Ibid.*, para. 265.

³ *Ibid.*, *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 237.

and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/740, para. 30).

6. At its twenty-first session (New York, 14-18 May 2012), the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.50 and Add.1 and 2). At that session, the Working Group approved the substance of the terminology and the recommendations of the draft Registry Guide (A/CN.9/743, para. 21). In addition, the Working Group agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session in 2013 (A/CN.9/743, para. 73). Moreover, the Working Group agreed to propose to the Commission that the mandate be given to the Working Group to develop a model law on secured transactions and that the topic of security rights in non-intermediated securities should be retained on its future work agenda and be considered at a future session (A/CN.9/743, para. 76).

7. At its forty-fifth session (New York, 25 June-6 July 2012), the Commission expressed its appreciation to the Working Group and requested the Working Group to proceed with its work expeditiously and to complete it so that the draft Registry Guide would be submitted to the Commission for final approval and adoption at its forty-sixth session, in 2013.⁴ In addition, the Commission agreed that, upon its completion of the draft Registry Guide, the Working Group should undertake work to prepare a simple, short and concise model law on secured transactions based on the general recommendations of the *Secured Transactions Guide* and consistent with all texts prepared by UNCITRAL on secured transactions.⁵ Moreover, the Commission agreed that, consistent with the Commission’s decision at its forty-third session, in 2010, the topic of security rights in non-intermediated securities, in the sense of securities other than those credited in a securities account, should continue to be retained on the future work programme for further consideration, on the basis of a note to be prepared by the Secretariat, which would set out all relevant issues so as to avoid any overlap or inconsistency with texts prepared by other organizations.

8. At its twenty-second session (Vienna, 10-14 December 2012), the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.52 and Add.1-6). At that session, the Working Group adopted the substance of the draft Registry Guide and requested the Secretariat to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group (A/CN.9/764, para. 15).

⁴ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 100.

⁵ Ibid., para. 105.

II. Organization of the session

9. The Working Group, which was composed of all States members of the Commission, held its twenty-third session in New York from 8 to 12 April 2013. The session was attended by representatives of the following States members of the Working Group: Austria, Belarus, Benin, Brazil, Canada, Chile, China, Colombia, El Salvador, France, Germany, India, Italy, Japan, Kenya, Mexico, Nigeria, Paraguay, Philippines, Poland, Republic of Korea, Russian Federation, Thailand, Turkey, Ukraine and United States of America.

10. The session was attended by observers from the following States: Angola, Burkina Faso, Croatia, Guatemala, Indonesia, Kuwait, Qatar and Switzerland. The session was also attended by observers from the Holy See.

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

(a) *United Nations system*: The World Bank;

(b) *Intergovernmental organizations*: Organization of American States (OAS);

(c) *International non-governmental organizations invited by the Commission*: American Bar Association (ABA), Commercial Finance Association (CFA), European Law Students' Association (ELSA), Inter-American Bar Association (IABA), Inter-Pacific Bar Association (IPBA), International Insolvency Institute (III), Moot Alumni Association (MAA), National Law Centre for Inter-American Free Trade (NLCIFT), New York City Bar (NYCBA) and Union Internationale des Huissiers de Justice et Officiers Judiciaires (UIHJ).

12. The Working Group elected the following officers:

Chairman: Mr. Rodrigo LABARDINI FLORES (Mexico)

Rapporteur: Mr. Madhukar R. UMARJI (India)

13. The Working Group had before it the following documents: A/CN.9/WG.VI/WP.53 (Annotated Provisional Agenda), A/CN.9/WG.VI/WP.54 and Addenda 1-6 (Draft Technical Legislative Guide on the Implementation of a Security Rights Registry) and A/CN.9/WG.VI/WP.55 and Addenda 1-4 (Draft Model Law on Secured Transactions).

14. The Working Group adopted the following agenda:

1. Opening of the session and scheduling of meetings.
2. Election of officers.
3. Adoption of the agenda.
4. Registration of security rights in movable assets.
5. Model law on secured transactions.
6. Other business.
7. Adoption of the report.

III. Deliberations and decisions

15. The Working Group first considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.54 and Add.1-6), adopted the draft Registry Guide and referred it to the Commission for adoption at its forty-sixth session, which was scheduled to take place in Vienna from 8 to 26 July 2013. Thereafter, the Working Group considered a note by the Secretariat entitled “Draft Model Law on Secured Transactions” (A/CN.9/WG.VI/WP.55 and Add.1-4). The deliberations and decisions of the Working Group are set forth below respectively in chapters IV to VI. The Secretariat was requested to revise the draft Registry Guide to reflect the deliberations and decisions of the Working Group.

IV. Registration of security rights in movable assets

A. Preface (A/CN.9/WG.VI/WP.54)

16. The Working Group adopted the substance of the preface of the draft Registry Guide on the understanding that the preface would be updated to reflect the results of the present session and the Commission session.

B. Introduction (A/CN.9/WG.VI/WP.54 and A/CN.9/WG.VI/WP.54/Add.1, paras. 1-23)

17. With respect to section A (purpose of the draft Registry Guide and its relationship with the *Secured Transactions Guide*), it was agreed that: (a) in paragraph 3, reference should be made to registration as a method of achieving third-party effectiveness or, at least, as a method of establishing priority; (b) in paragraph 4, reference should be made to other texts on registration, such as texts prepared by the World Bank; and (c) in paragraph 6 (e), reference to academics should be added.

18. With respect to section B (terminology and interpretation), it was agreed that: (a) the explanation of the meaning of the term “amendment” should be revised to refer to “a modification with respect to information ...”; (b) paragraph 10 should be revised to read along the following lines “registration of an amendment notice does not result in the deletion or modification of information in previously registered notices to which the amendment notice relates. The legal consequence of the registration of an amendment notice is that the effect of the information to which it relates in the previously registered notice is modified to the extent of the change specified in the amendment notice. Under recommendation 11, an amendment notice is effective from the time it is accessible to searchers.”; (c) at the end of paragraph 11, a sentence along the following lines should be added “Under recommendation 11, a cancellation notice is effective from the time the previously registered notice to which the cancellation notice relates is no longer accessible to searchers of the public registry record.”; (d) the explanation of the meaning of the term “cancellation” should refer to “the removal of *all* information” from the public registry record; (e) in the explanation of the meaning of the term “registrant”, the

bracketed text “and may be a service provider” should be deleted; (f) in the explanation of the meaning of the term “registration”, the term “database” should be deleted and the word “record” should be retained outside square brackets; (g) in the explanation of the meaning of the term “registry record”, the terms “record” and “database” should be deleted and reference should be made to “information ... that is stored *by* the registry”; (h) in the explanation of the meaning of the term “secured creditor”, the bracketed text “and may be the secured creditor or its representative” should be deleted; and (i) an explanation of the meaning of the term “registry” should be added to read along the following lines “a system for registering and searching information about security rights in movable assets”.

19. With respect to section D (overview of secured transactions law and the role of registration), it was agreed that: (a) in subsection D.2 (concept of a security right), a security right should be qualified as a “limited” property right; (b) in subsection D.4 (third-party effectiveness of a security right), paragraph 30 should include a reference to paragraph 37 (dealing with the exclusion of securities from the scope of the *Secured Transactions Guide*), while footnote 9, dealing with the same issue, should be deleted, and paragraph 31 should be clarified to explain that registration in a specialized registry would be an alternative method of third-party effectiveness only if intellectual property law did not provide otherwise; (c) in subsection D.5, (a) to (d) and throughout the draft Registry Guide, the Secretariat should make any editorial changes necessary to ensure consistency of expression and to avoid duplication; (d) in subsection D.5 (e), it should be explained that, even if preferential claims were made subject to registration, the first-to-register priority rule might not necessarily apply; (e) in subsection D.6 (extended transactional scope of the registry), the heading of the subsection should be revised to read along the following lines “extended scope of the registry” as preferential claims (e.g. tax claims) did not necessarily arise as a result of a transaction, a subheading “preferential claims” should be added before paragraph 5, the paragraph should refer to the fact that the *Secured Transactions Guide* “discussed but made no recommendation on that matter” (an expression that should be used throughout the draft Registry Guide to refer to such instances) and the last sentence of paragraph 5 should be deleted; (f) in subsection D.7 (registration and enforcement of security rights), reference should be made directly to what was recommended in the *Secured Transactions Guide*; and (g) in subsection D.9 (notice registration), for consistency reasons, reference should be made to the “grantor” rather than to the “debtor”.

20. It was also agreed that a paragraph should be added at the end of section D to address international coordination among national security rights registries along the following lines: “States would benefit from coordinating and harmonizing their registry rules and procedures to the greatest extent possible in order to reduce transaction costs for registrants and searchers of the registry record. Accordingly, registrars would be well-advised to consult with registrars in other States and take into consideration the rules and procedures of registries in those States.”

21. With respect to section E (transitional considerations), it was agreed that: (a) paragraphs 24 to 30 should be deleted; (b) paragraphs 31 and 32 should be placed at the end of section D or in a more appropriate place; and (c) paragraph 33 should follow paragraph 39 as it referred to additional implementation considerations.

22. Subject to the above-mentioned changes (see paras. 17-21 above), the Working Group adopted the Introduction.

C. Establishment and functions of the security rights registry (A/CN.9/WG.VI/WP.54/Add.1, paras. 34-49)

23. With respect to subsection A.2 (appointment of the registrar), it was agreed that it should be made clear that the registrar could be either a legal person or a natural person.

24. With respect to recommendation 3, subparagraphs (d) and (g), in line with the decision with respect to the terms “registration” and “registry record” (see para. 18 above), it was agreed that reference should be made to “registry record” rather than to the “registry database”.

25. Subject to the above-mentioned changes (see paras. 23 and 24 above), the Working Group adopted chapter I.

D. Access to registry services (A/CN.9/WG.VI/WP.54/Add.1, paras. 50-65)

26. With respect to subsection A.3 (access to registration services), it was agreed that the third sentence of paragraph 56 should be deleted as the grantor would send a demand to amend or cancel an unauthorized registration to the secured creditor, and not to the registrant.

27. With respect to subsections A.4 (verification of identity, evidence of authorization or scrutiny of the content of the notice not required), it was agreed that: (a) paragraphs 59 to 61 would apply to notices in general and would not necessarily be limited to initial notices; (b) references should be made to authorization by the grantor, as the authorization of amendment or cancellation notices by the secured creditor was dealt with elsewhere in the draft Registry Guide (see A/CN.9/WG.VI/WP.54/Add.4, paras. 28-37); and (c) reference should be made to the discussion in the draft Registry Guide of types of amendment that required the grantor’s authorization as the grantor’s authorization was not required for all types of amendment (see A/CN.9/WG.VI/WP.54/Add.4, para. 3).

28. With respect to recommendations 4 to 10, it was agreed that: (a) in recommendation 4, the bracketed text should be retained outside square brackets; (b) in recommendation 6, the bracketed text in the chapeau should be deleted and subparagraph (b) should be revised to read along the following lines “identifies itself in the manner prescribed by the registry”; (c) in recommendations 6 and 9, a subparagraph should be added to require the registry to provide grounds for the rejection of access to registration and searching services respectively; (d) in recommendation 7, the bracketed text in subparagraph (a) should be retained outside square brackets and the relevant commentary should explain that subparagraph (b) referred to authorization by the grantor with a cross-reference to the part in the draft Registry Guide in which the effectiveness of amendment and cancellation notices that were not authorized by the secured creditor was discussed; (e) in recommendation 8, subparagraph (a) should be revised to read along the following

lines “the registry rejects the registration of a notice submitted to it if information is not entered in all the required designated fields ...”; (f) the commentary should explain the relationship between recommendation 6, which dealt with access to registration services, and recommendation 8, which dealt with the rejection of a notice, and discuss situations in which the registry might need to provide reasons for denying access to registration services (e.g. where the notice was submitted by mail and the registrant used the wrong form, an identity card that had expired or a credit card the limit of which had been exceeded); and (g) in recommendation 10, subparagraph (a) should be revised to read along the following lines “the registry rejects ...”, while the Secretariat should make similar editorial changes throughout the draft Registry Guide to ensure consistency of expression.

29. Subject to the above-mentioned changes (see paras. 26-28 above), the Working Group adopted chapter II.

E. Registration (A/CN.9/WG.VI/WP.54/Add.2, paras. 1-49)

30. With respect to subsection A.2 (period of effectiveness of registered notice), it was agreed that the first sentence of paragraph 11 should be revised to read along the following lines “if a State adopts option A, it is not necessary to design its registry system to allow the registrant to reduce the legal period of effectiveness”.

31. With respect to subsection A.3 (time when a notice may be registered), it was agreed that, where the draft Registry Guide recommended a rule typically found in the secured transactions law, which, depending on the drafting conventions in the enacting State might need to be included or reiterated in the registry regulation, reference should be made to the part in the draft Registry Guide which dealt with issues of legislative technique and drafting (see A/CN.9/WG.VI/WP.54/Add.1, para. 32).

32. With respect to subsection A.7 (preserving the integrity and security of the registry record), it was agreed that: (a) in line with recommendation 18, the commentary should refer to the obligation of the registry to send a copy of the registered notice to the secured creditor, rather than to the registrant; and (b) the commentary should explain that the registry could correct only errors it made in entering into the registry record information contained in a paper notice, but not possible errors made by the registrant.

33. With respect to section A.9 (registry’s duty to send a copy of the registered notice to the registrant), in line with the decision made by the Working Group with respect to subsection A.7 (see para. 32 above), it was agreed that reference should be made to the obligation of the registry to send a copy to the secured creditor, rather than to the registrant.

34. With respect to subsection A.12 (removal of information from the public registry record and archival), it was agreed that a reference should be made to recommendation 74 of the *Secured Transactions Guide*, under which information should be archived upon expiration or cancellation of a notice as provided in recommendations 69, 72 or 73 and to the part in the draft Registry Guide in which the effectiveness of amendment and cancellation notices that were not authorized by the secured creditor was discussed (see A/CN.9/WG.VI/WP.54/Add.4, paras. 28-37).

35. With respect to subsection A.13 (language of notices and search requests), it was agreed that paragraph 49 should be recast to set out the issue (multiple linguistic versions of a grantor that was a legal person under the law of its constitution) and provide options for States with advantages and disadvantages. It was noted that one option, for example, might be to require that all linguistic versions of the grantor's name be listed in the notice. In that connection, it was pointed out that that approach would protect third-party searchers using one of the versions but expose the secured creditor to the risk of error and potential ineffectiveness of the notice. It was also noted that another approach might be to require that only one of the linguistic versions of the grantor's name be listed in the notice. It was stated that that approach would protect the secured creditor against the risk of error and ineffectiveness of the notice, but expose third-party searchers to the risk that they might not find the registered notice if they used another version of the grantor's name.

36. With respect to recommendations 11-22, it was agreed that: (a) in line with the decision made by the Working Group with respect to terminology and interpretation (see para. 18 above), in recommendation 11, reference should be made to the "registry record", rather than to the "registry database", and, as the words "as soon as practicable" were sufficient, the words "or within [a short period of time to be specified by the enacting State]" should be deleted from subparagraph (c); (b) in recommendation 11, references to a "notice" in subparagraphs (a), (b) and (c) should be qualified with the words "initial or amendment"; (c) in recommendation 11, subparagraphs (d) and (e) should be added to read along the following lines "(d) The registration of a cancellation notice is effective from the date and time when the previously registered notice to which it relates is no longer accessible to searchers of the public registry record" and "(e) The registry maintains a record of the date and time when the previously registered notice to which a cancellation notice relates is no longer accessible to searchers of the public registry record", while commentary should be prepared to explain the new subparagraphs that addressed an issue that was not specifically dealt with in the *Secured Transactions Guide*"; (d) in recommendation 12, the bracketed text should be retained outside square brackets and revised to read along the following lines "all notices related to an initial notice are [identified by] or [associated with] the same number"; (e) in all the options of recommendation 13, subparagraph (c) should be deleted and replaced with words to be inserted after the first sentence of subparagraph (b) along the following lines "by an amendment notice indicating that its purpose was to extend the period of effectiveness"; (f) in recommendation 14, the bracketed texts should be deleted; (g) in recommendation 16, the bracketed text should be retained outside square brackets; (h) in recommendation 18, subparagraph (b) should state that the secured creditor "must" send a copy of an initial notice to each grantor and indicate that the copy of the registered notice mentioned at the end of that subparagraph was a copy transmitted by the registry to the secured creditor in accordance with subparagraph (a), while the commentary should explain that, where there were multiple secured creditors, it was sufficient if one of the secured creditors sent the copy to the grantor; and (i) in recommendation 22, consistent with the terminology used in the draft Registry Guide, the obligation of the registrant in subparagraph (a) should be reflected with the verb "must", while the obligation of the registry in subparagraph (b) should be reflected with the verbs "specifies" and "makes".

37. Subject to the above-mentioned changes (see paras. 30-36 above), the Working Group adopted chapter III.

F. Registration of initial notices (A/CN.9/WG.VI/WP.54/Add.2, paras. 50-71 and A/CN.9/WG.VI/WP.54/Add.3, paras. 1-35)

38. With respect to subsection A.2 (grantor information), it was agreed that: (a) the row “other entity” in the table following paragraph 66 should be deleted, as it was too general to provide any guidance and, in any case, enacting States would have to adjust the examples in the table to fit in their context; (b) following the order of examples in the table, the order of paragraphs 67 and 68 should be reversed; and (c) paragraphs 69 to 71 should be recast to state how the address of the grantor was dealt with in the *Secured Transactions Guide*, list additional issues that needed to be addressed, and conclude with a reference to the recommendations of the draft Registry Guide that dealt with those issues. In that connection, it was also agreed that the commentary should elaborate on instances where the grantor had multiple addresses or no address at all in the State in which the registry was located with a cross-reference to recommendation 18, subparagraph (b), which required the secured creditor to send a copy of the initial notice to the grantor at the address set forth in the notice and a copy of an amendment notice to the grantor at the address set forth in the notice or at the current address known to the secured creditor.

39. With respect to subsection A.3 (secured creditor information), it was agreed that: (a) paragraphs 2 and 4 should be aligned; and (b) paragraph 4 should make it clear that third parties should be able to rely on the fact that, even if it was not the actual secured creditor, the person mentioned in the notice as the secured creditor could act on behalf and bind the secured creditor, without having to determine what its exact relationship with the actual secured creditor was.

40. With respect to subsection A.4 (description of encumbered assets), it was agreed that paragraphs 10 and 11 should be revised to clarify that the need to amend the description of the encumbered assets in the notice would arise only if the proceeds were of a type that was not covered by the description of the encumbered assets in the initial notice.

41. With respect to subsection A.6 (maximum amount for which the security right may be enforced), it was agreed that: (a) the discussion of the possibility that the requirement to include in a notice the maximum amount might be used as a pretext to impose a tax on secured transactions should be deleted from paragraph 15 as it was addressed elsewhere (see A/CN.9/WG.VI/WP.54/Add.3, para. 19, and A/CN.9/WG.VI/WP.54/Add.4, para. 56); and (b) the commentary should explain that, in accordance with recommendation 11, subparagraph (a), an amendment of the maximum amount would only be effective when the registration of the amendment notice became effective and thus third parties that relied on the previous maximum amount would be protected.

42. With respect to subsection A.7 (effect of errors or omissions on the effectiveness of the registration of a notice), it was agreed that: (a) paragraph 27 should include a reference to the part of the draft Registry Guide in which serial number indexing and searching was discussed (see A/CN.9/WG.VI/WP.54/Add.2,

paras. 24-27); and (b) paragraphs 30 and 31 (with the exception of the first sentence, which should be placed after para. 28) should be deleted as the matter was addressed in paragraphs 32-35.

43. With respect to recommendations 23-29, it was agreed that: (a) references to the representative of the secured creditor in recommendations 23 and 27 should be deleted as the draft Registry Guide used the term “secured creditor” to encompass its representative, if that person was identified in the notice as the secured creditor; (b) recommendation 24, subparagraph (e), should be aligned with the relevant commentary (see A/CN.9/WG.VI/WP.54/Add.2, para. 56, and the table following that paragraph); (c) recommendation 26, subparagraph (a), should be revised to read along the following lines “if the grantor is subject to insolvency proceedings and the security right is created in the assets of the grantor by the insolvency representative ...” to ensure that it would not be understood as implying that an amendment notice would be required for a security right created by the grantor prior to the insolvency proceedings (see para. 52, (d), and 53 below); (d) recommendation 26, subparagraphs (b) and (d), should be deleted, while the relevant issues should be discussed in the commentary; (e) recommendation 26, subparagraph (c), should be aligned with the relevant commentary (see A/CN.9/WG.VI/WP.54/Add.2, para. 66, and the table following that paragraph) to refer to a trustee or representative of an estate; (f) the commentary to recommendation 27, subparagraph (c), should explain that subparagraph (c) would be of little practical importance, as it would be rather rare that an insolvent person or a trustee of an estate of a deceased person would be a secured creditor; (g) in recommendation 29, the word “registration” in subparagraphs (b)-(e) should be replaced with the words “registration of a notice” to ensure consistency of expression with other parts of the draft Registry Guide; (h) the reference in recommendation 29 to the fact that the registration of a notice might be rendered ineffective did not mean that the entry of information would be rejected but rather that the legal consequences of the registration would not be achieved; and (i) recommendation 29, subparagraph (c), should be revised to refer to an “insufficient” rather than to “incorrect” grantor identifier as, according to recommendation 29, subparagraph (a), even a notice with an incorrect grantor identifier might be effective (if the notice would be retrieved by a search of the public registry record using the grantor’s correct identifier).

44. Subject to the above-mentioned changes (see paras. 38-43 above), the Working Group adopted chapter IV.

G. Registration of amendment and cancellation notices (A/CN.9/WG.VI/WP.54/Add.4, paras. 1-41)

45. With respect to subsection A.1 (amendment notices), it was agreed that the commentary should clarify that: (a) the secured creditor, rather than the registrant, had a right to make an amendment; (b) an amendment to reflect a voluntary subordination would be optional; (c) the discussion was exhaustive to the extent that it related to all amendments with respect to the minimum content of a notice, but not exhaustive to the extent that it could not address all the reasons for an amendment; (d) in the case of a change in the grantor’s name, a search under the name of the old or the new grantor should retrieve the registration; (e) the *Intellectual Property Supplement* took a different position than the *Secured Transactions Guide* with

respect to the effectiveness of a registration in the case of a transfer of the encumbered assets (recommendation 244); and (f) the registry system could be designed to accommodate the registration of an amendment notice to disclose a subordination but adding new features to the registry system would be associated with cost.

46. With respect to subsection A.4 (effectiveness of amendment and cancellation notices not authorized by the secured creditor), it was agreed that it should be replaced by new text that would describe the issue, state that the *Secured Transactions Guide* did not address it explicitly and fully, identify the specific policy issues that an enacting State would need to address and discuss some of the possible approaches to those issues. In addition, it was agreed that the new text should reflect the two basic policy approaches (protection of third-party searchers relying on the registry record and protection of the secured creditor) and indicate the need to distinguish cases involving fraud by a third party (which could be addressed with secured access mechanisms) from cases involving a mistake by the secured creditor, its employees or agents (which could be addressed by rules relating to professional liability). Moreover, it was agreed that the new text should explain that the registry and bona fide third-party searchers would have no way of knowing whether fraud or mistake were involved in an unauthorized amendment or cancellation. It was also agreed that the new text should clarify that, upon registration of a cancellation notice, under recommendation 74 of the *Secured Transactions Guide*, the registry had to remove the relevant notice from the public registry record, irrespective of whether it was authorized by the secured creditor or not, as the registry had no way of verifying whether a cancellation notice had been authorized by the secured creditor.

47. With respect to recommendation 30, it was agreed that subparagraphs (a) and (f) should be retained to provide guidance as to amendments that related to information required in a notice, while subparagraphs (b)-(e) should be deleted and the matters addressed therein should be discussed in the commentary (for a change to recommendation 33, subpara. (g), see para. 57 below).

48. Subject to the above-mentioned changes (see paras. 45-47 above), the Working Group adopted chapter V.

H. Search criteria and search results (A/CN.9/WG.VI/WP.54/Add.4, paras. 42-51)

49. With respect to subsection A.2 (search results), it was agreed that the commentary should clarify that: (a) the registration number was the only other search criterion in addition to the identifier of the grantor; and (b) the discussion on close matches would only be applicable to searches conducted using the grantor identifier and not the registration number. Subject to those changes, the Working Group adopted chapter VI.

I. Registration and search fees (A/CN.9/WG.VI/WP.54/Add.4, paras. 52-58)

50. With respect to recommendation 36, it was agreed that it should refer to “paper” rather than to “paper-based” notices. Subject to those changes, the Working Group adopted chapter VII.

J. Annex I. Terminology and recommendations (A/CN.9/WG.VI/WP.54/Add.5)

51. Having adopted the commentary and recommendations of all the chapters of the draft Registry Guide, the Working Group noted that, it had also adopted Annex I, which reproduced the terminology and recommendations, set forth in the relevant chapters of the draft Registry Guide.

K. Annex II. Examples of registry forms (A/CN.9/WG.VI/WP.54/Add.6)

52. The Working Group next turned to the examples of registry forms, set forth in Annex II of the draft Registry Guide. With respect to form A (example of initial notice), it was agreed that: (a) the disclaimer at the top of form A should also mention that it was the responsibility of the registrant to ensure that all information in the notice was complete, accurate and legally effective (it was noted that the same change should also be made to forms B, C, D and E); (b) to the indication of the time of effectiveness that was to be automatically generated by the registry, minutes and seconds should be added (it was noted that the same change should also be made to forms B, C, D, E, G and H); (c) the reference to additional grantor information throughout form A should be revised to read along the following lines “additional information about the grantor”, placed within square brackets and accompanied by a note that would read along the lines of the relevant part of the commentary (see A/CN.9/WG.VI/WP.54/Add.2, para. 53; it was noted that the same change should also be made to form B); (d) section A.3 should be revised to indicate whether the grantor was the person that was subject to insolvency proceedings or that person’s insolvency representative; (e) throughout form A, reference to a “syndicate or joint venture” and to “an entity other than those mentioned above” should be deleted, and the reference to “a named trust or estate” should be revised to read along the following lines “a trustee or representative of an estate” (it was noted that the same change should also be made to form B); (f) in section C, reference to a description of the encumbered assets by serial number should be deleted; (g) in section D, reference should be made to the duration of registration, and the commentary should explain that that reference meant the last day of that period; and (h) in section G, the reference to the indication that the registration was transitional should be retained, while the reference to the indexing criterion and the date and time of effectiveness was not necessary and should thus be deleted.

53. As a result of the change to section A.3 of form A (see para. 52, (d) above) the Working Group revisited recommendation 26, subparagraph (a) (see para. 43, (c) above). It was widely felt that the answer to the question as to who might be the

person that had the right to grant a security right in assets that were part of an insolvency estate (i.e. the person that was subject to insolvency proceedings or that person's insolvency representative), and thus the answer to the question as to the person whose name should be entered as grantor in section A.1. or A.2 of form A, would depend on the law of the enacting State, which might differ from State to State. Accordingly, it was agreed that recommendation 26 (a) (and the relevant commentary) should be revised to state that the grantor identifier could be either the name of the person that was subject to insolvency proceedings or that person's insolvency representative.

54. With respect to form B (example of amendment notice), it was agreed that: (a) the list of acts, set forth at the top of the form, should be deleted and registrants should be instructed to fill out as many of the fields on the form as they might need; (b) with respect to a global amendment, to implement the options offered in recommendation 31, the commentary should explain that enacting States would need to design a form for a secured creditor to implement that amendment or an application for the secured creditor to request the registry to make that amendment; (c) in section D, wording along the following lines should be inserted "enter name of the grantor to whom the amendment relates"; and (d) in section G, wording along the following lines should be inserted "enter name of the secured creditor to whom the amendment relates".

55. With respect to form C (example of mandatory amendment notice), it was agreed that: (a) the heading should be revised to read along the following lines "example of amendment notice pursuant to a judicial or administrative order" (it was noted that a similar change should also be made to the heading of form E); (b) in section B, reference should also be made to "changes" of information pursuant to a judicial or administrative order; (c) in section C, reference should be made to a "registrant", and to its name and position, as well as to the name of the authority and its address (it was noted that the same change should also be made in form E); (d) the commentary to recommendation 33 should explain that an enacting State would need to determine whether a copy of all of the order (with the facts, the rationale and the actual decision) or only the actual decision should be attached, and whether a certified copy should be attached, and, if so, what constituted a certified copy under the law of the enacting State (it was noted that the same commentary would apply also with respect to form E); and (e) in section D, reference should be made to a copy of the judicial or administrative order (the same change should also be made in form E).

56. With respect to form D (example of cancellation notice), it was agreed that: (a) it should be revised to refer to the "registration number of the initial notice to be cancelled"; (b) a note should be added to alert the secured creditor to the legal consequences of a cancellation; and (c) the commentary should discuss the issue of inadvertent cancellations by secured creditors and ways in which such cancellations might be prevented (e.g. by requiring that additional information, such as the grantor identifier, be mentioned in a cancellation notice, and that the cancellation notice should be rejected if the registration number did not match the grantor identifier, or by designing the registry so as to have the entire record relating to the notice to be cancelled appear on a screen upon entry of the registration number).

57. In the context of the discussion of form E, it was agreed that, in recommendation 33, subparagraph (g), option A should be aligned with option B to

require that a copy of the relevant judicial or administrative order be attached, rather than the order itself (see para. 47 above).

58. With respect to form F (example of search request form), it was agreed that: (a) at the top of the form, wording along the following lines should be inserted “sections A and B are alternatives and only one of them needs to be filled out”; (b) the reference to the time should be deleted as that information would be set forth in the search result in form G; and (c) reference to “additional grantor information” should be deleted as, in accordance with recommendation 34, that information was not a search criterion.

59. With respect to form G (example of a search result), it was agreed that: (a) in line with the terminology used in the draft Registry Guide, reference should be made to notices being “retrieved”; (b) to indicate which notice matched the search criterion in line with recommendation 35, subparagraph (a), reference should be made to the search criterion used; and (c) the commentary should discuss the kind of information to be provided to a searcher in a search result (all information in an attachment or table, or some information relating to notices that matched the search criterion). In that connection, the Working Group discussed “currency dates” and noted that the relevant commentary (see A/CN.9/WG.VI/WP.54/Add.4, para. 51) was sufficient in discussing that issue.

60. With respect to form H (example of rejection of a registration or a search request), it was agreed that: (a) the form should be presented in a check-box format which would indicate to the registrant or the searcher the reason or reasons for the rejection of a registration or search request; (b) the time of rejection should be indicated in the form; (c) in line with the decision made by the Working Group at the present session (see para. 43 above), the reference to the representative of the secured creditor in section A.1.(b) should be deleted; (d) section A.2.(b) and (c) should be combined and revised to read along the following lines “it failed to provide any legible information”; (e) section B should be revised to read along the following lines “the search request is rejected because it failed to provide a search criterion in a legible manner in the designated field”; (f) the commentary should explain that form H would generally be used in a paper-based registry, as an ideal electronic registry would automatically reject a registration or a search request if some required information was not provided.

61. Subject to the above-mentioned changes, (see paras. 52-60 above), the Working Group adopted the examples of the registry forms and the revised recommendations 26, subparagraph (a), and 33, subparagraph (g), option A.

L. Title of the draft Registry Guide

62. The Working Group decided that the title of the draft Registry Guide should be “UNCITRAL Guide on the Implementation of a Security Rights Registry”. It was agreed that that title was appropriate, mainly as it indicated the contents of the draft Registry Guide but also its relationship to the *Secured Transactions Guide*.

V. Draft Model Law on Secured Transactions

63. Upon completion of its deliberations on the draft Registry Guide, the Working Group had a general exchange of views with respect to the draft Model Law on Secured Transactions (the “draft Model Law”) and in particular with respect to its scope. At the outset, the Working Group expressed its appreciation to the Commission for its decision to refer to the Working Group the preparation of a simple, short and concise model law on secured transactions based on the general recommendations of the *Secured Transactions Guide* and consistent with all texts prepared by UNCITRAL on secured transactions⁶ and to the Secretariat for preparing a first draft of the draft Model Law. One view was that Commission’s mandate for the draft Model Law did not require that matters that were the subject of asset-specific recommendation in the *Secured Transactions Guide* be excluded from the scope of the draft Model Law. It was stated that, the Commission’s mandate rather required that the decisions as to the scope should be made on the basis of the economic value of having the draft Model Law cover a transaction, and not on the basis of whether the asset was the subject of an asset-specific recommendation.

64. Another view was that the main elements of the mandate given by the Commission to the Working Group were that the text to be prepared should be simple, concise and supplement the *Secured Transactions Guide*. It was stated that, before considering the provisions of the draft Model Law, it was premature to discuss in any detail, or to refer to the Commission, the matter of the scope of the draft Model Law. In that connection, it was observed that the draft Model Law could meet the three conditions set by the Commission if it had a broad scope and included general principles but not if it had a broad scope and included detailed provisions. It was also pointed out that, while simplicity might be a subjective criterion, conciseness was objective and referred, for example, to a limited number of provisions. It was also observed that, in any case, the draft Model Law should supplement, and not replace, the *Secured Transactions Guide*.

VI. Future work

65. The Working Group referred the draft Registry Guide to the Commission for adoption at its upcoming forty-sixth session.

66. The Working Group noted that its twenty-fourth session was tentatively scheduled to take place in Vienna from 7 to 11 October 2013, those dates being subject to confirmation by the Commission at its forty-sixth session.

⁶ Ibid.

**D. Note by the Secretariat on a draft Technical Legislative Guide on
the Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-third session**

(A/CN.9/WG.VI/WP.54 and Add.1-6)

[Original: English]

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Preface

At its forty-second session (Vienna, 29 June-17 July 2009), the Commission noted with interest the future work topics discussed by Working Group VI at its fourteenth and fifteenth sessions (A/CN.9/667, para. 141, and A/CN.9/670, paras. 123-126). At that session, the Commission agreed that the Secretariat could hold an international colloquium early in 2010 to obtain the views and advice of experts with regard to possible future work in the area of security interests.¹ In accordance with that decision,² the Secretariat organized an international colloquium on secured transactions (Vienna, 1-3 March 2010). At the colloquium several topics were discussed, including registration of security rights in movable assets, security rights in non-intermediated securities, a model law on secured transactions, a contractual guide on secured transactions, intellectual property licensing and implementation of UNCITRAL texts on secured transactions. The

¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17)*, paras. 313-320.

² *Ibid.*

colloquium was attended by experts from governments, international organizations and the private sector.³

At its forty-third session (New York, 21 June-9 July 2010), the Commission considered a note by the Secretariat on possible future work in the area of security interests (A/CN.9/702 and Add.1). The note discussed all the items discussed at the colloquium. The Commission agreed that all issues were interesting and should be retained on its future work agenda for consideration at a future session on the basis of notes to be prepared by the Secretariat within the limits of existing resources. However, in view of the limited resources available to it, the Commission agreed that priority should be given to registration of security rights in movable assets.⁴

In that connection, it was widely felt that a text on registration of security rights in movable assets would usefully supplement the Commission's work on secured transactions and provide urgently needed guidance to States with respect to the establishment and operation of security rights registries. It was stated that secured transactions law reform could not be effectively implemented without the establishment of an efficient publicly accessible security rights registry. It was also emphasized that the *UNCITRAL Legislative Guide on Secured Transactions* (the "*Secured Transactions Guide*") did not address in sufficient detail the various legal, administrative, infrastructural and operational questions that needed to be resolved to ensure the successful implementation of a registry.⁵

The Commission also agreed that, while the specific form and structure of the text could be left to the Working Group, the text could: (a) include principles, guidelines, commentary, recommendations and model regulations; and (b) draw on the *Secured Transactions Guide*, texts prepared by other organizations and national law regimes that have introduced security rights registries similar to the registry recommended in the *Secured Transactions Guide*. After discussion, the Commission decided that the Working Group should be entrusted with the preparation of a text on registration of security rights in movable assets.⁶

At its eighteenth session (Vienna, 5-10 November 2010), the Working Group considered a note by the Secretariat entitled "Registration of security rights in movable assets" (A/CN.9/WG.VI/WP.44 and Add.1 and 2). At the outset, the Working Group expressed its broad support for a text on the registration of security rights in movable assets, noting that empirical evidence clearly demonstrated that the efficacy of a secured transactions law depended on an effective registration system (A/CN.9/714, para. 12). As to the specific form and structure of the text to be prepared, the Working Group adopted the working assumption that the text would be a guide on the implementation and operation of a registry of security rights in movable assets that could include principles, guidelines, commentary and possibly model regulations. The Working Group also agreed that the text of the proposed registry guide should be consistent with the type of secured transactions legal regime contemplated by the *Secured Transactions Guide*, while also taking into account the diverse approaches taken by modern national and international registry regimes. It was also observed that, in line with the *Secured Transactions Guide*

³ For the colloquium papers, see www.uncitral.org/uncitral/en/commission/colloquia/3rdint.html.

⁴ Ibid., *Sixty-fifth Session, Supplement No. 17* (A/65/17), paras. 264 and 273.

⁵ Ibid., para. 265.

⁶ Ibid., paras. 266-267.

(see recommendation 54, subpara. (j)), the proposed registry guide should take into account the need to accommodate a hybrid electronic/paper system in which parties would have the option of submitting registration and search inquiries either electronically or in paper form (A/CN.9/714, para. 13). The Secretariat was asked to prepare a draft of the proposed registry guide based on the discussions and conclusions of the Working Group (A/CN.9/714, para. 11).

At its nineteenth session (New York, 11-15 April 2011), the Working Group considered notes by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.46 and Add.1 and 2) and “Draft Model Regulations” (A/CN.9/WG.VI/WP.46/Add.3). At the outset, the Working Group considered the form and content of the text to be prepared. One view was that a stand-alone guide should be prepared that would include an educational part introducing the secured transactions law recommended in the *Secured Transactions Guide* and a practical part that would consist of model registration regulations and commentary thereon (see A/CN.9/719, para. 13). Another view was that emphasis should be placed on model registration regulations and a commentary thereon, which would provide States that had enacted the secured transactions law recommended in the *Secured Transactions Guide* with practical advice as to the issues to be addressed in the context of the establishment and operation of a general security rights registry (see A/CN.9/719, para. 14). At that session, differing views were also expressed as to whether the regulations should be formulated as model regulations or as recommendations (A/CN.9/719, para. 46). The Working Group requested the Secretariat to prepare a revised version reflecting the deliberations and decisions of the Working Group (A/CN.9/714, para. 12).

At its forty-fourth session (Vienna, 27 June-8 July 2011), the Commission considered the reports of the eighteenth and nineteenth sessions of the Working Group (A/CN.9/714 and A/CN.9/719, respectively). At that session, the significance of the work undertaken by Working Group VI was emphasized in particular in view of efforts currently undertaken by several States with a view to establishing a general security rights registry and the significant beneficial impact the operation of such a registry had on the availability and the cost of credit. With respect to the form and content of the text to be prepared, it was stated that, following the approach followed with respect to the *Secured Transactions Guide*, the text should be formulated in the form of a guide with commentary and recommendations, rather than as a text with model regulations and commentary thereon. In that connection, it was noted that the next version of the text before the Working Group would be formulated in a way that would leave the matter open until the Working Group had made a decision. After discussion, the Commission agreed that the mandate of the Working Group, leaving the decision on the form and content of the text to be prepared to the Working Group, did not need to be modified, and that, in any case, a final decision would be made by the Commission once the Working Group had completed its work and submitted the text to the Commission.⁷

At its twentieth session (Vienna, 12-16 December 2011), the Working Group continued its work based on a note by the Secretariat entitled “Draft Security Rights Registry Guide” (A/CN.9/WG.VI/WP.48 and Add.1-3). At that session, the Working Group agreed that the text should take the form of a guide (the “draft Registry

⁷ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 233.

Guide”) with commentary and recommendations along the lines of the *Secured Transactions Guide*. In addition, the Working Group agreed that, where the draft Registry Guide offered options, examples of model regulations could be included in an annex to the draft Registry Guide (A/CN.9/740, para. 18). As to the presentation of the text, it was agreed that the draft Registry Guide should be presented as a separate, stand-alone, comprehensive text that would be consistent with the *Secured Transactions Guide*, and be tentatively entitled “Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/740, para. 30).

At its twenty-first session (New York, 14-18 May 2012), the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry: Annex I. Terminology and recommendations” (A/CN.9/WG.VI/WP.50 and Add.1-2). At that session, the Working Group approved the substance of the terminology and the recommendations of the draft Registry Guide (A/CN.9/743, para. 21). In addition, the Working Group agreed that the draft Registry Guide should be finalized and submitted to the Commission for adoption at its forty-sixth session, in 2013 (A/CN.9/743, para. 73).

At its forty-fifth session (New York, 25 June-6 July 2012), the Commission considered the reports of the twentieth and twenty-first sessions of the Working Group (A/CN.9/740 and A/CN.9/743, respectively). At that session, the Commission expressed its appreciation to the Working Group and requested the Working Group to proceed with its work expeditiously and to complete it so that the draft Registry Guide would be submitted to the Commission for final approval and adoption at its forty-sixth session, in 2013.⁸

At its twenty second session, the Working Group considered a note by the Secretariat entitled “Draft Technical Legislative Guide on the Implementation of a Security Rights Registry” (A/CN.9/WG.VI/WP.52 and Add.1-6). At that session, the Working Group adopted the substance of the draft Registry Guide and requested the Secretariat to prepare a revised version of the text reflecting the deliberations and decisions of the Working Group (A/CN.9/764, para. 15).

[Note to the Working Group: The Working Group may wish to note that the preface will be updated after each Working Group meeting and completed after the Commission adopts the draft Registry Guide at its forty-sixth session, in 2013.]

Introduction

A. Purpose of the draft Registry Guide and its relationship with the *Secured Transactions Guide*

1. The *UNCITRAL Legislative Guide on Secured Transactions* (the “*Secured Transactions Guide*”) deals with the full range of issues that should be addressed in a modern secured transactions law (as supplemented with respect to security rights in intellectual property by the *Supplement on Security Rights in Intellectual Property*; the “*Supplement*”). The establishment of a publicly accessible registry in which information about the potential existence of a security right in movable assets

⁸ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 99.

may be registered is an essential feature of the *Secured Transactions Guide* and of modern law reform initiatives in this area generally. Chapter IV of the *Secured Transactions Guide* contains commentary and recommendations on many aspects of a general security rights registry. Chapters III and V address the related issues of third-party effectiveness and priority of a security right.

2. However, the *Secured Transactions Guide* does not address in every detail the myriad of legal, technological, administrative and operational issues involved in developing and operating an effective and efficient general security rights registry. This is in line with the typical legislative drafting approach. Thus, the detailed rules applicable to the establishment and the operation of the registry, as well as the registration and search process, are dealt with in subordinate regulations, ministerial guidelines or the like. The draft Technical Legislative Guide on the Implementation of a Security Rights Registry (the “draft Registry Guide”) seeks to implement the *Secured Transactions Guide* by addressing these issues in greater detail.

3. It should be emphasized at the outset that the recommendations of the draft Registry Guide are intended to be implemented by States that have enacted or are prepared to enact a secured transactions law that is substantially in conformity with the recommendations of the *Secured Transactions Guide*. For example, in order to implement the recommendations of the draft Registry Guide, a State would need to have in place or be prepared to enact a secured transactions law that provides for notice (rather than document) registration and that treats registration as a method of making a security right effective against third parties (rather than for creating a security right). It follows that, in order to understand the legal framework in which the registry is intended to function, a user of the draft Registry Guide should have a basic understanding of the secured transactions law contemplated by the *Secured Transactions Guide*. Section E of the Introduction to the draft Registry Guide offers a summary of the secured transactions regime recommended by the *Secured Transactions Guide* and other chapters include additional guidance. For a thorough understanding, however, the draft Registry Guide should be read together with the *Secured Transactions Guide*.

4. The experience of States that have instituted the kind of general security rights registry contemplated by the *Secured Transactions Guide* demonstrates how advances in information technology can significantly improve its operational efficiency. Particularly in relation to the technical aspects of registry design and operation, the draft Registry Guide draws on these national precedents. In addition, the draft Registry Guide has benefitted from international sources that deal with secured transactions, including the following:

(a) Law and Policy Reform at the Asian Development Bank — A Guide to Movables Registries, Asian Development Bank (ADB) (2002);

(b) Publicity of Security Rights: Guiding Principles for the Development of a Charges Registry, European Bank for Reconstruction and Development (EBRD) (2004);

(c) Publicity of Security Rights: Setting Standards for Charges Registries, EBRD (2005);

(d) Model Registry Regulations under the Model Inter-American Law on Secured Transactions, Organization of American States (OAS) (2009);

(e) Principles, Definitions and Model Rules of a European Private Law, Draft Common Frame of Reference (DCFR), volume 6, book IX (Proprietary security in movable assets), chapter 3 (Effectiveness as Against Third Parties), section 3 (Registration), (2010), Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group) (2010);

(f) Secured Transactions Systems and Collateral Registries, The International Finance Corporation (World Bank Group) (2010); and

(g) Convention on International Interests in Mobile Equipment (Cape Town, 2001) and Regulations and Procedures for the International Registry, document 9864, International Civil Aviation Organization (ICAO) (4th ed. 2010).

5. The national, regional and international sources referred to above are largely consistent with, but do not always fully accord with, the recommendations of the *Secured Transactions Guide*. Where appropriate, the draft Registry Guide explains the policy rationale for the approach recommended in the *Secured Transactions Guide* relative to other possible approaches.

6. The draft Registry Guide is addressed to all those who are interested or actively involved in the design and implementation of a security rights registry, as well as to those who may be affected by or interested in its establishment and operation, including:

(a) Policymakers implementing the recommendations of the *Secured Transactions Guide*, especially in relation to the establishment of a security rights registry;

(b) Registry system designers, including technical staff charged with the preparation of design specifications and with fulfilling the hardware and software requirements for the registry;

(c) Registry administrators and staff;

(d) Registry clientele, including potential secured creditors, credit reporting agencies, other creditors of the grantor of a security right and the grantor's insolvency representative, as well as all other persons whose rights may be affected by a security right, such as a potential buyer of an encumbered asset;

(e) The general legal community (including judges, arbitrators and practising lawyers); and

(f) All those involved in secured transactions law reform and the provision of technical assistance, such as the World Bank Group, the EBRD, the ADB and the Inter-American Development Bank.

7. The draft Registry Guide uses neutral generic legal terminology that is consistent with the terminology used in the *Secured Transactions Guide*. Consequently, it can be adapted readily to the diverse legal traditions and drafting styles of different States. The draft Registry Guide is also formulated in a flexible fashion enabling it to be implemented in accordance with local drafting conventions regarding which types of rule must be incorporated in principal legislation and which may be left to subordinate regulations, or ministerial or other administrative rules.

B. Terminology and interpretation

8. The terminology and interpretation section of the *Secured Transactions Guide* (see Introduction, sect. B, para. 20), applies also to the draft Registry Guide, except to the extent modified below. The terminology of the draft Registry Guide is also consistent with the refinement of these terms and the explanations of additional terms in the various chapters of the *Secured Transactions Guide*. For example, when the draft Registry Guide uses the term “future asset”, it means assets that come into existence or are acquired by the grantor after the time the security agreement is entered into (see *Secured Transactions Guide*, chap. I, para. 8; chap. II, para. 51; and chap. V, para. 151).

9. However, the draft Registry Guide modifies certain terminological and interpretation provisions of the *Secured Transactions Guide* for purposes of their use in the draft Registry Guide and also introduces additional terms as follows:

(a) Address

“Address” means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; (iii) an electronic address; or (iv) another address that would be effective for communicating information.

(b) Amendment

“Amendment” means the modification of information contained in a previously registered notice to which the amendment relates.

10. Registration of an amendment notice does not result in the deletion from the registry record of previously registered notices to which the amendment notice relates. It may have the effect, however, of modifying or terminating the effectiveness of a previously registered notice with respect to a particular security right (see A/CN.9/WG.VI/WP.54/Add.2, para. 46, and A/CN.9/WG.VI/WP.54/Add.4, paras. 1-22).

(c) Cancellation

“Cancellation” means the removal of [all] information contained in a previously registered notice to which the cancellation relates from the public registry record.

11. The legal consequence of the registration of a cancellation notice is that the previously registered notice to which it relates is no longer effective (see A/CN.9/WG.VI/WP.54/Add.4, paras. 23-25).

(d) Designated field

“Designated field” means the space on the prescribed form of notice designated for entering the specified type of information.

(e) Grantor

“Grantor” means the person identified in the notice as the grantor.

(f) Law

“Law” means the law of the enacting State governing security rights in movable assets.

12. The secured transactions law of the enacting State has to be in substantial conformity with the recommendations of the *Secured Transactions Guide* (see para. 3 above).

(g) Notice

“Notice” means a communication in writing (paper or electronic) to the registry of information with respect to a security right; a notice may be an initial notice, an amendment notice or a cancellation notice.

13. In the registration context, the *Secured Transactions Guide* uses the term “notice” to refer both to the form that a registrant uses to submit information to the registry (see *Secured Transactions Guide*, Introduction, sect. B, “notice”, and recs. 54, subpara. (b), and 57), and to the “information contained in a notice” or “the content of the notice” (see *Secured Transactions Guide*, recs. 54, subpara. (d), and 57). The draft Registry Guide uses the term “notice” in the same way.

(h) Registrant

“Registrant” means the person who completes a registry notice form and submits it to the registry [and may be a service provider].

14. The registrant may be the secured creditor (including an agent or trustee in the case of a syndicate of lenders) or its representative (e.g., a law firm or other service provider that is identified in the notice as the secured creditor). A courier or other mail service provider used by the registrant to transmit the notice is not the registrant and its identity is irrelevant.

(i) Registrar

“Registrar” means the person appointed pursuant to the law and the regulation to supervise and administer the operation of the registry.

(j) Registration

“Registration” means the entry of information contained in a notice into the registry [record] [database].

(k) Registration number

“Registration number” means a unique number allocated to an initial notice by the registry and permanently associated with that notice and any related notice.

(l) Registry record

“Registry record” means the information in all registered notices that is stored in the registry [record] [database] and consists of the record that is publicly accessible (public registry record) and the record that has been removed from the public registry record (registry archives).

15. Because the term “registry record” means the information contained in all registered notices (and not just the notices relating to a specified grantor), when referring to a particular notice in the registry record, reference is made to a “registered notice” as opposed to the “registry record”.

(m) Regulation

“Regulation” means the body of rules implemented by the enacting State with respect to the registry, whether these rules are found in administrative guidelines or the substantive secured transactions law.

16. The exact form and contents of the regulation will depend on the legislative policy and drafting technique of each enacting State. For example, if the secured transactions law is enacted in two or more statutes (e.g., one that deals with all the substantive rules, another that deals with conflict-of-laws rules, and another that establishes the registry), there may be rules relating to registration that are enacted as subordinate legislation (e.g., a regulation that is a separate enactment) in respect of all these statutes.

(n) Secured creditor

“Secured creditor” means the person identified in the notice as the secured creditor [and may be the secured creditor or its representative].

[Note to the Working Group: The Working Group may wish to note that: (a) the terms “amendment” and “cancellation” are explained by reference to their generic meaning, rather than their legal effect which is addressed in the commentary; (b) the bracketed text in the term “cancellation” may be necessary to distinguish a cancellation from an amendment; (c) the term “notice” is explained by reference to both the medium and the information contained therein; (d) the term “registrant” is explained by reference to the meaning of that term as is generally understood (the language in square brackets may be retained in the terminology or in the commentary); (e) the term “registry record” is used to reflect the contents (information) by reference to the container (the database); (f) the term “secured creditor” is a new term intended to clarify that the registry may rely on the person who is identified in the notice as the secured creditor or the secured creditor of record (the language in square brackets may be retained in the terminology or in the commentary). As the difference between the term “registry record” (the contents) and the term “database” (the container) may not be clear to the average reader of the draft Registry Guide, the Working Group may wish to consider whether: (a) the difference between the two terms should be explained in the commentary; or (b) in view of the fact that the recommendations of the Secured Transactions Guide use only the term “registry record” and most of recommendations of the draft Registry Guide use the term “registry record” (see, for example, recs. 3, subpara. (e) and 16), the reference to the term “database” in the terminology (subparas. (j) and (l)) and in recommendations 3, subparagraphs (d) and (g) and recommendation 11 should be replaced with a reference to the term “registry record” (in the sense of both the contents and the container). The Working Group may also wish to consider whether the term “registry” should also be explained along the following lines: “‘Registry’ means a system established for registering information about security rights in movable assets”.]

C. Key objectives and fundamental policies of an efficient registry

17. The security rights registry envisaged by the *Secured Transactions Guide* and the draft Registry Guide is informed by the following overarching principles:

(a) The legal and operational guidelines governing registry services, including registration and searching, should be simple, clear and certain from the perspective of all potential users; and

(b) Registry services, including registration and searching, should be designed so as to be as fast and inexpensive as possible, while also ensuring the security and searchability of the information entered in the registry record.

D. Overview of secured transactions law and the role of registration

1. General

18. As already mentioned, a general security rights registry is an integral component of the secured transactions regime recommended by the *Secured Transactions Guide*. The potential users of the draft Registry Guide will not necessarily be versed in the intricacies of that regime or even have legal training. Accordingly, this section provides an overview, focusing in particular on the legal function and consequences of registration. For more detailed guidance, the reader is encouraged to then refer to the *Secured Transactions Guide*.

2. Concept of a security right

19. In general terms, a security right is a property right (a right in rem, distinct from ownership and personal rights) in a movable asset that is created by agreement and secures payment or other performance of an obligation (see the term “security right” and “grantor” in the introduction to the *Secured Transactions Guide*, sect. B). The function of a security right is to mitigate the risk of loss resulting from a default in payment by entitling the secured creditor to claim the value of the assets encumbered by the security right as a back-up source of repayment in preference to the claims of the grantor’s other creditors. For example, if a business that borrows funds on the security of its equipment fails to repay the loan, a secured creditor with a security right in that equipment will be entitled to obtain possession and dispose of the equipment and apply the proceeds to the outstanding balance. As the risk of loss from default is mitigated, the grantor’s access to credit is expanded, quite often on more favourable terms.

20. The *Secured Transactions Guide* adopts a functional approach to the concept of a security right. Under this approach, the term encompasses any type of property right in a movable asset that functions in substance to secure performance of an obligation (see *Secured Transactions Guide*, chap. I, paras. 101-112, and recs. 2 and 10). Thus, the concept is not limited to the types of nominated security device conventionally recognized by different legal systems, such as a pledge, charge or hypothec. It encompasses any type of property right that functions as security. As such, it includes a transfer of tangible assets or assignment of intangible assets for security purposes, as well as a retention-of-title by a seller to secure payment of the

purchase price of an asset or the residual ownership of a lessor under a financial lease (see *Secured Transactions Guide*, chap. I, paras. 101-112 and recs. 2, 8 and 9).

21. The *Secured Transactions Guide* recommends this functional, integrated and comprehensive approach to the concept of security in order to ensure that the legal rights of creditors, debtors and third parties are subject to a common legal framework regardless of the form of the transaction, the type of encumbered asset, the nature of the secured obligation or the status of the parties. However, it recognizes that secured transactions covering specified types of encumbered asset may need to be excluded either because they are already covered by other law of the enacting State (for example, aircraft equipment covered by the Cape Town Convention/Aircraft Protocol) or raise concerns that are more appropriately dealt with by a more specialized regime (for example, investment securities covered by the Geneva Securities Convention). However, any additional exceptions (e.g., employment benefits), should be narrow and clearly specified in the law (see *Secured Transactions Guide*, chap. I, para. 44 and recs. 4 and 7).

3. Creation of a security right

22. The *Secured Transactions Guide* recommends that a distinction should be drawn between the creation of a security right (effectiveness between the grantor and the secured creditor) and its effectiveness against third parties (see *Secured Transactions Guide*, chap. I, paras. 1-7, chap. III, paras. 6-8, and recs. 1, subpara. (c), 13 and 30). The main reason for this approach is to enable parties to create a security right in their assets in an uncomplicated and efficient manner (see *Secured Transactions Guide*, recs. 1, subpara. (c), and 13).

23. Thus, the *Secured Transactions Guide* imposes minimum formalities on the creation of a security right. It recommends that: (a) a security right may be created simply by an agreement between the grantor and the secured creditor; (b) the agreement must indicate the intent of the parties to create a security right, identify the parties and describe the secured obligation and the encumbered assets (but there are no other requirements); (c) the agreement must be in a writing that indicates the grantor's intent to create a security right only if it is not accompanied by a transfer of actual possession of the encumbered asset to the secured creditor; and (d) the required form of writing is flexible and includes electronic means of communications (see *Secured Transactions Guide*, recs. 11-15).

24. By dispensing with the need for a transfer of possession of the encumbered assets to create a security right, the secured transactions law contemplated by the *Secured Transactions Guide* enables an enterprise to encumber not only its tangible existing assets but also its intangible and future assets, as well as pools of circulating assets, including, most significantly, receivables and inventory (see *Secured Transactions Guide*, chap. II, paras. 49-70 and recs. 2 and 17). Under the recommendations of the *Secured Transactions Guide*, a security right in future assets is created as soon as the grantor acquires rights in the assets (see *Secured Transactions Guide*, rec. 13). It also permits an enterprise to continue to retain possession of and to use its tangible encumbered assets. This approach is likely to increase access to credit by expanding the range of assets that a grantor can offer as security. The recommendations of the *Secured Transactions Guide* further confirm that a security right may secure any type of obligation, including future and indeterminate obligations (see *Secured Transactions Guide*, rec. 16).

25. This recognition by the *Secured Transactions Guide* of non-possessory security rights also enhances consumer access to credit since it enables consumer grantors to take immediate possession of assets acquired on secured credit terms. The *Secured Transactions Guide*, however, is mindful of the need to preserve the rights of consumers and other persons that may require special protection. Thus, it recommends that the secured transactions law should not affect the rights of consumers under consumer protection legislation or override statutory limitations on the types of asset that may be transferred or encumbered (see *Secured Transactions Guide*, chap. I, paras. 10 and 11; chap. II, paras. 56, 57 and 107; recs. 2, subpara. (b) and 18).

26. The *Secured Transactions Guide* also confirms that, unless otherwise agreed, a security right automatically continues in any proceeds of the encumbered assets (and proceeds of proceeds) without the need for a specific agreement with respect to the proceeds (see *Secured Transactions Guide*, rec. 19). This approach is consistent with the expectations of the parties (see *Secured Transactions Guide*, chap. II, paras. 72-81).

4. Third-party effectiveness of a security right

27. Under the recommendations of the *Secured Transactions Guide*, a security right becomes effective between the parties as soon as the requirements for creation outlined above are satisfied. However, the security right cannot be set up against rights acquired by third parties in the encumbered assets unless and until the requirements for third-party effectiveness of the security right are satisfied. The reason for this distinction is to ensure that the security right created by the parties' private agreement is adequately publicized to third parties that might be negatively affected by its existence.

28. Registration of a notice in a general security rights registry is the main method recognized by the *Secured Transactions Guide* for achieving the third-party effectiveness of a security right (see *Secured Transactions Guide*, rec. 32). While this is the only method of achieving third-party effectiveness of a security right that is available for all types of encumbered asset, the *Secured Transactions Guide* recognizes other methods for specific types of encumbered asset.

29. First, the dispossession of the grantor qualifies as an alternative method of achieving third-party effectiveness, provided that the dispossession is actual (not constructive, fictive deemed or symbolic). The transfer of possession of the encumbered assets to the secured creditor or its representative is considered to be sufficient practical notice to third parties that the grantor's rights in the assets are likely to be encumbered (see *Secured Transactions Guide*, Introduction, sect. B, "possession" and rec. 37). Since physical dispossession is required, this method of achieving third-party effectiveness is available only for the tangible assets of a grantor that the grantor owns at the time of the conclusion of the security agreement and then only if, as a practical matter, the grantor is prepared to relinquish possession.

30. Second, the *Secured Transactions Guide* recommends that, where the encumbered asset is a right to payment of funds credited to a bank account or a right to receive the proceeds of a letter of credit, secured creditors should be given the option of achieving third-party effectiveness by taking "control" of the encumbered

asset in lieu of registration in the general security rights registry (see *Secured Transactions Guide*, Introduction, sect. B, “control” and rec. 103).⁹

31. Third, the *Secured Transactions Guide* may apply to security rights in types of asset that are subject to a specialized registration regime, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)). To the extent that the *Secured Transactions Guide* applies to security rights in these types of asset, it recommends that registration in the specialized registry should be recognized as an alternative method of achieving third-party effectiveness (see *Secured Transactions Guide*, rec. 38).

32. Fourth, where the encumbered movable asset is at the time of the conclusion of the security agreement or may be subsequently attached (and does become attached) to immovable property, the *Secured Transactions Guide* recommends that the security right may be made effective against third parties by registration in either the general security rights registry or the immovable property registry (see *Secured Transactions Guide*, rec. 43; as to the priority implications of the choice of registration venue, see para. 40 below).

5. Priority of a security right

(a) Competing security rights

33. If more than one security right created by the same grantor in the same encumbered asset has been made effective against third parties, it is necessary to have a priority rule to rank the competing security rights (see *Secured Transactions Guide*, chap. III, paras. 12-14). Where the competing security rights were all made effective against third parties by registration, priority is generally determined by the temporal order of registration (see *Secured Transactions Guide*, rec. 76, subpara. (a)). Where the competing security rights were all made effective against third parties otherwise than by registration, priority is generally determined by the temporal order of when third-party effectiveness was achieved (see *Secured Transactions Guide*, rec. 76, subpara. (b)). In the event a security right that was made effective against third parties otherwise than by registration (e.g. by delivery of possession) comes into competition with a security right that was made effective against third parties by registration, priority is generally determined by the respective temporal order of registration or when the third-party effectiveness was otherwise established (see *Secured Transactions Guide*, rec. 76, subpara. (c)).

34. Although these recommendations provide the baseline rules, a modern secured transactions law along the lines recommended in the *Secured Transactions Guide* will invariably recognize exceptions in the interest of facilitating other business practices and policy objectives. The following paragraphs summarize the principal exceptions recognized by the *Secured Transactions Guide*.

⁹ It should be noted that securities, payment rights arising under or from financial contracts governed by netting agreements and payment rights arising under or from foreign exchange contracts are excluded from the scope of the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. I, paras. 37-39, and rec. 4, subparas. (c)-(e)). For these types of encumbered asset, the enacting State may wish to consider enacting specialized rules.

35. First, the *Secured Transactions Guide* recognizes a special priority in favour of a secured creditor that finances the grantor's acquisition of tangible assets (for example, consumer goods, equipment or inventory) or intellectual property (see *Secured Transactions Guide*, chap. X, paras. 125-139, and *Supplement*, paras. 181-183). Provided that the requirements recommended by the *Secured Transactions Guide* for obtaining this special priority are satisfied (that is, registration of a notice and, in the case of inventory, possibly notification of inventory financiers of record; see rec. 180, alternative A, subpara. (b), and alternative B, subpara. (b)), the "acquisition security right" has priority with respect to the value of those assets over security rights in the grantor's future assets of that kind that were previously acquired and registered or otherwise made effective against third parties. This approach does not prejudice the prior secured creditor since the grantor would likely not have been able to acquire these new assets but for the new financing. Giving priority to acquisition security rights also benefits the grantor by giving it access to diversified sources of secured credit to finance new acquisitions.

36. Second, a security right in money and in negotiable instruments or negotiable documents that is made effective against third parties by a transfer of possession to the secured creditor has priority over a security right that was previously made effective against third parties by registration (see *Secured Transactions Guide*, recs. 101, 102, 108 and 109). This exception is based on the policy of preserving the free negotiability of these types of asset in the market place.

37. Third, where the encumbered asset is the right to payment of funds credited to a bank account or a right to receive the proceeds of a letter of credit, a secured creditor that achieves priority by taking "control" of the encumbered asset has priority over a prior or subsequent security right that is made effective against third parties by registration (see *Secured Transactions Guide*, Introduction, sect. B, "control" and recs. 103 and 107). As already mentioned (see footnote 9 above), securities, payment rights arising under or from financial contracts governed by netting agreements and payment rights arising under or from foreign exchange contracts are excluded from the scope of the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. I, paras. 37-39, and rec. 4, subparas. (c)-(e)). Enacting States will need to enact special priority rules in relation to these types of asset.

38. Fourth, to the extent that the secured transactions law applies to security rights in types of movable asset that are subject to specialized registration systems, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)), the *Secured Transactions Guide* recommends that priority should be given to a security right that was made effective against third parties by registration in the specialized registry as against a security right registered in the general registry; where both security rights are registered in the specialized registry, it recommends that priority should be determined by the order of registration in the specialized registry (see *Secured Transactions Guide*, recs. 77 and 78). These rules are designed to preserve the reliability and comprehensiveness of the specialized registry record.

39. Fifth, the *Secured Transactions Guide* adopts a similar approach to priority competitions involving competing security rights in attachments to immovable property. It recommends that priority should be given to a security right, notice of

which was registered in the immovable property registry, over a security right in the attachment, notice of which was registered only in the general security rights registry; where notice with respect to both competing security rights was registered in the immovable property registry, it recommends that priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 87 and 88). These rules are likewise designed to preserve the reliability and comprehensiveness of the immovable property registry record.

(b) Buyers or other transferees of encumbered assets

40. As a general rule, the *Secured Transactions Guide* recognizes that a secured creditor that has complied with the requirements for third-party effectiveness with respect to its security right has a “right to follow” the encumbered asset into the hands of a buyer or other transferee from the grantor that acquires rights in the encumbered asset (see *Secured Transactions Guide*, chap. II, paras. 72-89, chap. III, paras 15, 16 and 89, and rec. 79). Conversely, a transferee of an encumbered asset will take it free of a security right that has not been made effective against third parties by registration or by some other method even if it has knowledge of the existence of the security right (under the *Secured Transactions Guide*, “knowledge” means actual knowledge; see Introduction, sect. B). This approach is not unfair to secured creditors since they could have protected themselves by timely registration or by otherwise making their security right effective against third parties. However, the *Secured Transactions Guide* recognizes a number of exceptions to this general rule. The following paragraphs summarize the principal exceptions.

41. First, where a secured creditor authorizes the grantor to sell, lease or licence an encumbered asset free of a security right, the rights of a buyer or lessee or licensee are unaffected by the security right (see *Secured Transactions Guide*, rec. 80). Typically, the secured creditor will give its consent only after some arrangement has been made with the grantor to provide other security such as ensuring that the proceeds of the transaction will be remitted directly to the secured creditor.

42. Second, a buyer or lessee or licensee that acquires an encumbered asset in the ordinary course of the grantor’s business acquires rights unaffected by any security right in that asset even if the secured creditor has registered a notice of the security right or otherwise complied with the requirements for third-party effectiveness (see *Secured Transactions Guide*, rec. 81). This approach is consistent with the reasonable commercial expectations of the parties involved. For example, it is not realistic to expect buyers dealing with a commercial enterprise which routinely sells the types of asset in which the buyer is interested to check the registry before entering into the transaction. Moreover, a secured creditor that takes a security right in a grantor’s inventory will normally have done so on the expectation that the grantor will dispose of the inventory free of the security right in the ordinary course of the grantor’s business. After all, for the grantor to be able to generate the revenue necessary to pay back the secured loan, its customers need to be assured that they will acquire unencumbered title in any inventory sold to them in the grantor’s ordinary course of business.

43. Third, the same policy of preserving negotiability that justifies awarding a special priority to secured creditors that take physical possession of encumbered assets in the form of money or negotiable documents (such as a bill of lading) or

negotiable instruments (such as a cheque) also justifies awarding priority to outright transferees of these types of encumbered asset who take possession (see *Secured Transactions Guide*, recs. 101, 102, 108 and 109).

44. Fourth, as already mentioned, the *Secured Transactions Guide* may apply to assets that are subject to a specialized registration regime, such as motor vehicles, ships, aircraft and intellectual property (see *Secured Transactions Guide*, chap. I, paras. 32-36, and rec. 4, subparas. (a) and (b)). These registries typically serve broader goals than simply publicizing security rights in the relevant assets, notably, also recording ownership or transfers of ownership. Accordingly, to the extent that the *Secured Transactions Guide* applies to security rights in these types of asset, it recommends that priority should be given to the rights of a buyer or other transferee with respect to which a notice was registered in the specialized registry as against a security right with respect to which a notice was registered in the general security rights registry; where a notice with respect to the security right is also registered in the specialized registry, it recommends that priority should be determined by the order of registration (see *Secured Transactions Guide*, recs. 77 and 78).

45. Fifth, a similar approach is taken to priority competitions involving security rights in attachments to immovable property. The *Secured Transactions Guide* recommends that priority should be given to the rights of a buyer or other transferee of the relevant immovable property with respect to which a notice was registered in the immovable property registry as against a security right in the attachment with respect to which a notice was registered only in the general security rights registry; where a notice with respect to the security right in the attachment is also registered in the immovable property registry, it recommends that priority should be determined by the order of registration in the immovable property registry (see *Secured Transactions Guide*, recs. 87 and 88).

(c) Unsecured creditors of the grantor

46. One of the principal advantages of taking security is that it entitles the secured creditor to claim the value of the encumbered assets in preference to the claims of the grantor's unsecured creditors. Accordingly, the *Secured Transactions Guide* recommends that a security right has priority over the rights of an unsecured creditor provided that the secured creditor registers or otherwise makes its security right effective against third parties before the unsecured creditor obtains a judgement or provisional court order against the grantor and takes the steps necessary under other law of the enacting State to acquire rights in the encumbered assets (see *Secured Transactions Guide*, rec. 84). This approach enables unsecured creditors to determine the extent to which their debtors' assets may be encumbered in order to decide whether it is worthwhile to obtain a judgement and pursue judgement enforcement proceedings. This priority rule, however, is subject to an important caveat. Even if the secured creditor registers a notice of its security right or otherwise achieves third-party effectiveness after the unsecured creditor acquires rights in its debtor's encumbered assets, the secured creditor will have priority to the extent of credit that it advances before it has knowledge that the unsecured creditor has acquired rights in the encumbered assets or that it advances pursuant to a prior irrevocable commitment to extend credit to the grantor (see *Secured Transactions Guide*, chap. V, paras. 94-106, and rec. 84).

47. The *Secured Transactions Guide* discusses but does not make any recommendation with respect to the steps that an unsecured creditor must take to acquire rights in its debtor's assets so as to potentially prevail over a secured creditor that has failed to achieve third-party effectiveness at all or in time (see *Secured Transactions Guide*, chap. V, paras. 94-106). This is left to the judgement enforcement and execution law of the enacting State. In some States, an unsecured creditor acquires rights in its debtor's assets only once the judgement enforcement process is completed by seizure and sale and the judgement creditor's rights attach to the proceeds of the sale. In other States, an unsecured creditor upon obtaining judgement can obtain the equivalent of a general security right in the judgement debtor's present and future movable assets simply by registering a notice of the judgement in the general security rights registry. Accordingly, States enacting the general recommendations of the *Secured Transactions Guide* will need to take into account their existing law on this issue and decide on the most appropriate approach.

(d) The insolvency representative

48. Modern insolvency laws generally respect the priority to which secured creditors are entitled under other law in the event that insolvency proceedings are commenced against the grantor. This is the approach recommended in the *Secured Transactions Guide* (see *Secured Transactions Guide*, rec. 239) in line with the UNCITRAL Legislative Guide on Insolvency Law (the "Insolvency Guide"). It follows that a secured creditor generally will have priority over the claims of an insolvent grantor's unsecured creditors, provided that the secured creditor registered or otherwise satisfied the third-party effectiveness requirements of secured transactions law before the commencement of the insolvency proceedings. Conversely, the failure of the secured creditor to register a notice or otherwise make its security right effective against third parties before the commencement of the insolvency proceedings generally results in the secured creditor being effectively demoted to the status of an unsecured creditor.

49. Timely registration does not, however, protect a secured creditor from challenges on the basis of general insolvency law policies, such as rules avoiding preferential or fraudulent transfers and rules giving priority to certain protected classes of creditors (see *Secured Transactions Guide*, chap. XII, and rec. 239; see also *Insolvency Guide*, recs. 88 and 188).

50. A security right that was effective against third parties at the time of the commencement of the insolvency proceedings might lapse thereafter, for example, because it was made effective against third parties by registration and the period of effectiveness of the registration expired. To address this risk, the *Secured Transactions Guide* recommends that a secured creditor should be entitled to take any action required by the secured transactions law to preserve the effectiveness of its security right against third parties even after the commencement of insolvency proceedings (see *Secured Transactions Guide*, rec. 238). This recommendation is designed to ensure that a secured creditor is not denied the ability to maintain its priority status as a result of the automatic stay typically imposed on enforcement action by creditors upon the commencement of insolvency proceedings.

51. Where the insolvency proceeding takes the form of a reorganization, modern insolvency laws generally authorize the insolvent grantor to create a security right

in the assets of the insolvency estate to obtain post-commencement finance (see Insolvency Guide, rec. 65). Under the Insolvency Guide, such a security right does not have priority over any existing secured creditors unless agreed to by them or authorized by the court with the appropriate protections for them (see Insolvency Guide, recs. 66 and 67).

(e) Preferential claims

52. For various policy reasons, a State's secured transactions law, insolvency law or both may sometimes award preferential priority status to specified categories of unsecured creditors over the claims of secured creditors. Typical examples include the claims of the enacting State for taxes and of employees for unpaid wages or other employment benefits. In addition or alternatively, in the insolvency context, some States set aside a specified portion of the value of encumbered assets, particularly business assets, in favour of unsecured creditors in preference to secured creditors. The *Secured Transactions Guide* discusses preferential claims and recommends that, to the extent an enacting State decides to maintain any, they should be limited in both type and amount and prescribed in the secured transactions law and the insolvency law, as the case may be, in a clear and specific way (see *Secured Transactions Guide*, chap. V, paras. 90-93, and chap. XII, paras. 59-63, and recs. 83 and 239). The reason why the *Secured Transactions Guide* follows this approach is twofold. On the one hand, the *Secured Transactions Guide* is mindful of the social policies enacting States may wish to pursue with preferential claims. On the other hand, the *Secured Transactions Guide* recognizes that preferential claims may have an impact on the cost and availability of credit.

53. In some States, while a notice with respect to preferential claims may be registered in the general security rights registry, the registration and priority rules that apply to security rights created by a voluntary security agreement may not necessarily apply. The *Secured Transactions Guide* discusses but does not make any recommendation with respect to whether notices with respect to preferential claims should be registered and what the priority implications of registration should be (see *Secured Transactions Guide*, chap. V, para. 90).

(A/CN.9/WG.VI/WP.54/Add.1) (Original: English)
Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-third session

ADDENDUM

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Introduction (*continued*)

D. Overview of secured transactions law and the role of registration (*continued*)

6. Extended transactional scope of the registry

(a) Outright assignments

1. As already explained (see A/CN.9/WG.VI/WP.54, paras. 18-20), the secured transactions law contemplated by the *Secured Transactions Guide* is comprehensive in scope, covering all consensual transactions that in substance function to secure an obligation regardless of the formal character of the secured creditor's property right, the type of encumbered asset, the nature of the secured obligation or the status of the parties (see *Secured Transactions Guide*, chap. I, paras. 101-112, and recs. 2 and 10).

2. The *Secured Transactions Guide* recommends that the secured transactions law (with the exception of the rules governing enforcement on default) should also apply to outright assignments of receivables. Bringing such outright assignments within the scope of the secured transactions law does not mean that outright assignments are re-characterized as secured transactions. Rather, it is intended to ensure that an outright assignee of receivables is subject to the same rules relating to creation, third-party effectiveness and priority as the holder of a security right in receivables. It also ensures that the outright assignee has the same rights and obligations vis-à-vis the debtor of the receivable as a secured creditor (see *Secured Transactions Guide*, chap. I, paras. 25-31, and recs. 3 and 167).

3. Under this approach, an assignee generally will have to register a notice of its right in the security rights registry for the assignment to be effective against third parties that have claims against the assignor; and priority among the rights of successive competing assignees or secured creditors that have acquired rights in the same receivables from the same assignor/grantor will generally be determined by the order of registration (see *Secured Transactions Guide*, chap. III, para. 43). This approach recognizes that outright assignments of receivables not only perform a financing function but also create the same problem of information inadequacy for third parties as security rights in receivables. Unless a notice is registered in the security rights registry as a condition of third-party effectiveness, a potential secured creditor or assignee, or other third party would have no efficient means of verifying whether the receivables owed to a business have already been made subject to a security right or an assignment. While inquiries could be made of the debtors of the receivables, this is not practically feasible if they have not been notified of the assignment or if the transaction covers not only present but also future receivables generally.

(b) Other non-security transactions

4. True long-term leases and consignment sales of movable assets do not operate to secure the acquisition price of assets and consequently do not qualify as security rights so as to fall within the secured transactions law contemplated by the *Secured Transactions Guide*. However, they create the same information inadequacy concerns for third parties as non-possessory security rights, since they necessarily

involve a separation of a property right (the ownership of the lessor or consignor) from actual possession (which is with the lessee or consignee). To address this concern, some States expand the scope of their secured transactions regime (other than the enforcement rules) as it applies to acquisition security rights to these types of transaction. In addition to providing adequate information to third parties, this approach also diminishes the risk of litigation concerning whether a transaction in the form of a lease or a consignment is functionally a secured transaction. As such, a lease or a consignment would be: (a) ineffective against third parties if a notice with respect to it was not registered; or (b) subordinate in priority if the lessor or consignor did not comply with the requirements for obtaining the special priority given to acquisition security rights. The *Secured Transactions Guide* discusses but makes no recommendation on this matter (see *Secured Transactions Guide*, chap. III, para. 44). It may be noted, however, that, a lessor or a consignor can always register a precautionary notice, if it is concerned that its right might be characterized as a security right under the functional concept of security recommended in the *Secured Transactions Guide*, and thus lose its third-party effectiveness or priority status.

5. Some legal systems go even further and require registration of a notice with respect to preferential claims (for a discussion of the related topic of the priority status of preferential claims, see A/CN.9/WG.VI/WP.54, para. 52). The rationale underlying this approach is that, in the absence of registration, it will typically be difficult or impossible for prospective creditors to know whether preferential claims exist, a circumstance that is likely to increase uncertainty and thereby discourage secured credit. The *Secured Transactions Guide* does not recommend this approach. Even registered preferential claims can adversely affect the availability and the cost of secured credit when they are given priority over pre-registered security rights, as preferential claims diminish the economic value of an asset to a secured creditor, who will often shift the economic burden of such claims to the grantor by increasing the interest rate or by withholding the estimated amount of such claims from the available credit (see *Secured Transactions Guide*, chap. V, paras. 90-93).

7. Registration and enforcement of security rights

6. Some legal systems require secured creditors to register in the general security rights registry a notice that they have initiated or propose to initiate an enforcement action. The goal of this approach is to enable the security rights registry to notify third parties that have registered a notice with respect to a competing right in the same encumbered assets of the details of the pending enforcement. The *Secured Transactions Guide* does not recommend this approach. Instead, the *Secured Transactions Guide* recommends that the enforcing secured creditor should be required to search the registry and send out the required notices to interested third parties (including competing claimants) of the particular enforcement remedy that the enforcing secured creditor seeks to exercise (see *Secured Transactions Guide*, rec. 151). Such notification is intended to provide interested third parties (such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets) with an opportunity to monitor the enforcement proceedings, bid at any sale, or remedy the default that has given rise to the enforcement proceeding.

8. Conflict-of-laws considerations

7. Where a secured transaction is connected to more than one State, secured creditors and third parties need clear guidance as to which State's law applies. Under the conflict-of-laws recommendations of the *Secured Transactions Guide*, the law applicable to the creation, third-party effectiveness and priority of a security right in tangible assets is the law of the State in which the encumbered asset is located (see *Secured Transactions Guide*, rec. 203). This means that, where a secured creditor wishes to make its security right in a tangible asset effective against third parties by registration, it must register in the registry of the State where the encumbered asset is located. It follows that, where encumbered tangible assets are located in multiple States, registrations in the registries of all those States will be necessary. With respect to the creation, third-party effectiveness and priority of security rights in intangible assets and mobile assets that are ordinarily used in multiple jurisdictions, the applicable law, as a general rule, is the law of the State in which the grantor is located (see *Secured Transactions Guide*, rec. 208). As a result, the secured creditor must register in the registry of the State where the grantor is located.

8. The rules outlined above are the general baseline rules. The *Secured Transactions Guide* recommends different specialized conflict-of-laws rules for security rights in certain types of asset, including: (a) assets that are subject to a specialized registration regime; (b) receivables arising from a transaction relating to immovable property; (c) rights to the payment of funds credited to bank accounts; (d) rights to receive the proceeds under an independent undertaking; and (e) intellectual property rights (see *Secured Transactions Guide*, recs. 204-207, 209-215 and 248). For example, where the encumbered asset is an intellectual property right, the applicable law is primarily the law of the State under which the intellectual property is protected, although a security right that is created and made effective against third parties only under the law of the State in which the grantor is located may still be effective against the grantor's insolvency representative and judgement creditors (see *Supplement*, rec. 248).

9. Notice registration

9. Most States have established registries for recording title and encumbrances on title on immovable property. Many States have also established similar registries for a limited number of high-value movable assets, such as ships and aircraft. It is essential to the successful implementation of the kind of general security rights registry contemplated by the *Secured Transactions Guide* that its very different characteristics be well understood.

10. First, unlike the typical land, ship or aircraft registry, the general security rights registry contemplated by the *Secured Transactions Guide* does not purport to record the existence or transfer of title to the encumbered asset described in the notice or to guarantee that the person named as grantor in the notice is the true owner. It only provides a record of potentially existing security rights on whatever property right the grantor has or may acquire in the assets described in the notice as a result of off-record transactions or events (see *Secured Transactions Guide*, chap. IV, paras. 10-14).

11. Second, title registries typically require registrants to file or tender for scrutiny the underlying documentation. This is because registration generally is considered to constitute at least presumptive evidence of title and any property rights affecting title. While, the security rights registries in some States also require submission of the underlying security documentation, the *Secured Transactions Guide* recommends that States adopt a notice registration rather than a document registration system (see *Secured Transactions Guide*, recs. 54, subpara. (b), and 57). A notice registration system does not require the actual security documentation to be registered or even tendered for scrutiny by registry staff. All that need be registered is a notice that provides the basic information necessary to alert a searcher that a security right may exist in the assets described in the notice. It follows that registration does not mean that the security right to which the notice refers necessarily exists; only that one may exist at the time of registration or may come into existence later.

12. Third, in States that adopt document registration, registration is sometimes treated as a pre-condition to the creation of a security right. As already explained (see A/CN.9/WG.VI/WP.54, paras. 21, 22, 26 and 27), registration of a notice is irrelevant to the creation of a security right; registration makes any security right created by an off-record security agreement between the parties effective against third parties (see *Secured Transactions Guide*, recs. 32, 33 and 67).

13. The *Secured Transactions Guide* recommends notice registration rather than document registration because notice registration:

(a) Reduces transaction costs for registrants (as they do not need to register or provide evidence of the security documentation in order to register) and third-party searchers (as they do not need to peruse what may be voluminous security documentation to determine if a security right may exist in the relevant assets);

(b) Reduces the administrative and archival burden on registry system operators;

(c) Reduces the risk of registration error (since the less information that must be submitted, the lower the risk of error); and

(d) Enhances privacy and confidentiality for secured creditors and grantors (since the only information about a secured transaction that is publicly available is that which is necessary to alert a searcher that a security right may exist in the assets described in the registered notice).

14. As registration in a notice registration system does not necessarily mean that a security right actually exists, third parties with a competing property right in the encumbered assets will normally wish to obtain proof of the existence of an effective security agreement between the parties and the scope of the assets covered by it. The same is true even where the alleged security right has been made effective against third parties by some other method, such as a transfer of possession, since possession by the putative secured creditor may be for a purpose other than security.

15. Some States provide a procedure whereby a third party with a property right in the encumbered asset may demand this information directly from the person named as a secured creditor in a registration or who is otherwise claiming this status. The same right is extended to unsecured creditors of the grantor so as to enable them to

assess whether they should extend unsecured credit and whether it is worthwhile to undertake the expense of obtaining a judgement and pursuing enforcement against the debtor's assets. While the *Secured Transactions Guide* does not make a recommendation on this matter, it is always open to the debtor to request the secured creditor to send the relevant information directly to a third party. However, the debtor or the secured creditor may not be cooperative in which event the third party will need to seek a judicial order under other law.

16. Even in States that allow third parties to demand verification of the existence of a security right and its scope directly from the secured creditor, this right may not apply to potential buyers or potential secured creditors. They can protect themselves simply by refusing to buy or extend secured credit unless the registration relating to the security right is cancelled or the putative secured creditor is willing to undertake to them that it is not asserting and will not assert in the future a security right in the asset in which they are interested.

17. The grantor may also need to obtain up-to-date information about the scope and value of the security right claimed by its secured creditor and a copy of any written security agreement under which the security right is claimed. In some States, the grantor is entitled to demand this information free of charge although limits are usually placed on the frequency with which requests may be made so as to discourage demands that are unjustified or intended to harass.

10. Coordination with specialized movable property registries

18. Where specialized registries exist and permit the registration of security rights in movable assets with third-party effects (as is the case with the international registry under the Convention on International Interests in Mobile Equipment and its Aircraft Protocol), modern secured transactions regimes must deal with matters related to the coordination of registrations in the two types of registry. The *Secured Transactions Guide* and the *Supplement* discuss coordination of registries in detail (see the *Secured Transactions Guide*, chap. III, paras. 75-82, chap. IV, para. 117; and the *Supplement*, paras. 135-140).

19. One way of coordinating registries is through appropriate third-party effectiveness and priority rules. As already mentioned, the *Secured Transactions Guide* recommends that, while a security right in an asset subject to a specialized registry may be made effective against third parties by registration in the general security rights registry, it is subordinate in priority to a security right or other right, a notice of which was registered in the relevant specialized registry, irrespective of the temporal order of registration (see A/CN.9/WG.VI/WP.54, paras. 30 and 37, and *Secured Transactions Guide*, recs. 43 and 77, subpara. (a)).

20. The *Secured Transactions Guide* also discusses other ways of coordinating registries, including the automatic forwarding of information registered in one registry to another registry and the implementation of common gateways to the various relevant registries. This approach raises complexities with respect to the design of the general security rights registry where the specialized registry organizes registrations by reference to the asset as opposed to the grantor-based indexing system used in the general security rights registry (see *Secured Transactions Guide*, chap. III, paras. 77-81; see also A/CN.9/WG.VI/WP.54/Add.2, paras. 24-27). The *Secured Transactions Guide* envisages that States may wish to

modernize their various specialized registries. However, it does not make a formal recommendation as to how States should ensure the most efficient coordination of registries. This approach takes into account the fact that specialized registries are typically subject to law other than secured transactions law, and their purposes, organization and administration vary from State to State and often from registry to registry. Still, the *Secured Transactions Guide* suggests that a secured transactions law reform and the establishment of a general security rights registry may be used as an opportunity to reform specialized registry regimes to ensure an equivalent level of modern and efficient operation, by introducing, for example, notice registration, debtor-based indices, and for third-party effectiveness and priority purposes (see *Secured Transactions Guide*, chap. IV, para. 117).

11. Coordination with immovable property registries

21. Immovable property registries exist in most, if not in all, States. Typically, the general security rights registry is separate from the immovable property registry owing to differences as to: (a) what is registered (that is, document or notice); (b) the requirements for the description of the encumbered asset (that is, specific or generic); (c) indexing structures (that is, asset-based or debtor-based indices; see also A/CN.9/WG.VI/WP.54/Add.2, paras. 21-27) and legal consequences of registration (that is, creation or third-party effectiveness).

22. However, a State implementing a general security rights registry will need to provide potential secured creditors and third-party financiers with guidance as to the rules governing the third-party effectiveness and priority of security rights in movable assets that are at the time when the security right is created or subsequently become attachments to immovable property. As already discussed, the *Secured Transactions Guide* recommends that a notice of a security right in an attachment to immovable property may be registered either in the general security rights registry or in the immovable property registry and that the security right will be subordinate in priority to a security right or other right with respect to which a notice was registered in the immovable registry, irrespective of the temporal order of registration (see A/CN.9/WG.VI/WP.54, paras. 30 and 37, and *Secured Transactions Guide*, recs. 43, 87 and 88).

23. The asset description requirements for the registration of a notice relating to a security right in an attachment to immovable property may differ depending on whether the registration is made in the security rights registry or in the immovable property registry. The *Secured Transactions Guide* recommends that, for the purposes of registration in the security rights registry, an attachment to immovable property, just like any other encumbered asset, should be described in a manner that reasonably allows its identification (see *Secured Transactions Guide*, rec. 57, subpara. (b)). Thus, a description of the movable asset that is or will be attached may be sufficient without a description of the immovable property. In contrast, the immovable property registry regime will generally require that the immovable property to which the tangible asset is or will be attached be described sufficiently to allow the indexing of the notice in the immovable property registry.

E. Transitional considerations

24. The *Secured Transactions Guide* contains a detailed discussion of the various issues that States implementing a secured transactions law based on its recommendations will need to consider (see *Secured Transactions Guide*, Introduction, sect. E). These issues include the transitional treatment of security rights created under prior law, legislative drafting considerations and post-enactment acculturation.

25. The transitional treatment of existing security rights created under prior law is by far the most important of these considerations, since a law based on the recommendations of the *Secured Transactions Guide* will often constitute a significant departure from the enacting State's prior law.

26. The *Secured Transactions Guide* recommends that an enacting State apply its secured transactions law to all security rights including those already in existence on the date that the new law takes effect (the "effective date"). However, it recognizes four important qualifications.

27. First, prior law applies to enforcement matters that were already the subject of litigation or alternative binding dispute resolution proceedings that commenced before the effective date (see *Secured Transactions Guide*, rec. 229). However, this principle does not apply when the parties have recourse to a non-binding process, such as conciliation. In addition, continuing litigation under prior law should not preclude the secured creditor from commencing enforcement action under the new law after the effective date (see *Secured Transactions Guide*, chap. XI, paras. 15 and 16).

28. Second, prior law determines whether a security right allegedly created before the effective date was effectively created (see *Secured Transactions Guide*, rec. 230).

29. Third, a security right that was effective against third parties under prior law remains effective until the earlier of: (a) the time it would cease to be effective against third parties under prior law; and (b) the expiration of a period of time specified in the law after the effective date (the "transition period") (see *Secured Transactions Guide*, rec. 231). Under this approach, the holder of a security right that was created under prior law is given a transition period to comply with the third-party effectiveness requirements of the new secured transactions law.

30. Fourth, the priority of a security right is determined by prior law if: (a) the security right and all competing rights arose before the effective date; and (b) the priority of none of these rights changed after the effective date (see *Secured Transactions Guide*, rec. 233).

31. If the enacting State already has in place a registry for security rights in movable assets, additional transitional considerations will need to be addressed. If the new secured transactions law covers security rights previously within the scope of an existing registry, the enacting State may decide to assume responsibility for migrating the information in the existing record into the new registry record. In contrast to this approach, the *Secured Transactions Guide* recommends that the burden of migration be placed on secured creditors by giving them a transition period (for example, one year) to register or otherwise make their security right

effective against third parties. This approach has been used with considerable success in a number of States (especially, when such “re-registration” is free of charge). If this approach is chosen, a space or field on the registration form should be provided for indicating that the registration is a migration of a registration made prior to the effective date of the new secured transactions law (for a more detailed discussion of these types of transition issue, see chap. XI of the *Secured Transactions Guide*).

32. States implementing the recommendations of the draft Registry Guide will also need to consider issues of legislative method and drafting. Certain recommendations of the draft Registry Guide reiterate recommendations of the *Secured Transactions Guide* relating to the administration of the registry or its technical design. Such recommendations include the following: 7 (see recs. 55, subpara. (b), and 54, subpara. (d)); 11, subparagraph (a) (see rec. 70); 13 (see rec. 69); 12 (see rec. 67); 15 (see rec. 68); 18 (see rec. 55, subparas. (c) and (d)); 23 (see rec. 57); 28, subparagraph (a) (see rec. 63); 29, subparagraph (a) (see rec. 58); 29, subparagraph (b) (see rec. 64); 29, subparagraph (d) (see rec. 65); and 33 (see rec. 72). The rest of the recommendations address purely technical registration matters. Enacting States will need to consider whether to deal with all these issues in the secured transactions law, in the registry regulation, in the terms of use of the registry, or in all or more than one of these texts.

33. Enacting States will also need to consider issues of post-enactment acculturation and, in particular, will need to design a programme aimed at familiarizing potential registry users with the operation of the registry. More specifically, to ensure the smooth implementation of the registry and its active take up by potential users, enacting States will need to consider entrusting an implementation team with the task of developing education and awareness programmes, disseminating promotional and explanatory material and conducting training sessions. The implementation team should also develop instructions on entering information into paper registration forms and electronic screens.

I. Establishment and functions of the security rights registry

A. General remarks

1. Establishment of the registry

34. Typically, the opening provisions of the regulation provide for the establishment of the registry and reiterate briefly that, in line with its purpose as set out in the secured transactions law, the purpose of the registry is to receive, store and make available to the public, information relating to security rights in movable assets (see draft Registry Guide, rec. 1).

2. Appointment of the registrar

35. The regulation typically identifies, either directly or by reference to the relevant law, the authority that is empowered to appoint the registrar, determine his or her duties and generally supervise the registrar in the performance of those duties. To ensure flexibility in the administration of the registry, the term registrar should be understood as referring either to a single person or to a group of persons

appointed and supervised by the registrar to perform his or her duties (see draft Registry Guide, rec. 2).

3. Functions of the registry

36. The opening provisions of the regulation might also include a provision that lists the various functions of the registry that are dealt with in detail in the later provisions of the regulation with cross-references to the relevant provisions of the regulation in which these functions are addressed. This is the approach recommended in the draft Registry Guide (see draft Registry Guide, rec. 3). The advantage of this approach is clarity and transparency as to the nature and scope of the issues that are dealt with in detail later in the regulation. The possible disadvantage is that the list may not be comprehensive or may be read as implying unintended limitations on the detailed provisions of the regulation to which cross-reference is made. Accordingly, implementation of this approach requires special care to avoid any omissions or inconsistencies.

4. Additional implementation considerations

37. It is critical that the technical staff responsible for the design and implementation of the registry are familiar with the legal and practical objectives that it is designed to fulfil, as well as of the practical needs of the registry personnel and of potential registry users. Consequently, it is necessary at the very outset of the design and implementation process to constitute a team that reflects technological, legal and administrative expertise, as well as user perspectives.

38. It will also be necessary at an early stage to determine whether the registry is to be operated in-house by a governmental agency or in partnership with a private sector firm with demonstrated technical experience and financial accountability. While the day-to-day operation of the registry may be delegated to a private entity, the enacting State should always retain the responsibility to ensure that the registry is operated in accordance with the applicable legal framework (see *Secured Transactions Guide*, chap. IV, para. 47, and rec. 55, subpara. (a)). In addition, for the purposes of establishing public trust in the registry and preventing commercialization and fraudulent use of information in the registry record, the enacting State should retain ownership of the registry record and, when necessary, the registry infrastructure.

39. The design team will need to plan the storage capacity of the registry record. This assessment will depend in part on whether the registry is intended to cover consumer as well as business secured transactions and whether it will cover other transactions, such as true leases. If so, a much greater volume of registrations can be anticipated and thus the storage capacity should be increased. Capacity planning will also need to take into account the potential for additional applications and features to be added to the system. For example, designers may wish to provide sufficient capacity to permit expansion of the registry database at a later point to accommodate the registration of judgements or non-consensual security rights or the addition of linkages to other governmental records such as the State's corporate registry or its other movable or immovable registries. Capacity planning will depend as well on whether registered information is stored in a computer database or a paper record. Ensuring sufficient storage capacity is less of an issue if the record is in electronic form since recent technological developments have greatly decreased

storage costs (the *Secured Transactions Guide* recommends that the registry be electronic “if possible”; see rec. 54, subpara. (j), and paras. 42-49 below).

5. Registry terms and conditions of use

40. As already mentioned, registry-related matters are typically dealt with in the secured transactions law and the registry regulation. They may also be addressed in the registry “terms and conditions of use”. The registry terms and conditions of use are the terms and conditions of the agreement that is entered into by people who submit notices to, or search the public record of, the registry. For example, the registry terms and conditions of use may offer the opportunity to a regular user of the registry to open an account. Such an account could offer practical benefits such as quick access and a simplified mechanism for the payment of any fees. In addition, the registry terms and conditions of use should address the issues of the security and confidentiality of information and user data (such as, for example, user name and password, or other modern security technique).

41. Based on their terms and conditions of use, some registries make available to users upon request additional services. These services include, for example, the following: (a) transaction inquiries that allow users to track by their names or account information their transactions over a specified period of time; (b) verification statement reprints that provide reprints of a verification relating to a specific registration; and (c) statistical reports that provide registry designers, policymakers and academics with useful data (for example, as to the number of registrations and searches, the operating costs, and the registration and search fees collected).

6. Electronic or paper-based registry

42. The *Secured Transactions Guide* recommends that, if possible, the registry record, that is, the information in all registered notices, should be electronic in the sense that information in notices is stored in electronic form in a computer database, that is, the container of the information (see *Secured Transactions Guide*, chap. IV, paras. 38-41 and 43, and rec. 54, subpara. (j)(i)). An electronic registry record is the most efficient and practical means of enabling enacting States to implement the recommendation of the *Secured Transactions Guide* that the registry record must be centralized and consolidated (see *Secured Transactions Guide*, chap. IV, paras. 21-24, and rec. 54, subpara. (e)).

43. The *Secured Transactions Guide* further recommends that, if possible, the registry should be electronic in the sense of permitting the direct electronic submission of notices and search requests by users over the Internet or via direct networking systems as an alternative to the submission of paper registration notices and search requests (see *Secured Transactions Guide*, chap. IV, paras. 23-26 and 43 and rec. 54, subpara. (j)(ii)). This approach is the most effective means of implementing the recommendation of the *Secured Transactions Guide* that the system should be designed to minimize the risk of human error (see *Secured Transactions Guide*, chap. IV, rec. 54, subpara. (j)(iii)-(iv)) since it eliminates the need for registry staff to enter the information contained in a paper notice into the registry record and the risk of error associated with the transcription task.

44. Direct electronic registration and searching also contributes to a speedier registration and search process. When information is submitted to the registry in paper form, registrants must wait until the registry staff has entered the information into the registry record and the information is searchable by third parties before the registration becomes legally effective. Search requests transmitted by paper, fax or telephone also give rise to delays since searchers must wait until the registry staff member carries out the search on their behalf and transmits the results.

45. In addition to eliminating these delays and reducing the risk of human error, a registry system in which registrants and searchers have the option to electronically enter the information directly into the registry record offers the following other advantages:

(a) A very significant reduction in the staffing and other day-to-day costs of operating the registry;

(b) Reduced opportunity for fraudulent or corrupt conduct on the part of registry personnel;

(c) A corresponding reduction in the potential liability of the registry to users who otherwise might suffer loss as a result of the failure of registry staff to enter registration information or search criteria at all, or to enter it accurately; and

(d) User access to registration and searching services outside of normal business hours.

46. If this approach is implemented, the registry should be designed to permit registry users to submit a registration and conduct searches from any private computer facility, as well as from computer facilities made available to the public at branch offices of the registry or other locations. In addition, owing to the reduced costs of direct electronic access, the conditions governing access to the services of the registry should permit third-party private sector service providers to carry out registrations and searches on behalf of their clientele.

47. If the registry record is computerized, the hardware and software specifications should be robust and employ features that minimize the risk of data corruption, technical error and security breach. Even in a paper-based registry, measures should be taken to ensure the security and integrity of the registry record but this is more efficiently and easily accomplished if the registry record is in electronic form. In addition to database control programmes, software will also need to be developed to manage user communications, user accounts, payment of fees and financial accounting, computer-to-computer communication and the gathering of statistical data.

48. The necessary hardware and software needs will need to be evaluated and a decision made as to whether it is appropriate to develop the software in-house by the registry implementation team or purchase it from private suppliers. In making that determination, the team will need to investigate whether an off-the-shelf product is available that can easily be adapted to the needs of the implementing State. It is important that the developer/provider of the software is aware of the specifications for the hardware to be supplied by a third-party vendor, and vice versa.

49. Consideration should also be given to whether the registry should be designed to provide an electronic interface with other governmental databases. For example, in some States, registrants can search the company or commercial registry in the course of effecting a registration to verify and automatically input grantor or secured creditor identifier information (for a discussion of electronic matching of names, see A/CN.9/WG.VI/WP.54/Add.2, para. 58).

B. Recommendations 1-3

[Note to the Working Group: The Working Group may wish to consider recommendations 1-3, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

II. Access to registry services

A. General remarks

1. Public access

50. The *Secured Transactions Guide* recommends that any person may register a notice of an existing or potential security right or search the public record (not the archives; see *Secured Transactions Guide*, chap. IV, paras. 25-30 and rec. 54, subparas. (f) and (g)). This approach is in line with one of the key objectives of the *Secured Transactions Guide* which is to enhance certainty and transparency (see *Secured Transactions Guide*, chap. IV, para. 25, and rec. 1, subpara. (f)). Because of the importance of ensuring public access to registry services, this principle should be stated in the regulation (see draft Registry Guide, rec. 5).

51. Public access is facilitated if the registry is designed to enable users to submit notices and conduct searches electronically without the need for the assistance or intervention of registry personnel. As already discussed (see paras. 42-49 above), registration using paper forms is associated with cost, delay and the potential for error and liability for the registry.

2. Operating days and hours of the registry

52. The approach to the operating days and hours of the registry recommended in the *Secured Transactions Guide* depends on the extent to which the registry is designed to permit direct electronic registration and searching by users or requires their in-person attendance at a physical office of the registry. In the former case, the registry should be accessible continuously except for brief periods to undertake scheduled maintenance; in the latter case, it should operate during reliable and consistent hours compatible with the needs of potential registry users (see *Secured Transactions Guide*, chap. IV, para. 42, and rec. 54, subpara. (l)). In view of the importance of this issue to users, it should be addressed in the regulation or in administrative guidelines published by the registry (see draft Registry Guide, rec. 5).

53. Where the registry provides services through a physical office, the minimum operating days and hours should be the usual business days and hours in the enacting State. To the extent that the registry requires or permits the registration of paper notices, the registry should aim at ensuring that the information is entered into the registry record and made available to searchers on the same business day that the paper notice is received by the registry. Search requests submitted in paper form should likewise be processed on the same day they are received. To achieve this goal, the deadline for submitting paper notices or search requests may be set independently from the business hours. For example, the regulation or administrative guidelines of the registry could stipulate that, while the registry office is open between 09:00 and 17:00, all forms must be received by an earlier time (e.g. 16:00) so as to ensure that the registry staff has sufficient time to enter the information on notices into the registry record or conduct the search. Alternatively, the registry office could continue to receive paper notices throughout its business hours, but set a “cut off” time, after which information in notices received may not be entered into the registry record, or searches performed, until the next business day. A third approach would be for the registry to undertake that information will be entered into the registry record and a search will be performed within a stated number of business hours after receipt of the notice or search request.

54. The registry regulation or administrative guidelines could also enumerate either in an exhaustive way or an indicative way the circumstances in which access to the registry services may temporarily be suspended. An exhaustive list would provide more certainty but there is a risk that it may not cover all possible circumstances. An indicative list would provide more flexibility but less certainty. Circumstances justifying a suspension of the registry services might include any event that makes it impossible or impractical to provide users with access to the registry services (such as force majeure, due, for example, to fire, flood, earthquake, or war, or where the registry provides users with direct electronic access, a breakdown in Internet or network connection).

3. Access to registration services

55. The *Secured Transactions Guide* recommends that the registry must accept an initial notice of a security right submitted to it for registration (as opposed to an amendment or cancellation notice, acceptance of which is subject to different requirements), if it: (a) is presented in the authorized medium of communication (that is, in the prescribed paper or electronic form); (b) is accompanied by the authorized fee, if any; and (c) provides the grantor identifier and the other information required to be included in the notice (see *Secured Transactions Guide*, rec. 54, subpara. (c), and A/CN.9/WG.VI/WP.54/Add. 2, paras. 53 and 54).

56. In addition, the *Secured Transactions Guide* recommends that the registry must request and maintain a record of the identity of the registrant (see *Secured Transactions Guide*, rec. 55, subpara. (b) and paras. 57-59 below). This additional requirement is included as a measure of protection against the risk that a registration was not authorized by the person identified as the grantor in a registered notice. Requiring the registry to request and maintain the identity of the registrant enables the named grantor to determine to whom a demand to amend or cancel the unauthorized registration should be made. In order to facilitate the registration process, the evidence of identity required of a registrant should be that generally

accepted as sufficient in day-to-day commercial transactions in the enacting State (for example, a driver's licence or other state-issued official document); and the registry should have no right or duty to confirm the evidence of identity submitted by a registrant. Registrants should also be given the option of setting up a user account that provides them with special secure access codes for transmitting notices to the registry. This would facilitate access by frequent users (such as financial institutions, automobile dealers, lawyers and other intermediaries), since they would need to provide the required evidence of their identity only once when initially setting up the account.

57. To implement these recommendations, the regulation should provide that a person is entitled to have access to the registration services of the registry, if that person: (a) uses the prescribed form of notice; (b) provides its identity in the manner prescribed by the registry; and (c) has paid, or made arrangements to pay, any fees (see draft Registry Guide, rec. 6). The regulation should further provide that the registry may reject registration of a notice if it does not contain the required information in the designated field for that type of information or if the information entered is illegible (for the information required in an initial notice and an amendment or cancellation notice, see A/CN.9/WG.VI/WP.54/Add.2, para. 50, A/CN.9/WG.VI/WP.54/Add.4, para. 4, and draft Registry Guide, recs. 23, 30 and 32).

58. Where incomplete or illegible notices are submitted in paper form, there will necessarily be some delay between the receipt of the form by the registry and the communication of its rejection and the reasons for the rejection to the registrant. However, in a registry system that allows registrants and searchers to electronically submit registration information directly to the registry, the system should be designed so as to automatically reject the submission of incomplete or illegible notices and display the reasons on the electronic screen.

4. Verification of identity, evidence of authorization or scrutiny of the content of the notice not required

59. As already mentioned (see para. 56 above), the *Secured Transactions Guide* recommends that the registry must request and maintain a record of the identity of the registrant (see *Secured Transactions Guide*, chap. IV, para. 48, and rec. 55, subpara. (b)). To facilitate the registration process, the *Secured Transactions Guide* further recommends that the registry may not verify the evidence of identity offered by the registrant (see *Secured Transactions Guide*, rec. 54, subpara. (d)). This recommendation should be incorporated into the regulation (see draft Registry Guide, rec. 7, subpara. (a)).

60. In addition, the *Secured Transactions Guide* recommends that registration of a notice should be ineffective unless authorized by the grantor in writing. However, to avoid delay and costs for registrants, evidence of the grantor's authorization is not a pre-condition to access to registry services. Rather, the grantor's authorization may be given before or after registration, and a written security agreement is sufficient to constitute authorization (see *Secured Transactions Guide*, chap. IV, para. 106, and rec. 71). This recommendation should be incorporated into the regulation (see draft Registry Guide, rec. 7, subpara. (b)).

61. Once a registrant satisfies the requirements outlined above for obtaining access to the registry services, the registry has no right to reject the notice. Accordingly, the regulation should confirm that the registry may not conduct other scrutiny of the content of the notice (see draft Registry Guide, rec. 7, subpara. (c)). This does not mean that the registered notice will necessarily be legally effective. The registrant is responsible for any errors or omissions in the registration information submitted by the registrant to the registry (on the types of errors or omissions that may render a registered notice ineffective, see A/CN.9/WG.VI/WP.54/Add.3, paras. 17-29). If the registry had to scrutinize the notice and confirm its effectiveness, the result would be delay, cost and potential for error, a result that would run counter to the kind of efficient registry envisaged in the *Secured Transactions Guide*. Accordingly, the regulation should also confirm that it is not the responsibility of the registry to ensure that the information in a notice is entered in the designated field and is complete, accurate and legally sufficient (see draft Registry Guide, rec. 7, subpara. (c)).

5. Access to search services

62. Citing privacy concerns, some States require searchers to provide justifiable reasons for conducting a search. To facilitate public access to the registry's search services, the *Secured Transactions Guide* recommends that a searcher should not be required to give reasons for the search (see *Secured Transactions Guide*, rec. 54, subpara. (g)). To require searchers to justify a search would undermine the efficiency of the search process, since the registry would have to train its employees to perform this function and would have to scrutinize the reasons given and determine whether they are sufficient to justify a search. Depending on the exact reasons required, equal public access to information in the registry may be impeded, since some potential searchers may not have information available to others. Privacy concerns relating to the grantor are more effectively dealt with by requiring grantor authorization for a registration (see para. 60 above) and by establishing a summary judicial or administrative procedure to enable grantors to cancel or amend unauthorized or erroneous notices quickly and inexpensively (see A/CN.9/WG.VI/WP.54/Add.4, paras. 38-41). Privacy concerns relating to the identity of the secured creditor can be addressed by enabling registrations to be effected by and in the name of the secured creditor's representative. In any event, privacy is less of a concern under the notice registration approach recommended by the *Secured Transaction Guide*, since registered notices provide only the minimal information needed to alert a searcher that a security right may exist in the asset described in a registered notice (see paras. 9-11 above).

63. Accordingly, the regulation should provide that any person is entitled to search the publicly accessible registry record provided that person submits the search request in the prescribed form and has paid, or made arrangements to pay any prescribed fee (see draft Registry Guide, rec. 9). The recommended provision refers to the "public" registry record because expired and cancelled registrations must be removed from the public record and archived (see A/CN.9/WG.VI/WP.54/Add.2, paras. 44 and 45, and draft Registry Guide, rec. 20).

64. As with incomplete or illegible registrations, the regulation should provide that the registry may reject a search request if the searcher does not enter a search criterion in a legible manner in the designated field and must provide the

grounds for a rejection immediately or as soon as practicable (see draft Registry Guide, rec. 10). In registry systems that permit registrants to electronically submit search requests to the registry, the software should be designed so as to automatically prevent the submission of search requests that do not include a legible search criterion in the designated field and display the reasons on the electronic screen.

65. Unlike the approach adopted for registrants (see paras. 55-57 above), the *Secured Transactions Guide* does not require the registry to request and maintain evidence of the identity of a searcher as a pre-condition to submitting a search request (see *Secured Transactions Guide*, rec. 55, subpara. (b)). Since a searcher is merely retrieving information contained in registered notices from the registry record, there is no equivalent concern with protecting the grantor from unauthorized registrations. Accordingly, identification evidence should be requested of searchers only if this is necessary for the purposes of collecting search fees, if any.

B. Recommendations 4-10

[Note to the Working Group: The Working Group may wish to consider recommendations 4-10, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

(A/CN.9/WG.VI/WP.54/Add.2) (Original: English)
Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-third session

ADDENDUM

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III. Registration

A. General remarks

1. Time of effectiveness of the registration of a notice

1. The *Secured Transactions Guide* recommends that the registration of a notice becomes effective only when the information contained in the notice is entered into the registry record so as to be available to searchers, rather than when the information contained in the notice is received by the registry (see *Secured Transactions Guide*, chap. IV, paras. 102-105, and rec. 70).

2. In view of the importance of the effective time of registration for determining the third-party effectiveness and priority of the security right to which it relates, this recommendation should be included in the regulation (see draft Registry Guide, rec. 11, subpara. (a)). In addition, the regulation should provide that the effective time of registration (that is, the date and time when the notice became searchable) should be indicated on the registry record relating to that notice (see draft Registry Guide, rec. 11, subpara. (b)).

3. As already mentioned, the *Secured Transactions Guide* recommends that the registry record should be computerized if possible. Where information contained in notices is entered into a computerized registry record, the registry software should be designed to ensure that the information becomes publicly searchable immediately or nearly immediately after it is entered. With modern advances in technology, this should not be a problem. As a result, any delay between the entry of the information in a notice into the record and the time when the information becomes available to searchers will be all but eliminated.

4. In registry systems that permit registrants to electronically transmit information directly to the registry, registrants will have control over the timing and efficiency with which their registrations become effective. However, in registry systems that permit or require registration information to be submitted using a paper form, registrants are dependent on the registry staff to enter the information found on the paper form into the registry record on their behalf. In view of the importance of the timing and order of registration to the third-party effectiveness and priority of a security right, the regulation should provide that the registry must enter information in paper notices into the registry record in the order in which they were submitted to the Registry (see draft Registry Guide, rec. 11, subpara. (c)).

5. In a hybrid registry system which permits notices to be submitted in both paper and electronic form, this recommendation would not necessarily ensure the priority of a secured creditor that submitted a paper notice to the registry before a competing secured creditor submitted a notice electronically. For example, the paper notice may be received at 08:00, and entered into the registry record by the registry staff and become searchable at 08:30, while a competing secured creditor may enter a notice electronically at 08:05 which may become searchable at 08:10. Assuming priority between them is determined by the general first-to-register rule, the latter would have priority since its notice was the first to become searchable and therefore the first to be registered. In systems that adopt a hybrid approach, registrants who elect to use paper notices should be alert to this potential disadvantage.

6. The regulation should require the registry to assign a unique registration number to an initial notice (see draft Registry Guide, rec. 12). This is necessary to ensure that any subsequent amendment or cancellation notice that relates to the security right to which the initial notice relates is associated with that initial notice in the registry record so as to be capable of being retrieved and included in a search result (for a discussion of the need for a registrant to provide the registration number of the initial notice to which the amendment or cancellation relates, see A/CN.9/WG.VI/WP.54/Add.4, paras. 4 and 24).

2. Period of effectiveness of the registration of a notice

7. The *Secured Transactions Guide* recommends that an enacting State may adopt one of two approaches to the period of effectiveness (or duration) of a registered notice (see *Secured Transactions Guide*, chap. IV, paras. 87-91, and rec. 69).

8. Under option A, all registered notices are subject to a uniform statutory period of effectiveness. It follows that, where the secured transaction to which the registered notice relates has a longer duration, the secured creditor must ensure that the period of effectiveness is renewed before the expiry of the statutory period. This approach provides certainty as to the period of effectiveness of a registered notice, but limits the flexibility of the registrant to match the period of effectiveness of the registered notice to the likely duration of the secured financing relationship.

9. Under option B, the registrant is permitted to self-select the desired period of effectiveness with the option to renew for an additional self-selected period by registering an amendment notice. In legal systems that adopt this approach, it may be desirable to base registration fees on a sliding tariff related to the duration selected by the registrant in order to discourage the selection of excessive terms that do not correspond to the expected duration of the underlying security agreements (with a cushion of extra time to allow for delays in payment of the secured obligation).

10. Enacting States should incorporate one or the other of these options in their secured transactions law and in the regulation (see draft Registry Guide, rec. 13, options A and B). Alternatively, enacting States could adopt a third option, which is a hybrid of the first two options. Under this approach, the registrant would be entitled to select the period of effectiveness of the registered notice subject to a maximum limit, so as to discourage the selection of excessive terms (see *Secured Transactions Guide*, chap. IV, para. 88, and draft Registry Guide, rec. 13, option C).

11. If a State adopts option A, it needs to design its registry system to allow the registrant to reduce the legal period of effectiveness of a registered notice if the actual duration of their security agreement is less than the specified statutory period. This is because a registrant is obligated, in any event, to register a cancellation notice once the secured obligation is satisfied and the security agreement is terminated (see A/CN.9/WG.VI/WP.54/Add.4, paras. 38-41).

12. In States that implement options B or C, the period of effectiveness of the registered notice is a mandatory component of the information required to be included in a notice with the result that a notice would be rejected if it did not indicate its period of effectiveness in the designated field (see A/CN.9/WG.VI/WP.54/Add.3, para. 14).

13. Where option B or C is selected by an enacting State, it may be desirable to design the prescribed notice form in a way that permits the registrant to easily indicate the desired period without the risk of inadvertent error, for example, by limiting the choice to whole years from the date of registration.

14. Whether a State adopts option A, B or C, the general law of the enacting State for calculating time periods will apply to the calculation of the period of effectiveness of a registered notice, unless the secured transactions law provides otherwise. For example, the general law of the enacting State may provide that where the calculation is from the day of registration or from the anniversary of the day of registration, a year runs from the beginning of that day.

15. Regardless of the approach an enacting State may take to determining the period of effectiveness of a registration, under the recommendations of the *Secured Transactions Guide*, the third-party effectiveness of a security right is lost once the registration expires unless: (a) the security right is made effective against third parties prior to the lapse by some other permitted method permitted for that type of encumbered asset (see *Secured Transactions Guide*, rec. 46); or (b) an amendment notice is registered extending the period of effectiveness of the registration. While the third-party effectiveness of that security right could be re-established by registering a new notice, the security right would take effect against third parties only from the time of the new registration. Consequently, it would as a general rule be subordinate to prior registered secured creditors and secured creditors that earlier made their security rights effective against third parties by a method other than registration (see *Secured Transactions Guide*, recs. 47 and 96 and A/CN.9/WG.VI/WP.54/Add.4, paras. 25-27).

3. Time when a notice may be registered

16. The *Secured Transactions Guide* recommends that it should be possible for a notice to be registered before the creation of the security right or the conclusion of a security agreement; this is often referred to as “advance registration” (see *Secured Transactions Guide*, chap. IV, paras. 98-101, and rec. 67). This rule may apply to an initial or amendment notice (as, in principle, an initial or an amendment notice may be pre-registered) but not to a cancellation notice (as normally the negotiations have to be concluded unsuccessfully for a cancellation notice to be registered). This rule typically would be stated in the secured transactions law. However, depending on the drafting conventions in the enacting State, it may be included in the regulation (see draft Registry Guide, rec. 14).

17. As already explained (see A/CN.9/WG.VI/WP.54, para. 27), registration does not create and is not necessary for the creation of a security right (see also *Secured Transactions Guide*, rec. 33). Consequently, until the security agreement is actually entered into and the other requirements for the creation of a security right are satisfied, the secured creditor may be defeated by a competing claimant, such as a buyer that acquires rights in the encumbered assets in the period between advance registration and the creation of the security right. However, registration will generally ensure that the secured creditor, once the security right is created, has priority over another secured creditor that registers subsequently, regardless of the order of creation of the competing security rights (A/CN.9/WG.VI/WP.54, para. 33).

18. If the negotiations are aborted after the registration is effected or for some other reason no security agreement is ever entered into between the parties, the creditworthiness of the person named as grantor in the registration may be adversely affected by the existence of the registration unless it is cancelled. To address this concern, the *Secured Transactions Guide* recommends that, if the potential secured creditor does not cancel its registration, the enacting State should establish a summary judicial or administrative procedure to enable the grantor to have the registration cancelled in the event the registrant fails or refuses to do so itself (see *Secured Transactions Guide*, rec. 72, subpara. (a), recs. 54, subpara. (d), and 72, subparas. (b) and (c), and A/CN.9/WG.VI/WP.52/Add.4, paras. 38-41, and draft Registry Guide, rec. 33).

4. Sufficiency of a single notice

19. In a notice registration system of the kind contemplated by the *Secured Transactions Guide* (see *Secured Transactions Guide*, chap. IV, paras. 10-14, and rec. 57, as well as A/CN.9/WG.VI/WP.54/Add.1, paras. 9-17 and draft Registry Guide, rec. 21), there is no reason why a single notice should not be sufficient to give third-party effectiveness to present or future security rights arising under multiple security agreements between the same parties covering the assets described in the notice (see *Secured Transactions Guide*, rec. 68). Requiring a one-to-one relationship between each notice and each security agreement would generate unnecessary costs and undermine the ability of the secured creditor to flexibly respond to the grantor's evolving financing needs without having to fear a loss of the priority position it holds under the initial registration. Accordingly, the *Secured Transactions Guide* recommends that the registration of a single notice should be sufficient to achieve the third-party effectiveness of one or more than one security right, whether they exist at the time of registration or are created later and whether they arise from one or more than one security agreements between the same parties (see *Secured Transactions Guide*, rec. 68). This rule typically would be stated in the secured transactions law. However, depending on the drafting conventions in the enacting State, it may be included or reiterated in the regulation (see draft Registry Guide, rec. 13).

20. It should be emphasized that a registration achieves the third-party effectiveness of security rights arising under multiple security agreements only to the extent that the description of the encumbered assets in the notice corresponds to their description in any new or amended security agreement (see *Secured Transactions Guide*, rec. 63). Otherwise, the registration would not serve the function of alerting third-party searchers to the potential existence of a security right. Accordingly, to the extent that any security agreement concluded between the parties covers additional assets that were not described in the initial notice, a new notice or an amendment of the initial notice would be needed and the third-party effectiveness and priority of the security right in these additional assets would date only from the time of registration of the new notice or the amendment.

5. Grantor-based organization and retrieval of registered notices

21. Registrations in an immovable registry are typically organized and retrieved by reference to an alphanumeric or similar identifier for the particular immovable (for example, its civic address). The same approach is usually taken for

asset-specific movables registries such as ship or aircraft registries. For example, the international registry established under the Cape Town Convention and Aircraft Protocol uses the serial number assigned by the manufacturer of the aircraft object as the principal indexing and search criterion.

22. In contrast to this approach, the *Secured Transactions Guide* recommends that the primary indexing criterion for the purposes of searching and retrieving registered notices should be the identifier of the grantor (see *Secured Transactions Guide*, chap. IV, paras. 31-36, and rec. 54. subpara. (h)). This recommendation is based on two considerations. First, most categories of movable asset do not have a sufficiently unique identifier to enable useful asset-based searching. Second, grantor-based indexing and searching enables a security right in the grantor's future assets and circulating pools of revolving assets, such as inventory and receivables, to be made effective against third parties by a single one time registration (see *Secured Transactions Guide*, rec. 68). To implement this recommendation, enacting States should incorporate it in the regulation (see draft Registry Guide, rec. 14).

23. Although the *Secured Transactions Guide* refers to the indexing of information in the registry record, indexing as a technical matter is not the only mode of organizing information in a data base so as to make it searchable. Accordingly, the regulation should be drafted to allow flexibility at this level in the design of the registry (see draft Registry Guide, rec. 16).

6. Serial number-based organization and retrieval of registered notices

24. Grantor-based indexing and searching has a drawback in a specific transactional context often referred to as the "A-B-C-D problem". Suppose, for example, that B, after granting a security right in its automobile in favour of A, sells the automobile to C, who in turn proposes to sell or grant security in it to D. Assuming D is unaware that C acquired the asset from the original grantor B, D will search the registry using C's identifier as the search criterion. Unless A amended its registration to add C as an additional grantor or registered a new registration notice naming C as the grantor, D's search will not retrieve the registered notice relating to the security right granted by B in favour of A (on the question whether a secured creditor should be obligated to amend its registration to add a transferee from the original grantor as a new grantor, see A/CN.9/WG.VI/WP.54/Add.4, paras. 9-12). Yet under the recommendations of the *Secured Transactions Guide*, the security right granted by B will generally follow the automobile into the hands of D (see *Secured Transactions Guide*, recs. 79 and 81).

25. In response to the "A-B-C-D problem", some secured transactions laws provide for supplementary asset-based indexing and searching. As a practical matter, this approach is feasible only for types of movable assets for which unique and reliable serial numbers or equivalent alphanumerical identifiers are available. For example, the automotive industry assigns a unique alphanumerical identifier, commonly referred to as a vehicle identification number, to identify individual motor vehicles according to a system based on standards issued by the International Organization for Standardization (ISO). In regimes that enable searchers to retrieve registered notices using a unique alphanumerical number of this kind, a prospective transferee in the position of D is protected, since a search by that number will disclose all security rights granted in the particular motor vehicle by any owner in

the chain of title. Other types of assets for which some regimes have adopted this approach include trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors.

26. The *Secured Transactions Guide* discusses but makes no recommendation on the question of using the serial number or equivalent alphanumeric identifier of an asset as an indexing and search criterion (see *Secured Transactions Guide*, chap. IV, paras. 34-36). The disadvantage of this approach is that it may reduce the ability of the parties to create an effective security right in future assets to the extent that the registrant must continuously amend its registered notice to add the serial number or other identifier of assets that are acquired by the grantor after the registration of the initial notice. Accordingly, in States that have implemented this approach, it is limited to assets that, in addition to having a unique identifier, have a high resale value and a significant resale market (for example, in addition to motor vehicles, trailers, mobile homes, aircraft frames and engines, railway rolling stock, boats and boat motors).

27. In addition, under the secured transactions law of States that have adopted this approach, serial number registration is required for the purposes of achieving third-party effectiveness and priority only as against those classes of competing claimants that are most potentially prejudiced by the so-called “A-B-C-D problem” (notably, transferees of the encumbered assets). As against other classes of competing claimants, for example, the grantor’s judgment creditors or insolvency administrator, registration of a notice that does not include entry of the serial number in the designated field is still effective against third parties so long as the notice otherwise sufficiently describes the encumbered asset. Furthermore, the entry of the serial number is not required at all where the relevant assets are held by the grantor as inventory. In the case of inventory, the entry of a generic description in the general field designated for entering a description of the encumbered assets is sufficient. This is because the “A-B-C-D problem” does not arise in the case of inventory, since buyers that acquire inventory from the original grantor in the ordinary course of the grantor’s business take the inventory free of the security right in any event (see *Secured Transactions Guide*, rec. 81, subpara. (a)).

7. Preserving the integrity and security of the registry record

28. As already mentioned (see A/CN.9/WG.VI/WP.54/Add.1, para. 38), for the purposes of establishing public trust in the security of the registry record, the *Secured Transactions Guide* recommends that, while the day-to-day operation of the registry may be delegated to a private authority, the State retains the responsibility to monitor the operation of the registry, and retains ownership of the registry record, and, if necessary, the registry infrastructure (see A/CN.9/WG.VI/WP.54/Add.1, para. 38). Other steps to ensure the integrity and security of the registry record include: (a) the obligation of the registry to request and maintain the identity of the registrant (see A/CN.9/WG.VI/WP.54/Add.1, paras. 56 and 57); (b) the obligation of the registry send promptly copies of registered notices to the registrant (see paras. 38-40 below); (c) the obligation of the registrant to send promptly copies of registered notices to the person named as the grantor in a registered notice (see paras. 41 and 42 below); and (d) the elimination of any discretion on the part of registry staff to reject users’ access to the registry services (see A/CN.9/WG.VI/WP.54/Add.1, paras. 55-58).

29. Additional measures to ensure that the integrity of the registry record is preserved include the following. First, the regulation should make it clear that the registry staff may not alter or remove information in registered notices, except as specified in the law and the regulation (see draft Registry Guide, rec. 17) and that any changes can only be made by registration of an amendment notice in accordance with the regulation (see draft Registry Guide, rec. 19). Nonetheless, enacting States may wish to consider whether the registry should be authorized to directly correct information in a registered notice where the notice was submitted by the registrant in paper form and the registry failed to accurately or completely enter the information on the paper form into the registry record. If this approach is adopted, a notice of the correction should be promptly sent to the registrant. Alternatively, the enacting State could require the registry to notify the registrant of its error and the registrant could then submit an amendment notice free of charge (for a discussion of the liability of the enacting State for loss or damage caused to the registrant or, for example, to another secured creditor that registered before the notice was amended, see paras. 34-37 below).

30. Second, to protect the registry record against the risk of physical damage or destruction, the enacting State should maintain back-up copies of the registry record (see *Secured Transactions Guide*, chap. IV, paras. 54, and rec. 54, subparas. (f)).

31. Third, the potential for registry staff corruption should be minimized by: (a) designing the registry system to make it impossible for registry staff to alter the time and date of registration or any information entered by a registrant; (b) instituting financial controls that strictly monitor staff access to cash payments of fees and to the financial information submitted by clients who use other modes of payment; and (c) designing the registry system to ensure that the archived copy of cancelled registrations preserves the original data submitted.

32. Fourth, it should be made clear to registry staff and registry users, *inter alia*, that the registry staff is not allowed to give legal advice on the legal requirements for effective registration and searching or on the legal effects of registrations and searches. However, registry staff should be able to give practical advice with respect to the registration and search process (see paras. 34-36 below).

33. Finally, as already discussed (see A/CN.9/WG.VI/WP.54/Add.1, paras. 55-58 and 62-65), the registry should be designed, if possible, to enable registrants and searchers to directly submit information for registration and conduct a search directly and electronically as an alternative to having registry staff do this on their behalf (see *Secured Transactions Guide*, rec. 54, subpara. (j)). Under this approach, users bear sole responsibility for any errors or omissions they make in the registration or search process and carry the burden of making the necessary corrections or amendments (see draft Registry Guide, rec. 7, and A/CN.9/WG.VI/WP.54/Add.1, para. 61). Consequently, the potential for corruption or misconduct on the part of the registry staff is greatly minimized since their duties are essentially limited to managing and facilitating electronic access by users, processing fees, overseeing the operation and maintenance of the registry system and gathering statistical data.

8. Liability of the registry

34. The *Secured Transactions Guide* recommends that the secured transactions law should provide for the allocation of legal responsibility for loss or damage caused by an error in the administration or operation of the registration and searching system (see *Secured Transactions Guide*, rec. 76).

35. As noted earlier, users bear sole legal responsibility for any errors or omissions in the registration information or search requests they submit to the registry and carry the burden of making the necessary corrections or amendments (see draft Registry Guide, rec. 7, and A/CN.9/WG.VI/WP.54/Add.1, para. 61). Where notices and search requests are directly submitted by users electronically without the interposition of registry staff, the potential liability of the enacting State should, therefore, be limited to system malfunction, since any other error would be attributable to the registrant (see *Secured Transactions Guide*, rec. 56). However, where a notice or search request was submitted using a paper form, the enacting State will need to address the existence or the extent of its potential liability for the refusal or failure of the registry to correctly enter registration information into the registry record or to correctly carry out a search request where the notice or search request was submitted using a paper form.

36. While it should be made clear that registry staff are not allowed to give legal advice, the enacting State will additionally need to address whether and to what extent it should be liable if registry staff provide incorrect or misleading information on the requirements for effective registration and searching or on the legal effects of registrations and searches.

37. To the extent they accept legal responsibility for loss or damage caused by system malfunction or registry staff error or misconduct, some States allocate part of the registration and search fees collected by the registry into a compensation fund to cover possible claims whereas in other States, claims are paid out of general revenue.

9. Registry's duty to send a copy of the registered notice to the registrant

38. As noted earlier, the registration of a notice becomes effective when the information contained in the notice is entered into the registry record so as to be available to searchers. In view of the importance of the effective time of registration to the third-party effectiveness and priority of a security right, the *Secured Transactions Guide* recommends that a registrant should be able to obtain a record of a registration as soon as the information contained in a notice is entered into the registry record and should be informed by the registry of any changes to an initial registration (see *Secured Transactions Guide*, chap. IV, paras. 49-52, and rec. 55, subparas. (d) and (e)). Accordingly, the regulation should provide that the registry must promptly transmit a copy of a registered notice (whether it is an initial or an amendment or cancellation notice) to the registrant, indicating the date and time when it became effective (see draft Registry Guide, rec. 18).

39. If the registry needs to send a paper copy of registered notices by ordinary mail to the registrant, this will delay the ability of the registrant to act with confidence on the third party effectiveness and priority of its security right. Accordingly, the registry should be designed, if possible, to automatically generate an electronic copy of a registered notice. If the system permits notices to be

submitted by the registrant electronically, the system should be designed to automatically transmit the electronic copy of the registered notice to the registrant using their common electronic interface. Even if the registrant submitted a paper notice, the registry system should be designed to permit electronic transmission of the copy, for example, by electronic mail attachment, to the registrant.

40. A registrant would want to receive a copy of a registered amendment or cancellation notice in order to be able to take prompt steps to protect its position in the event that the registration was unauthorized or erroneous. There are effective steps that can be taken to protect a registrant against the risk of fraudulent amendments or cancellations by a third party (for a discussion of the effectiveness of amendment or cancellation notices not authorized by the secured creditor, see A/CN.9/WG.VI/WP.54/Add.4, paras. 28-37).

10. Secured creditor's duty to send a copy of the registered notice to grantor

41. As already noted (see A/CN.9/WG.VI/WP.54/Add.1, para. 60), a secured creditor must obtain the written authorization of the grantor, in the security agreement or in a separate agreement, to effect a registration. To enable the person named as grantor in a registered notice to verify that the registration was in fact authorized, and that the registration information corresponds to the scope of the authorization, the *Secured Transactions Guide* recommends that the secured creditor must send a copy of the registered notice to the grantor (see *Secured Transactions Guide*, rec. 55, subpara. (c)). This recommendation should be reflected in the regulation (see draft Registry Guide, rec. 18, subpara. (b)).

42. Placing the obligation on the secured creditor, rather than the registry, to send a copy of the notice to the grantor is intended to avoid creating an additional burden for the registry which could negatively affect its efficiency. On the assumption that in most cases registrations will be made in good faith and will be authorized, the failure of the secured creditor to meet this obligation is not a pre-condition to the effectiveness of the registration. Rather, it results only in nominal penalties and liability to compensate the grantor for any actual damage resulting from the failure (see *Secured Transactions Guide*, chap. IV, para. 51, and rec. 55, subpara. (c), and paras. 41 and 42 above).

11. Amendment of information in the public registry record

43. The *Secured Transactions Guide* recommends that a secured creditor may amend information in a registered notice by registering an amendment notice at any time (see *Secured Transactions Guide*, chap. IV, paras. 110-116, and rec. 73). The *Secured Transactions Guide* also recommends that a grantor may, in certain circumstances, seek an amendment through a judicial or administrative process (see *Secured Transactions Guide*, chap. IV, paras. 107 and 108, and rec. 72). In view of the importance of these recommendations, the regulation may restate them and, in addition, set out the information that an amendment notice should contain (see draft Registry Guide, rec. 19 and paras. 50-53 below).

12. Removal of information from the public registry record and archival

44. The *Secured Transactions Guide* recommends that information contained in a registered notice should be removed promptly from the public record once the

period of effectiveness of the notice expires or a cancellation notice is registered; the information must then be archived so as to be capable of retrieval if necessary (see *Secured Transactions Guide*, chap. IV, para. 109, and rec. 74). If cancelled or expired notices remained publicly searchable, this might create legal uncertainty for third party searchers, impeding the ability of the grantor to grant a new security right in or deal with the assets described in the notice. Archival in a manner that permits retrieval is nonetheless required since expired or cancelled notices may need to be retrieved in the future, for example, in order to determine the time of registration or the scope of the encumbered assets in a subsequent priority dispute between the registrant and a competing claimant. The regulation should include rules implementing these recommendations (see draft Registry Guide, recs. 20 and 21).

45. The regulation should also specify a minimum period of time for which archived notices must be preserved (for example, twenty years) (see draft Registry Guide, rec. 21). The length of the archival period may be influenced by the length of the prescription or limitation period under the law of the enacting State for initiating claims. For example, with respect to security rights, if the law provides that no action may be brought later than fifteen years from the date of extinguishment of the security right or termination of the security agreement, the registry regulation could provide for a co-extensive archival period. In deciding the appropriate period, the enacting State should also consider whether the law permits an extension of the prescription period and whether the registry should then be obligated to keep the information in its archives for a period equivalent to any permitted extension.

13. Language of notices and search requests

46. While the *Secured Transactions Guide* does not make any specific recommendation with regard to the language to be used in submitting registration information and search requests to the registry, the commentary addresses the need for enacting states to address this issue in the registry regulation (see *Secured Transactions Guide*, chap. IV, paras. 44-46). Accordingly, it should be addressed in the regulation (see draft Registry Guide, rec. 22).

47. Regardless of the language used in the underlying security documentation, the regulation typically would require registration information and search requests to use the official language or languages of the State under whose authority the registry is maintained. While the enacting State could also authorize the use of other languages, this would undermine the efficiency and transparency of the registry record unless the typical searcher in the enacting State could reasonably be expected to understand that other language.

48. The only exception to this rule should be where the grantor's legal name, for example a business incorporated under foreign law, is expressed in a language that is different from that used by the registry. To address cases where the language in which the name is expressed uses a set of characters different from the characters used in the language or languages of the registry, it will be necessary for the regulation to provide guidance on how the characters are to be adjusted or transliterated to conform to the language of the registry. The same considerations apply to the secured creditor's name.

49. Where the grantor is a legal person and the law under which it is constituted allows the use of alternative linguistic versions of its name, the regulation should specify that all versions of the name must be entered as separate grantor identifiers, subject to the rules prescribed by the regulation regarding how names expressed in a foreign set of characters are to be adjusted or transcribed to conform to the language or languages of the registry. This is necessary to protect third parties that deal or have dealt with the grantor under any one of the alternative versions of its name and would therefore search the registry using that version.

B. Recommendations 11-22

[Note to the Working Group: The Working Group may wish to consider recommendations 11-22, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

IV. Registration of initial notices

A. General remarks

1. Introduction

50. The *Secured Transactions Guide* recommends (see *Secured Transactions Guide*, chap. IV, paras. 65-97, and rec. 57) that the following information and only the following information must be provided in an initial notice for the registration to be accepted by the registry: (a) the identifier and address of the grantor; (b) the identifier and address of the secured creditor or its representative; (c) a description of the encumbered asset; (d) the period of effectiveness of the registration, if the enacting State chooses the option in its secured transactions law of allowing the registrant to select the period of effectiveness of the notice (see paras. 7-15 above); and (e) the maximum monetary amount for which the secured creditor may enforce the security right, if the enacting State chooses to require this information in its secured transactions law (see A/CN.9/WG.VI/WP.54/Add.3, paras. 15-19). The regulation should restate and supplement this recommendation (see draft Registry Guide, rec. 23). The following paragraphs discuss each of the elements of the required content of a notice.

51. As already discussed (see A/CN.9/WG.VI/WP.54/Add.1, para. 57), the registrant must enter the required information in the designated field or space in the prescribed form of notice for entering that kind of information (see draft Registry Guide recs. 7 and 23). If the registrant enters, for example, the identifier of the grantor in the secured creditor field, this would not be a ground for the registry to reject the notice. However, the registration of the notice may be ineffective with the result that the security right to which it relates is not made effective against third parties.

2. Grantor information

(a) General

52. As already explained (see paras. 21-23 above), the *Secured Transactions Guide* recommends that registered notices should be indexed and organized so as to be retrievable by a searcher using the grantor's identifier as the search criterion. In line with the recommendations of the *Secured Transactions Guide* (see *Secured Transactions Guide*, recs. 58-60), the regulation should provide detailed guidance on what constitutes the correct identifier of the grantor so as to ensure that a registrant can be confident that its registration will be effective and that searchers can confidently rely on a search result (see draft Registry Guide, paras. 54-68 and recs. 24-26 below). The regulation should also provide guidance on the consequences of incorrect or insufficient statements with respect to the grantor identifier (see A/CN.9/WG.VI/WP.54/Add.3, paras. 20-23, and rec. 29, subpara. (a) below).

53. It is not uncommon for a person to create a security right in its assets to secure an obligation owed by a third-party debtor (including a third-party guarantor of the obligation owed by the grantor). Since the function of registration is to disclose the possible existence of a security right in the assets described in the notice, registrants should understand that the grantor information required is the identifier and address of the grantor that owns, or has rights in, the encumbered assets, and not that of the third-party debtor of the secured obligation (or a mere guarantor of the obligation owed by the debtor). Where there is more than one grantor, the regulation should specify that their identifiers and addresses must be entered in the designated fields or spaces on the notice separately for each grantor. This is necessary to ensure that a search of the registry record using the identifier of any one of the grantors will retrieve the registered notice (see A/CN.9/WG.VI/WP.54/Add.3, paras. 20-23). To facilitate the registration process, the prescribed form of notice should be designed so as to enable the identifiers and addresses of multiple grantors to be entered on the same notice (see examples of registry forms in A/CN.9/WG.VI/WP.54/Add.6). While the registrant could achieve the same result by registering separate notices for each grantor, this is a more cumbersome process since the registrant would need to re-enter all the other information required on a notice on each separate notice.

(b) Grantor identifier for natural persons versus legal persons

54. The *Secured Transactions Guide* provides separate recommendations with respect to determining the identifier of the grantor depending on whether the grantor is a natural or a legal person or other entity (see *Secured Transactions Guide*, recs. 59-60). It follows that registered notices will need to be indexed or otherwise organized in the registry record according to distinct criteria depending on the category of grantor.

55. This approach has implications for the registration and search process. In order to ensure that the information in a notice is entered in the registry record so as to be retrievable by a searcher, the regulation should make it clear that a registrant must enter the identifier and address of the grantor in the fields designated for entering information relating to that category of grantor. To achieve this result, the prescribed form of notice, as well as the form of search request, should provide separate and distinct designated fields for entering the identifier and address of

grantors in each category (see the examples of registry forms in A/CN.9/WG.VI/WP.54/Add.6).

(c) Grantor identifier for natural persons

56. The *Secured Transactions Guide* recommends that, if the grantor is a natural person, the identifier of the grantor for the purposes of an effective registration should be the name of the grantor as it appears in a specified official document (see *Secured Transactions Guide*, rec. 59). In order to implement this recommendation, the regulation should specify the types of official document that the enacting State regards as authoritative sources of the grantor's name, as well as the hierarchy among those official documents. The following table illustrates the type of approach that might be taken, although enacting States will need to determine in accordance with its own naming conventions what types of official document are most appropriate taking into account their local naming conventions (see draft Registry Guide, rec. 24).

| Grantor status | Grantor identifier |
|--|---|
| Born in enacting State and birth registered in enacting State | Name on birth certificate or equivalent official document |
| Born in enacting State but birth not registered in enacting State | (1) Name on current passport (2) If no passport, name on equivalent official document such as an identification card or driver's licence |
| Not born in enacting State but naturalized citizen of enacting State | Name on citizenship certificate |
| Not born in enacting State and not a citizen of enacting State | (1) Name on current passport issued by the State of which the grantor is a citizen (2) If no current foreign passport, name on birth certificate or equivalent official document issued at grantor's birth place |
| None of the above | Name on any two official documents issued by the enacting State, if those names are the same (for example, a social security, health insurance or tax card) |

57. The regulation should specify the components of the grantor's name that are required to be entered in the prescribed notice (for example, family name, followed by the first given name, followed by the second given name) and provide separate designated fields in the prescribed notice for entering each component. In deciding what components are required, the enacting State should take into account local naming conventions as well as the extent to which locally issued official documents specify the different components of the name. Guidance should also be provided for exceptional situations. For example, where the grantor's name consists of a single word, the regulation should provide that that word should be entered in the family name field and the registry system should be designed so as not to reject notices that

have nothing entered in the given name field (see draft Registry Guide, rec. 24, subpara. (b)).

58. The enacting State may wish to consider whether during the registration process the registry should provide electronic verification of names entered in registered notices against names in other databases maintained by the enacting State. In this regard, two issues should be considered. The first is that the registry should not attempt to provide this service unless it is confident that the database to which it has connected is current, complete and accurate. Otherwise, it would be providing a disservice and possibly exposing itself to liability. The second issue is the legal effect of offering matching services. One option would be for the regulation to provide that a matched record is legally sufficient to identify the grantor. Under this approach, electronic matching would shift the legal responsibility to correctly identify the grantor from the registrant to the registry, thereby exposing the registry to potential liability. The other option would be to provide that this is just a service without any legal effect and it is the responsibility of the registrant who relies on electronic matching to ensure that the grantor identifier in the external database is correct. This latter approach more closely accords with the recommendations of the *Secured Transactions Guide*.

59. In some States, many persons may have the same name, with the result that a search may disclose multiple grantors all having the same name. To accommodate this scenario, the *Secured Transactions Guide* recommends that, where necessary, information in addition to the name of the grantor (such as the grantor's birth date or personal identification or other official number issued by the enacting State) must be included in the notice to uniquely identify the grantor (see *Secured Transactions Guide*, rec. 59). The *Secured Transactions Guide*, however, does not recommend that this additional information be used as search criteria. A State wishing to implement this additional recommendation should specify in the regulation the type of additional information, as well as whether it must be included for the registration to be accepted by the registry or whether inclusion is at the option of the registrant (see draft Registry Guide, rec. 23, subpara. (a) (i)).

60. Whether an enacting State should provide for the inclusion in a notice of an identity or other official number issued by that State as additional information depends on three principal considerations. First, whether the registry system under which the identity numbers are issued is sufficiently universal and reliable to ensure that each natural person is assigned a permanent unique number. Second, whether the public policy of the enacting State permits the public disclosure of the identity or other number that it assigns to its citizens and/or residents. Third, whether there is a reliable documentary record or other source by which third-party searchers can objectively verify whether a particular number relates to the particular grantor. If these three conditions are met, the use of State-issued identity or other official numbers would be an ideal way to uniquely identify grantors. However, as mentioned above, the approach recommended in the *Secured Transactions Guide* is that additional information, whether in the form of an identity card number or otherwise, may be required only where necessary to uniquely identify a grantor (see *Secured Transactions Guide*, rec. 59) and only as a requirement in addition to entering the name of the grantor (see draft Registry Guide, rec. 23, subpara. (a) (i)), and, in any case, not as a search criterion (see draft Registry Guide, rec. 34).

61. In view of the conflict-of-laws recommendations of the *Secured Transactions Guide* (such as, for example, recommendation 203, which provides that the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State in which the tangible asset is located), the law of the enacting State (including its registry regulation) could apply to a security right created by a foreign grantor. Thus, where the enacting State requires the entry of a State-issued identity or other official number to uniquely identify a grantor, it will be necessary for the regulation to address cases where the grantor is not a citizen or resident of the enacting State, or, for any other reason, has not been issued a number. The enacting State might, for example, provide in the regulation that the number of the grantor's foreign passport or the number in some other foreign official document is a sufficient substitute.

(d) Grantor identifier for legal persons

62. For grantors that are legal persons, the *Secured Transactions Guide* recommends that the correct identifier for the purposes of effective registration is the name that appears in the document constituting the legal person (see *Secured Transactions Guide*, rec. 60). The regulation should restate and supplement this rule. In particular, the regulation should make it clear that the relevant constituting document includes any type of instrument (whether it be a private contract, a statute or a decree) that is the legal source of the grantor's status as a legal person according to the law under which it was constituted (see draft Registry Guide, rec. 25).

63. Virtually all States maintain a public commercial or corporate register for recording information about legal persons constituted under the law of that State including their names. In some States, upon registration in that record, a unique and reliable registration number is assigned to the legal person. If the enacting State is concerned that multiple legal persons may share a common name, the regulation could specify the inclusion of that number in the notice as additional information to be used to uniquely identify the grantor (see Registry Guide, rec. 25, option B). In States that require this additional information, the regulation should provide guidance for cases where the grantor is a legal person constituted under the law of a foreign State since the commercial or corporate record of the foreign State may not have an equivalent number system.

64. The name of a grantor that is a legal person typically includes generic abbreviations (such as S.A., "Ltd", "Inc", "Incorp", "Corp", "Co") or terms (such as Société Anonyme, "Limited", "Incorporated", "Corporation", "Company") indicative of the type of body corporate or other legal person. The regulation should make it clear whether these abbreviations or terms are an optional component of the grantor's identifier in the sense that a search with or without them, or using an erroneous version of them, would still retrieve the relevant registration. The optional approach would protect registrants that do not enter the correct generic abbreviation or term or fail to enter it altogether. However, it could reduce transparency for third-party searchers since a search result would disclose all grantors that are legal persons, regardless of their type, that share the same specific name.

65. Depending on the law applicable to the constitution of the grantor, the document or other instrument constituting it as a legal person may contain

inconsistent variations of the name (for example, referring to it in different places as “The ABC inc.” or “ABC Inc.” or “ABC”). Ideally, the regulation would provide guidance on which part of the constituting document is to be treated as the authoritative source of the grantor’s name for registration purposes.

(e) Special cases

66. The regulation will also need to set out additional guidelines on the required grantor identifier where the grantor does not fit into either the natural person or the legal person categories (see draft Registry Guide, rec. 26). The issue here is not whether the grantor has the legal capacity to create a security right, but rather how its identifier should be entered in a notice. The following table sets out examples of the types of situation that will need to be addressed, together with examples of possible identifiers. Enacting States will need to consider whether and how to adapt these examples to their context.

| Grantor status | Grantor identifier |
|---|--|
| Insolvency estate acting through an insolvency representative | Name of the insolvent person, entered in accordance with the rules applicable for grantors who are natural or legal persons, as the case may be, with the specification in a separate designated field that the grantor is insolvent |
| Syndicate or joint venture | Name of the syndicate or joint venture as stated in any document constituting it, entered in the field designated for entering the identifier of a legal person |
| Trustee or representative of an estate | Name of the trustee or the representative of the, estate, entered in accordance with the rules applicable for grantors who are natural or legal persons, as the case may be, with the specification in a separate field that the grantor is acting for a trust or is the representative of an estate |
| Other entity | Name of the entity as designated in any document constituting it, entered in accordance with the rules applicable for grantors who are legal persons |

67. In the case of a sole proprietorship, even though the business may be operated under a different business name and style than the name of the proprietor, the regulation should provide that the grantor’s identifier is the name of the proprietor entered in accordance with the rules applicable for grantors who are natural persons. The name of the sole proprietorship is unreliable and usually may be changed at will by the proprietor. While a registrant may enter the name of the sole proprietorship in the notice as an additional grantor, it is the name of the proprietor that is the required identifier.

68. In the above-mentioned table, where the grantor is an insolvency estate acting through an insolvency representative, registrants must, in addition to entering the name of the insolvent person in the appropriate grantor field, also specify in a separate field that the grantor is insolvent. Similarly, where the grantor is a trustee

or representative of an estate, registrants must, in addition to entering the name of the trustee or representative in the grantor field, specify in a separate field that the grantor is acting for a trust or is the representative of an estate. Accordingly, the prescribed form of notice will need to include a separate designated field to for this additional information.

(f) Address of the grantor

69. Under the *Secured Transactions Guide*, the address of the grantor is part of the required content of the notice (see *Secured Transactions Guide*, rec. 57, subpara. (a)). The grantor's address is relevant for the purpose of sending copies of registered notices to the grantor (see *Secured Transactions Guide*, rec. 55, subparas. (c) and (d)). Accordingly, the registrant should enter the current known address of the grantor. The grantor's address is not part of the grantor's identifier in the sense of being a search criterion and the prescribed form of notice should designate a field for entering the grantor's address that is separate from the field designated for entering the grantor's identifier. The regulation should restate and, where necessary, supplement these recommendations.

70. Some States do not require entry of the grantor's address where personal security concerns necessitate that an individual's address details not be disclosed in a publicly accessible record. Where this exception is recognized, the regulation may specify the entry of a post office box or similar non-residential mailing address.

71. The inclusion of the grantor's address in the notice also helps to uniquely identify the grantor in States where many people are likely to share the same common name with the result that a search may disclose multiple security rights granted by different grantors with the same name (see *Secured Transactions Guide*, rec. 59). The grantor's address plays less of a role at this level in systems in which the registrant is required to include additional information designed to uniquely identify the grantor, such as, for example, a birth date or State-issued official identity number (see paras. 59-61 above).

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ADDENDUM

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IV. Registration of initial notices (*continued*)

A. General remarks (*continued*)

2. Secured creditor information

1. The *Secured Transactions Guide* recommends that the identifier of the secured creditor or the secured creditor's representative, along with its address, be included in the notice submitted to the registry (see *Secured Transactions Guide*, rec. 57, subpara. (a)). The regulation should restate and, where necessary, supplement this recommendation (see draft Registry Guide, rec. 27).
2. The regulation should specify that the same identifier rules that apply to the grantor should apply also to the secured creditor or its representative. In this connection, it should be noted that an agent or trustee of a syndicate of lenders would be a representative of the secured creditor if the security right is granted to the syndicate of lenders, but a "secured creditor" if the security right is "granted" (even nominally) to the agent. A third-party service provider, who may submit a notice on behalf of the secured creditor, is neither the secured creditor nor its representative in the sense of the *Secured Transactions Guide*, unless the service provider's name is inserted in the secured creditor field in the registered notice.
3. The identifier of the secured creditor or its representative is not an indexing or search criterion (see A/CN.9/WG.VI/WP.54/Add.2, paras. 21-23, and A/CN.9/WG.VI/WP.54/Add.4, paras. 42-45). Accordingly, the consequences of an incorrect or insufficient statement of the secured creditor identifier are different

from those of an incorrect or insufficient statement of the grantor identifier (see paras. 20-24 below); and, even if the regulation requires additional identifier information to be entered in order to uniquely identify the grantor (for example, birth date or a personal identification number), there is no need to extend this requirement to the secured creditor.

4. The secured creditor identifier that should be entered in the notice may be either that of the actual secured creditor or that of its representative. This approach is intended to facilitate, for example, syndicated lending, since only the identifier of the trustee or agent for the syndicate of lenders need be entered in a notice. It is also intended to protect the privacy of the secured creditor. The rights of the grantor are not affected since the grantor is in a direct relationship with the secured creditor and already knows the secured creditor's identity. The rights of third parties also are not affected as long as the representative identified in the notice as the secured creditor is in fact authorized to act on behalf of the actual secured creditor in any communication or dispute connected to the security right to which the notice relates.

3. Description of encumbered assets

(a) General

5. The *Secured Transactions Guide* recommends that a description of the encumbered assets covered by the security right to which the registration relates should be a required component of an effective notice (see *Secured Transactions Guide*, rec. 57, subpara. (b)). This approach enables third parties dealing with a person's assets (such as prospective secured creditors, buyers, judgement creditors and the insolvency representative of that person) to determine which assets of that person may be encumbered by a security right and which assets may not be encumbered. The *Secured Transactions Guide* also recommends that a description of the encumbered assets should be considered sufficient, for the purposes of both an effective security agreement and an effective registration, as long as it reasonably allows identification of the encumbered assets (see *Secured Transactions Guide*, recs. 14, subpara. (d), and 63). Depending on the nature of the encumbered asset, the description may be specific or generic. For example, if the encumbered asset is one of many paintings owned by the grantor, the description in the notice may specify the title of the painting and the name of the painter in order to sufficiently identify the painting which is intended to be encumbered. On the other hand, if the encumbered assets are generic categories of assets, such as all the inventory of an art gallery, it would be sufficient to describe them generically, for example, as "all of the grantor's paintings", "all of the grantor's works of art" or "all of the grantor's inventory".

6. The regulation should restate and, where necessary, supplement this recommendation (see the draft Registry Guide, rec. 28). In particular, the regulation should explicitly state that the description of encumbered assets in a notice may be specific or generic as long as it reasonably allows their identification. The regulation should also clarify that a description that refers to all assets within a generic category or to all assets of a grantor is assumed to cover future assets within the specified category to which the grantor acquires rights during the duration of effectiveness of the notice.

7. If the prescribed form of notice limits the number of characters that may be entered in the space for describing the encumbered assets and additional space is needed (for example, to identify the encumbered assets in more detail), the registry form should be designed to allow additional information to be provided in an attachment or schedule to the notice. This is generally necessary only where the notice is in paper as opposed to electronic form, since the provision of sufficient space does not pose a practical problem in the latter case.

(b) Description of “serial number” assets

8. As already mentioned (see A/CN.9/WG.VI/WP./Add.2, paras. 24-27), the secured transactions laws of some States adopt supplementary asset-based indexing and searching for specified classes of high-value assets that have a significant resale market. In legal systems that adopt this approach, entry of the serial number in its own designated field is required in the sense of being necessary to achieve third-party effectiveness and priority as against specified classes of third parties that acquire rights in the asset.

9. The *Secured Transactions Guide* discusses but does not recommend this approach (see *Secured Transactions Guide*, chap. IV, paras. 34-36). Nonetheless, even in systems that do not adopt this approach, if the encumbered assets have a serial number, a registrant may wish to include the serial number in the description it enters in the notice as an economical method of sufficiently identifying the encumbered asset in a manner that reasonably allows their identification (see *Secured Transactions Guide*, recs. 63 and 14, subpara. (d)). For that purpose, the notice form could be designed to allow a registrant to enter the serial number in the form, if the registrant so wishes. However, it should be made clear that entry of the serial number is optional and not a mandatory component of an effective description as long as the description that is entered otherwise sufficiently identifies the asset. In addition, the serial number should not be a legally effective search criterion. Consequently, even if the registry is designed to permit serial number indexing and searching, such a search should be optional and thus a negative search result could not be relied upon.

(c) Description of proceeds

10. The *Secured Transactions Guide* recommends that a security right should automatically extend to any identifiable assets received in respect of the encumbered assets, unless otherwise agreed by the parties to the security agreement (see *Secured Transactions Guide*, Introduction, sect. B, “proceeds”, and rec. 19). Where the security right in the original encumbered assets was made effective against third parties by registration, the question arises as to whether the secured creditor needs to amend the description of the encumbered assets in the initial notice to include a description of the proceeds in order to ensure that its security right in the proceeds also is effective against third parties.

11. When the proceeds consist of cash or other equivalent proceeds (for example, money or a right to payment), the *Secured Transactions Guide* recommends the automatic continuation of the third-party effectiveness of a prior registered security right in the original encumbered assets into the proceeds. The same is true where the proceeds are of a type that is already covered by the description of the original encumbered assets in the registered notice (for example, the description covers

“all tangible assets” and the grantor trades in one item of equipment for another; see *Secured Transactions Guide*, rec. 39).

12. However, where the proceeds are not cash or other equivalent proceeds and are not otherwise encompassed by the description of the encumbered assets in the existing notice, the secured creditor must amend its registration to add a description of the proceeds within a short period of time after the proceeds arise in order to preserve the third-party effectiveness and priority of its security right in the proceeds from the date of the initial registration (see *Secured Transactions Guide*, rec. 40). An amendment is necessary because a third party otherwise would not be able to identify which categories of asset in the grantor’s possession constitute the relevant proceeds.

(d) Description of encumbered attachments to immovable property

13. As already discussed (see A/CN.9/WG.VI/WP.54/Add.1, paras. 21-23), like any other type of encumbered asset, a tangible asset that is or will become an attachment to immovable property needs to be described in a notice registered in the general security rights registry in a manner that reasonably allows its identification (see *Secured Transactions Guide*, recs. 14, subpara. (d), and 63). While a generic description of the asset may be sufficient for this purpose, the registrant may also need to register in the immovable property registry in order to ensure that its security right is effective against third parties that acquire and register a right in the relevant immovable property. In an immovable property registry, registrations are normally indexed or otherwise organized by reference to the specific immovable property as opposed to the identifier of the grantor. Thus, if the notice is to be capable of also being registered in the immovable property registry, the description of the asset in the notice must describe the specific immovable property. In addition, the rules governing registrations in the immovable property registry may need to be revised to permit the registration of notices and the generic description of encumbered assets (see *Secured Transactions Guide*, chap. III, para. 104). Moreover, if the grantor of the security right in the asset is not the owner of the related immovable property, the notice may also need to identify the owner of the asset if this information is necessary for the indexing of the notice in the immovable property registry.

4. Period of effectiveness of the registration of a notice

14. As already discussed (A/CN.9/WG.VI/WP.54/Add.2 paras. 7-15), the secured transactions law of an enacting State may adopt a uniform statutory period of effectiveness for all registrations (option A) or may give registrants the option to self-select the period of effectiveness (option B). In States that adopt this second option, the regulation should specify that an indication of the duration of effectiveness of a registration in the designated field is a mandatory component of the information that must be entered in a registered notice (see *Secured Transactions Guide*, rec. 69, and draft Registry Guide, recs. 13 and 23, subpara. (a)(iv)). If the enacting State imposes a maximum limit on the registrant’s right to self-select the period of effectiveness of the notice (option C), the registry should be designed so as to prevent a registrant from entering a period that exceeds the maximum limit.

5. Maximum amount for which the security right may be enforced

15. The *Secured Transactions Guide* recognizes that some States may require the maximum monetary amount for which the security right may be enforced to be specified in the security agreement and the registered notice (see *Secured Transactions Guide*, chap. IV, paras. 92-97, and recs. rec. 14, subpara. (d), and 57, subpara. (d)). The *Secured Transactions Guide*, however, does not leave room for this requirement to be used as a pretext to impose a tax on secured transactions. The registry fees, if any, should be set at a level no higher than necessary to permit cost recovery (see *Secured Transactions Guide*, rec. 54, subpara. (i), and draft Registry Guide, rec. 36).

16. The aim of this approach is illustrated by the following example. An enterprise has an asset with an estimated market value of \$100,000. The enterprise applies for a line of credit facility to a maximum amount of \$50,000 (including capital, interest and costs). The creditor is willing to extend the loan on the condition that it obtains a security right in the asset. The grantor is agreeable but since the maximum loan amount specified in the security agreement and in the notice is \$50,000 and the asset has a value of \$100,000, the grantor wishes to preserve the ability to obtain another secured loan from a subsequent creditor relying on the residual value of the asset. Ordinarily, the first-to-register priority rule may deter this subsequent creditor from giving a loan for fear that the first secured creditor may later extend loans beyond the initial \$50,000 for which it would have priority under the general first-to-register rule. By imposing a requirement to specify the maximum value for which the security right may be enforced, the subsequent creditor can be assured that the first-registered secured creditor cannot enforce its security right for an amount greater than \$50,000, leaving the residual value available to satisfy its own claim should the grantor default.

17. The *Secured Transactions Guide* recognizes that an equally valid approach is to not require the maximum amount to be included in the security agreement and the registered notice. This approach is based on the assumptions that: (a) the first-registered secured creditor is either the optimal long-term financing source or will be more likely to extend financing, especially to small, start-up businesses, if it knows that it will retain its priority with respect to any financing it may provide to the grantor in the future; (b) in any event, the grantor will not have sufficient bargaining power to require the first-registered secured creditor to enter a realistic maximum amount in the notice (instead the secured creditor will insist that an inflated amount be included to cover all possible future extensions of credit and the grantor will not usually be in a position to refuse); and (c) a subsequent creditor to whom the grantor applies for financing may be able to negotiate a subordination agreement with the first-registered security creditor for credit extended on the basis of the current amount of residual value in the encumbered asset.

18. Thus, the *Secured Transactions Guide* acknowledges that both approaches have merit and recommends that the secured transactions law of an enacting State should adopt the policy that is most consistent with efficient financing and credit market practices in that State. In States that adopt the first approach, the regulation would need to include a rule requiring the registrant to enter the maximum amount and the relevant currency in the designated field in the registered notice (see draft Registry Guide, rec. 23, subpara. (a)(v); for the consequences of entering a different maximum amount in the registered notice than the maximum amount actually

agreed to in the security agreement, see paras. 32-35 below). In States that adopt the second approach, there is no need to address the issue further in the regulation.

19. It should be emphasized that in States that adopt the first approach, the *Secured Transactions Guide* does not leave room for an enacting State to base its registration fees on an ascending scale linked to the maximum amount set out in the notice. Registry fees must be set at a level no higher than necessary to permit cost recovery (see *Secured Transactions Guide*, rec. 54, subpara. (i), and draft Registry Guide, rec. 36).

6. Effect of errors or omissions on the effectiveness of the registration of a notice

(a) Grantor information

20. The *Secured Transactions Guide* recommends that registration of a notice is effective only if the notice would be retrieved by a searcher of the registry record using the correct identifier of the grantor (see *Secured Transactions Guide*, chap. IV, paras. 66-77, and rec. 58). The regulation should restate this recommendation (see draft Registry Guide, rec. 29, subpara. (a)). Subject to the last sentence of this recommendation, it follows that an error in the grantor's identifier submitted by the registrant will render the registration of a notice ineffective, with the result that the third-party effectiveness of the security right would not be achieved. It does not matter that the error may seem minor or trivial in the abstract. The sole test is whether the error would cause the information in the registry record not to be retrieved by a searcher using the grantor's correct identifier as the search criterion.

21. The test is an objective one in the sense that the registration will be ineffective to achieve third-party effectiveness even if a competing claimant that challenges the effectiveness of the registration: (a) knew that a security right existed and the notice that related to it contained errors; and (b) did not suffer any personal prejudice as a result of the notice not being retrievable (for example, where the third-party searcher is the grantor's insolvency representative).

22. The *Secured Transactions Guide* does not include a recommendation as to the impact on the effectiveness of a registration of an error in the address of the grantor or in any additional grantor information (for example, the grantor's birth date or identification number) that the enacting State permits or requires to be included in order to more uniquely identify the grantor (for the discussion on additional grantor information, see A/CN.9/WG.VI/WP.54/Add.2, paras. 59-61 and 69-71). Like the identifier and address of the secured creditor, this type of information does not constitute a search criterion. Accordingly, by analogy to the test recommended in the *Secured Transactions Guide* for errors in the entry of secured creditor information (see *Secured Transactions Guide*, rec. 64), the regulation should specify that an error in the grantor's address or any required additional grantor information does not render the registration of a notice ineffective unless it would seriously mislead a reasonable searcher (see draft Registry Guide, rec. 29, subpara. (b)). For example, if the search result discloses numerous grantors, all having the same name as the person in whom the searcher is interested, but the error in the grantor's address or in any required additional grantor information is so acute as to cause a reasonable searcher to believe that none of the notices refer to the relevant grantor, the registration would be found to be ineffective.

23. The *Secured Transactions Guide* does not deal explicitly with the situation where a notice lists more than one grantor but an error occurs in the identifier of only one of the grantors listed in the notice. In this case, by analogy to the recommendation of the *Secured Transactions Guide* with respect to an error in the description of only some of the encumbered assets (see *Secured Transactions Guide*, rec. 65), the regulation should provide that the error does not render the registered notice ineffective with respect to the other grantors that were sufficiently identified (see draft Registry Guide, rec. 29, subpara. (c)).

(b) Secured creditor information

24. As the identifier of the secured creditor is not an indexing or search criterion (A/CN.9/WG.VI/WP.54/Add.2, para. 22), the *Secured Transactions Guide* recommends that an error by the registrant in the identifier or address of the secured creditor or its representative renders the registration ineffective only if it would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64). For example, if the actual secured creditor is Bank A, and a search of the registry record according to the identifier of the grantor returns a result that names Bank B as the secured creditor, the registered notice would generally still be effective, since a search result would still disclose the potential existence of a security right given by the named grantor. However, searchers rely on the identifier and address information of the secured creditor in the registry record for the purposes of sending notices under the secured transactions law. Consequently, a secured creditor may find itself disadvantaged if the secured creditor information that it entered is inaccurate. For example, the *Secured Transactions Guide* recommends that a notice of an extrajudicial disposition of an encumbered asset must be sent to all other secured creditors that have registered notices relating to the same grantor and the same encumbered assets (see *Secured Transactions Guide*, recs. 149-151). A secured creditor whose information is inaccurate risks not receiving the notice of extrajudicial disposition. In addition, the person named in the registered notice as grantor needs to be able to rely on this information to submit a written request to the secured creditor for the cancellation or the amendment of the notice where the registration was not authorized by the grantor (*Secured Transactions Guide*, rec. 72, subpara. (a), and A/CN.9/WG.VI/WP.54/Add.4, paras. [...]).

(c) Description of encumbered assets

(i) General

25. Under the *Secured Transactions Guide*, if a registrant fails altogether to describe an encumbered asset in a registered notice, the third-party effectiveness of the security right in the omitted asset will not be achieved (see *Secured Transactions Guide*, rec. 63). Where the description is merely erroneous, the error renders the registration of the notice ineffective only if the error would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64). Even if encumbered assets are omitted or the description is seriously misleading, the registration is ineffective only with respect to the omitted or erroneously described assets and not with respect to other assets that were sufficiently described (see *Secured Transactions Guide*, rec. 65). The regulation should include provisions corresponding to these recommendations (see draft Registry Guide, rec. 29, subparas. (b) and (c)).

(ii) *Serial number assets*

26. As already mentioned (see para. 8 above), encumbered assets that have a serial number asset may at the discretion of the registrant be described in a notice by reference to the serial number and the type of asset to allow them to be sufficiently identified (see *Secured Transactions Guide*, recs. 63 and 14, subpara. (d)). An error in the serial number or type of asset should be treated in the same way as any other error in the description. Accordingly, a minor error should not render the registration ineffective unless the error would seriously mislead a reasonable searcher (see *Secured Transactions Guide*, rec. 64 and draft Registry Guide, rec. 29, subpara. (b)).

27. Also as already mentioned (see para. 7 above), in some States, the serial number of specified types of asset is required to be entered in a notice in the sense of being necessary to achieve third-party effectiveness and priority as against specified classes of third parties that acquire rights in the asset. In States that adopt this approach, a notice that contained an incorrect serial number would only be effective if it could be retrieved by a search of the registry record under the correct serial number (see *Secured Transactions Guide*, rec. 58). In these States, the regulation will also need to address the consequences of an error in the entry of one but not both the grantor identifier and the serial number. The regulation should provide that both would need to be entered correctly.

(iii) *Period of effectiveness of registration*

28. As already discussed (see para. 14 above), the secured transactions law of an enacting State may allow a registrant to self-select the period of effectiveness of the registration (see options B and C discussed in A/CN.9/WG.VI/WP.54/Add.2, paras. 9-15). If an enacting State adopts this approach, the *Secured Transactions Guide* recommends that an incorrect statement in the registered notice as to the period of effectiveness should not render the registration ineffective except to the extent it seriously misled third parties that relied on the registered notice (see *Secured Transactions Guide*, rec. 66). The regulation should include a corresponding recommendation (see draft Registry Guide, rec. 29, subpara. (e)).

29. In addressing how third-party reliance may arise with respect to an error in entering the period of effectiveness of a registration, it is necessary to distinguish two situations (see *Secured Transactions Guide*, chap. IV, paras. 89-91). The first situation is where the error consists in entering too long a period. In this case, third-party searchers would not be prejudiced as they still would have been alerted to the fact that a security right might exist. The second situation is where the error consists in entering too short a period. In this case, the registration will lapse at the end of the specified period and the security right will no longer be effective against third parties, unless it was made effective prior to the lapse by some other method (see *Secured Transactions Guide*, rec. 46). As already mentioned, while the secured creditor can re-establish third-party effectiveness by registering a new notice, its security right will take effect against third parties only from the time of the new registration becoming effective (see *Secured Transactions Guide*, recs. 47 and 96).

30. Similarly, in determining what sort of error in the statement of the maximum amount is likely to cause detrimental reliance by third parties, two situations should be distinguished (see *Secured Transactions Guide*, chap. IV, paras. 96 and 97). Where the registrant enters in the registered notice by mistake an amount higher

than the amount specified in the security agreement, third parties are unlikely to be prejudiced since their decision to advance funds to the grantor normally will be based on the amount specified in the registered notice; and the grantor would be entitled to compel the secured creditor to amend the registered notice to reflect the amount specified in the security agreement. In the contrary case where the maximum amount specified in the notice is lower than the amount indicated in the security agreement, a third-party financier that searched the public registry record and extended credit to the grantor in reliance on the record could be prejudiced. Accordingly, if there are competing claimants, the secured creditor should be able to enforce its security right only up to the amount specified in the registered notice. If there are no competing claimants (in other words, there is no third-party reliance and prejudice), the secured creditor should be able to enforce its security right up to the amount specified in the security agreement.

31. It should be noted that (unlike situations covered by rec. 29, subpara. (b), where the test has to be objective; see para. 21 above), in this instance, the test whether the error is seriously misleading is subjective. A third party that challenges the notice on the basis of the error will need to show that it was actually seriously misled by the error. A subjective test is appropriate here since the purpose of requiring the maximum amount to be inserted is to ensure that the grantor can seek additional financing on the basis of the residual value of assets already encumbered by a security right without the third-party financier having to worry about the value of its security right (see *Secured Transactions Guide*, chap. IV, para. 96).

(iv) *Maximum monetary amount and impact of error*

32. For States that elect to require the maximum amount for which the security right may be enforced to be entered in the notice, the *Secured Transactions Guide* recommends that an incorrect statement in the registered notice of the maximum amount should not render the notice ineffective except to the extent it seriously misled third parties that relied on the registered notice (see *Secured Transactions Guide*, rec. 66). The regulation should include a corresponding recommendation (see draft Registry Guide, rec. 27, subpara. (e)).

33. As in the case of an error in the entry of the period of effectiveness of a registration (see para. 31 above), the test for whether the error is seriously misleading is subjective. A third party that challenges the notice on the basis of the error must show that it was actually seriously misled by the error. A subjective test is appropriate here since the purpose of requiring the maximum amount to be inserted is to ensure that the grantor can seek additional financing on the basis of the residual value of assets already encumbered by a security right without the third-party financier having to worry about a loss of priority to the first secured creditor (see *Secured Transactions Guide*, chap. IV, para. 96).

34. Thus, where the maximum amount indicated in the notice is greater than the maximum amount agreed to in the security agreement, a subsequent secured creditor generally would not be prejudiced since its decision to advance funds normally will be based on the amount indicated in the notice. The grantor would also be protected in this situation since it could request the secured creditor or, if the secured creditor failed to act in a timely manner, a judicial or administrative body through a summary proceeding, to amend the notice to correct the amount so that the grantor

can obtain financing against the residual value of the encumbered asset (see *Secured Transactions Guide*, rec. 72).

35. However, where the maximum amount indicated in the notice is less than the maximum amount agreed to in the security agreement, a subsequent secured creditor may have advanced credit on the assumption that it could enforce its security right against any residual value in the asset in excess of the amount indicated in the notice. Similarly, a buyer may have purchased the encumbered asset on the understanding that the secured creditor's right in it was limited to the value indicated in the notice. In addition, a judgement creditor may have initiated enforcement action in the belief that the excess value of the asset above that stated in the notice would be available to satisfy its judgement claim. Accordingly, the secured creditor in all these cases should be entitled to enforce its security right as against the third party only up to the maximum amount erroneously stated in the registered notice. It should be noted that the secured creditor can never, in any event, enforce its security right for an amount greater than that which is actually owed to it.

B. Recommendations 23-29

[Note to the Working Group: The Working Group may wish to consider recommendations 23-29, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted in here at this stage but will be inserted in the final text.]

(A/CN.9/WG.VI/WP.54/Add.4) (Original: English)
Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-third session

ADDENDUM

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V. Registration of amendment and cancellation notices

A. General remarks

1. Amendment notices

(a) General

1. A registrant may wish to amend the information in a registered notice for a variety of reasons, for example, to correct an error in a previous registered notice or to update the registration information as a result of subsequent events. This is done by submitting an amendment notice to the registry. The regulation should make it clear that the registrant is responsible for entering the information in relation to the

amendment in the manner required by the regulation for entering information of that kind in an initial notice (see draft Registry Guide, recs. 19 and 30).

2. The registry system should be designed to ensure that the registration of an amendment notice does not have the effect of deleting or replacing registration information contained in the initial notice and any previously registered amendment notices. Instead, the information in the amendment notice should be added to the existing registration information so that a search result will show the initial notice and all subsequently registered amendment notices.

3. A secured creditor should be able to register an amendment notice, to the extent appropriate, at any time (see *Secured Transactions Guide*, rec. 73). Some amendments require the grantor's authorization (such as, for example, an amendment to reflect the addition of new encumbered assets or a new grantor, or, if required by the secured transactions law of the enacting State, an increase in the amount for which a security right to which the registration relates may be enforced. Other amendments do not require the grantor's authorization (such as, for example, an amendment to reflect a subsequent change in the grantor's identifier, an assignment of the secured obligation, a voluntary subordination of the priority of the security right to which the registration relates, a change of address of the secured creditor or its representative, or an amendment to reflect a transferee of an encumbered asset from the grantor as an additional grantor. In any event, as noted earlier, to the extent the grantor's authorization is needed, it may be given before or after the registration of a notice, and a written security agreement constitutes sufficient authorization (see *Secured Transactions Guide*, rec. 71 and A/CN.9/WG.VI/WP.54/Add.1, para. 60). Accordingly, where the amendment relates, for example, to the addition of new encumbered assets or a new grantor, the completion of a written security agreement covering the new assets or with the new grantor will itself constitute authorization.

4. To effect an amendment, a registrant must provide in the designated fields in the amendment notice the registration number of the initial notice to which the amendment relates, and the relevant amendment information (see draft Registry Guide, rec. 30, subpara. (a)). As in the case with an initial notice, each amendment notice should be assigned by the registry the date and time when the information in the notice was entered into the registry database so as to be available to searchers of the public registry record (see draft Registry Guide, rec. 12, and A/CN.9/WG.VI/WP.54/Add.2, paras. 1-6). The enacting State may wish to consider whether the registry system and the prescribed form of amendment notice should be designed to allow the registrant to amend only a single item of information in an amendment notice (e.g., change the grantor's identifier) or to allow multiple items to be amended with a single amendment notice (e.g., add a new grantor and delete some encumbered assets). The latter approach is recommended as it is simpler and more cost-efficient (see draft Registry Guide, rec. 30, subpara. (f)).

5. The following paragraphs discuss the various reasons why a secured creditor may wish to register an amendment notice and the legal implications of registration or failure to register.

(b) Subsequent change of the grantor's name

6. A change in the name of the grantor indicated in a registered notice (for example, as a result of a merger) may undermine the publicity function of registration from the perspective of third parties that deal with the grantor after its name has changed. As the grantor's name is the principal indexing and search criterion, a search using the grantor's new name will not retrieve the notice. In a registry system that uses a State-issued permanent and unique identity or other official number as the grantor's identifier for the purposes of indexing and searching registered notices, it is less likely that this problem will arise since the number is typically permanent and not subject to change. However, under the approach recommended in the *Secured Transactions Guide*, the name of the grantor is the principal indexing and search criterion; an identity number may be required as additional identifier if necessary to uniquely identify the grantor but it is not an indexing or search criterion (see *Secured Transactions Guide*, recs. 58-60, A/CN.9/WG.VI/WP.54/Add.2, paras. 59 and 60, and paras. 42-45 below).

7. To address this problem, the regulation and the prescribed form of amendment notice should make it possible for the secured creditor to register an amendment notice to add the grantor's new name. While failure to submit an amendment notice should not make the security right generally or retroactively ineffective against third parties, third parties that deal with the grantor after the change in its name and before the amendment notice is registered should be protected. Accordingly, the *Secured Transactions Guide* recommends that, if the secured creditor does not register the amendment notice within a specified short "grace period" (for example, fifteen days) after the name has changed, its security right is ineffective against buyers, lessees, licensees and other secured creditors that acquire rights in the encumbered asset after the change in the grantor's name and before the amendment is registered (see *Secured Transactions Guide*, rec. 61). The *Secured Transactions Guide* also recommends that the grace period should begin to run from the date of the change of the name (some States provide it begins only from the date when the secured creditor acquired knowledge of the change). The secured transactions law of the enacting State should also provide guidance on what constitutes a change of name in the context, in particular, of corporate amalgamations and the effect of not making an amendment in the wake of the amalgamation.

8. As already noted (see para. 2 above), the registry system should be designed to ensure that the registration of an amendment notice does not have the effect of deleting or replacing registration information contained in the initial notice and any previously registered amendment notices. As a result, a search using either the old or the new name of the grantor as the search criterion would retrieve the registration. It is thus important for the registrant to understand that it should enter the grantor's new name in the field designated in the amendment notice for adding the identifier of an additional grantor, without also deleting the old grantor information. Otherwise, a search of the registry record according to the grantor's old name would not retrieve the registration, potentially prejudicing the effectiveness of the security right against third parties that dealt with the grantor prior to the change of name and that would, therefore, likely conduct their search using the grantor's name at that time.

(c) Transfer of an encumbered asset

9. When the grantor transfers, leases or licences an encumbered asset, the transferee, lessee or licensee will ordinarily acquire its right in the asset subject to the security right assuming it has been made effective against third parties (see *Secured Transactions Guide*, rec. 79). If the security right was made effective against third parties by registration, this creates a problem analogous to a post-registration change in the name of the grantor discussed above. Third parties that deal with the encumbered asset in the hands of the transferee, lessee or licensee typically will search the registry record using the name of the transferee, lessee or licensee as the search criterion. That search will not retrieve the registered notice since it was registered and indexed according to the name of the grantor (the transferor, lessor or licensor). To protect third parties that deal with the encumbered asset in the hands of the transferee, lessee or licensee, the registry system and the regulation should enable the secured creditor to submit an amendment notice to record the name and address of the transferee, lessee or licensee as a new additional grantor.

10. The *Secured Transactions Guide* recommends that an enacting State should address the legal implications of the failure of a secured creditor to register an amendment notice in this scenario, but leaves it to each enacting State to decide which of the three approaches discussed in the commentary it should adopt (see *Secured Transactions Guide* chap. IV, paras. 78-80, and rec. 62).

11. The first approach is analogous to that recommended by the *Secured Transactions Guide* to a change in the name of the grantor (see *Secured Transactions Guide*, rec. 61, and paras. 6-8 above). Under this approach, failure to amend the registration to add the transferee, lessee or licensee as a new additional grantor does not make the security right ineffective against third parties generally. However, if the secured creditor does not register the amendment notice within a short “grace period” (for example, fifteen days), its security right is ineffective against buyers, lessees, licensees and secured creditors that acquire rights in the encumbered asset after it was transferred, leased or licensed and before the amendment notice was registered. The second approach is similar subject to the important caveat that the grace period to register the amendment notice begins to run only when the secured creditor acquires knowledge that the grantor has transferred, leased or licensed the encumbered asset. The third approach is different in that registration of the amendment notice is purely optional in the sense that failure to register does not affect the third-party effectiveness or priority of the security right to which the registration relates (see *Secured Transactions Guide*, chap. IV, paras. 78-80).

12. Regardless of which approach an enacting State adopts, it should include in its regulation a provision enabling a secured creditor to register an amendment notice to add a transferee, lessee or licensee of the grantor as an additional grantor (see draft Registry Guide, rec. 30, subpara. (c)). That is to say, even if the enacting State adopts the third optional approach, a secured creditor should be able to register an amendment of this kind, if it wishes to do so. Registration would provide a measure of practical protection against the risk that the transferee, lessee, or licensee will dispose of the encumbered asset to a new transferee whose whereabouts may not be traceable. Registration would also reduce the risk of disputes as lenders to the transferee, lessee or licensee would be on notice. The registrant should understand

that it should enter the name and address of the transferee, lessee or licensee in the fields designated in the amendment notice for adding a new grantor, without deleting the original grantor information. Otherwise, a search of the registry record according to the grantor's name would not retrieve the registration, potentially prejudicing the effectiveness of the security right against third parties that dealt with the grantor before the encumbered asset was transferred, leased or licensed and that would, therefore, likely conduct their search using the grantor's name.

(d) Subordination of priority

13. Under the *Secured Transactions Guide*, a secured creditor with priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant (see *Secured Transactions Guide*, rec. 94). Subordination affects only the rights of the subordinating secured creditor and the beneficiary of the subordination. Accordingly, the registry should be designed to accommodate the registration of an amendment notice to disclose a subordination. However, registration should be purely optional in the sense that an amendment would not be needed to preserve the third-party effectiveness or priority (or subordination of priority) of the security right to which the registration relates.

(e) Assignment of the secured obligation and transfer of the security right

14. A secured creditor may assign the secured obligation. As in most legal systems, the *Secured Transactions Guide* recommends that, as an accessory right, the security right follows the secured obligation, with the result that the assignee of the obligation in effect will be the new secured creditor (see *Secured Transactions Guide*, recs. 25 and 48 that are based on article 10 of the United Nations Convention on the Assignment of Receivables in International Trade). Under the approach recommended in the *Secured Transactions Guide*, an amendment to the initial notice to add the assignee as a new secured creditor is not required in the sense of it being necessary to preserve the effectiveness of the registration (see *Secured Transactions Guide*, rec. 75). As the identifier of the secured creditor is not an indexing and search criterion, searchers will not be seriously misled by the change.

15. While registration of an amendment notice is optional, failure to register may be disadvantageous for the new secured creditor (assignee). As noted earlier, searchers rely on the secured creditor information in registered notices for the purposes of sending various communications under the secured transactions law (such as the notice of an extrajudicial disposition of an encumbered asset which a secured creditor is required to send to other secured creditors that have registered a notice relating to the same grantor and the same encumbered assets; see *Secured Transactions Guide*, recs. 149-151). If the assignee is not added as a new secured creditor, it will not receive notices of this kind directly and will be dependent on the original secured creditor (assignor) to forward them to it.

(f) Addition of new encumbered assets

16. A secured creditor may wish to register an amendment notice to add new encumbered assets to the description contained in a previously registered notice for a variety of reasons. For example, the grantor may have agreed to grant a security right in additional assets after the prior notice was registered or the secured creditor may have inadvertently omitted to include an encumbered asset in the previously

registered notice. To accommodate this possibility, the registry system should enable the secured creditor to amend the description of encumbered assets in a previously registered notice to add new assets. While the secured creditor could achieve the same result by registering a new initial notice with respect to the new assets, the registration of an amendment notice would typically be more efficient and would ensure that the duration of the effectiveness of the registration is the same for both the original and the additional assets. Regardless of which method is chosen, the security right in the new encumbered assets becomes effective against third parties only as of the time the amendment notice or the new notice as the case may be is entered into the registry record so as to be available to searchers (see *Secured Transactions Guide*, rec. 70). The reason for this approach is that a search of the registry record by third parties prior to registration of the amendment notice or the new notice would not disclose that the new encumbered assets were potentially subject to a security right.

(g) Deletion of encumbered assets

17. The secured creditor may wish or be required to register an amendment notice to delete encumbered assets from the description in the initial notice for a variety of reasons. For example, the grantor may have paid a portion of the obligation secured by the related security right on condition that the security right be extinguished against specified assets; or the description in the initial notice may have been overly broad and the grantor may have issued a demand to the secured creditor to amend the initial notice to reflect the true scope of the encumbered assets (as to the obligation of the secured creditor to amend a registered notice in the latter scenario, see paras. 38-41 below). Accordingly, the registry system should be designed to accommodate the registration of an amendment notice to delete specific assets that have been described in a previously registered notice as encumbered assets.

(h) Other changes to the description of encumbered assets

18. A registrant may wish to register an amendment notice to correct an error in the description of the encumbered assets contained in a previously registered notice. The amendment notice would normally take effect with respect to the assets to which it relates only as of the date it is entered into the registry record so as to be available to searchers unless the error is minor and the original description would have allowed the reasonable identification of the encumbered assets even if the amendment notice had not been registered (see *Secured Transactions Guide*, rec. 63).

19. A secured creditor may also wish to amend the description of the encumbered assets contained in a previously registered notice as a result of subsequent changes to the encumbered assets described in that previously registered notice. For instance, the previously registered notice may have described the encumbered assets as “all cherry wood furniture” but subsequent to its registration the grantor may have painted the furniture in green; or, in the previously registered notice, the encumbered assets may have been described as all inventory located at a specified address and the inventory may have since been relocated to a new address. Since the description in the previously registered notice no longer corresponds to the reality, the secured creditor may wish to submit an amendment notice to update the description. Generally, an amendment is not required in the sense of being necessary

to preserve the third-party effectiveness of the security right to which the registration relates. Searchers are expected to understand that aspects of the description of an encumbered asset in a previously registered notice may change as a result of post-registration events and that they may, therefore, need to make further inquiries. Accordingly, where an amendment notice of this kind is registered, the effective date of registration with respect to the encumbered assets to which it relates generally remains the date of registration of the prior notice containing the original description, provided that the description was current as of that time.

(i) Extension of the period of effectiveness of a registration

20. The *Secured Transactions Guide* recommends that a secured creditor should be able to extend the period of effectiveness of a registered notice by the registration of an amendment notice at any time before the expiry of its period of effectiveness (see *Secured Transactions Guide*, rec. 69). If the registration of a new notice were instead required, this would undermine the secured creditor's priority status and the continuity of the third-party effectiveness of its security right, since the new notice would take effect against third parties only from the time of its registration.

21. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 7-15), there are several approaches that States can take with respect to the period of effectiveness of the registration of a notice. In States where the period of effectiveness of the registration of a notice is established by law (option A), the registry system should be designed so that the registration of the amendment notice would automatically extend the period of effectiveness of the registration for an equivalent period. In States that permit the registrant to self-select the period of effectiveness (option B), the prescribed form of amendment notice should permit the registrant to likewise self-select the length of the extension period. Thus, a registrant who, for example, selected a five year term for the initial registered notice should be allowed to select a different period for the extension. In States that permit the registrant to self-select the period of effectiveness subject to a maximum limit (option C), the registry system should be designed to prevent a registrant from entering a period that exceeds the maximum limit.

(j) Global amendment of secured creditor information

22. The identifier or address, or both, of a secured creditor may change as a result of a merger, sale or other post-registration event. To enable the secured creditor information in all notices associated with that secured creditor to be efficiently amended, the registry system should be designed to allow a global amendment to be made either by registry staff at the request of the secured creditor or by the secured creditor directly (see draft Registry Guide, rec. 31; for the protection of the secured creditor against unauthorized or fraudulent amendments, see paras. 28-37 below).

2. Cancellation notices

23. As in the case of an amendment, the *Secured Transactions Guide* recommends that a secured creditor should be able to register a cancellation notice at any time (*Secured Transactions Guide*, rec. 73). A cancellation should not require authorization by the grantor, as it has no effect or only a beneficial effect on the grantor. As already mentioned, unlike an amendment, registration of a cancellation notice results in the removal of all registered notices to which it relates from the

public registry record. Information thus removed is archived for a long period of time in a manner that enables it to be retrieved by the registry staff (see A/CN.9/WG.VI/WP.54/Add.2, paras. 44 and 45, and draft Registry Guide, rec. 21).

24. To facilitate the registration process, the only information that the registrant should be required to enter in the designated field on the cancellation notice is the registration number assigned to the initial notice by the registry and permanently associated with that notice and any related subsequent notices (see draft Registry Guide, rec. 32; for authorization of a cancellation notice by the secured creditors, see paras. 28-37 below).

3. Effect of inadvertent expiration or cancellation of a registered notice

25. In the event that a secured creditor inadvertently fails to extend the period of effectiveness of a registration before it expires or inadvertently registers a cancellation notice, the secured creditor may register a new initial notice. However, the *Secured Transactions Guide* recommends that the third-party effectiveness and priority status of the security right to which the new notice relates should date only from the time of its registration (see *Secured Transactions Guide*, rec. 47). Accordingly, the secured creditor will suffer a loss of priority as against competing claimants whose rights became effective against third parties prior to the expiration or cancellation, including competing secured creditors against whom it previously had priority under the first-to-register rule (see *Secured Transactions Guide*, chap. V, paras. 132-134, and rec. 96). The policy underlying this approach is to avoid requiring a third-party searcher to go beyond the registry record in order to determine if a security right ever existed (see *Secured Transactions Guide*, chap. III, para. 123).

26. Some States adopt a more lenient approach. Under this second approach, the secured creditor is given a short grace period after the lapse or cancellation to revive its registration so as to restore the third-party effectiveness and priority status of its security right as of the date of the initial registration. However, to protect intervening third parties, the secured transactions law in States that adopt this approach provides that the security right is ineffective against or subordinate to competing claimants that acquired rights in the encumbered assets or advanced funds to the grantor after the lapse or cancellation and before the new registration. A third approach is the same except that there is no time limitation on when a lapsed or expired registration may be revived subject to the rights of intervening competing claimants (see *Secured Transactions Guide*, chap. III, para. 123).

27. On the one hand, the *Secured Transactions Guide* recognizes that the second and third approaches also protect third-party searchers. On the other hand, the *Secured Transactions Guide* also recognizes that reinstatement may give rise to a complicated “circular priority” dispute where the secured creditor that reinstates thereby regains a priority over a competing secured creditor that existed before the lapse or cancellation, but not over a third competing secured creditor that has entered the picture in the period between the lapse or cancellation and the reinstatement. In addition, adoption of either of these two approaches requires the registry system to be configured to enable revival of or a reference to the original registration on the reinstatement notice. To avoid these complications and in the interest of providing a clear and efficient registration and priority regime, the

Secured Transactions Guide recommends that a lapsed or cancelled registration can be revived only by registration of a new notice with the result that the related security right takes effect against competing claimants only from the date of its registration forward (see *Secured Transactions Guide*, chap. III, paras. 124-127, and rec. 47).

4. Effectiveness of amendment or cancellation notices not authorized by the secured creditor

28. As already discussed (see paras. 25-27 above), recommendation 47 of the *Secured Transactions Guide* provides that, where there is a lapse of third-party effectiveness as a result of the expiration of a registration or the registration of a cancellation notice, it can be re-established but only as of the time a new initial notice with respect to the security right is registered. However, recommendation 47 does not seem to deal with the issue of whether third-party effectiveness is lost where the registration of the cancellation notice was not authorized by the secured creditor. Nor does the *Secured Transactions Guide* address this issue in the context of an unauthorized amendment notice, the purported effect of which is equivalent to a cancellation (for example, where the amendment purports to delete an encumbered asset from the description in the initial notice or where it purports to delete a grantor). The balance of the discussion in this section also applies to such amendments as well as to cancellations.

29. In addition, as already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 38-40), recommendation 55, subparagraph (d), of the *Secured Transactions Guide* obligates the registry to send promptly a copy of a registered amendment or cancellation notice to the secured creditor. While the commentary in the *Secured Transactions Guide* explains that the purpose of this obligation is to enable the secured creditor to check the legitimacy of a cancellation or amendment, it does not go on to address the issue of whether an unauthorized cancellation or amendment may nonetheless be relied upon by third party searchers (see *Secured Transactions Guide*, chap. IV, para. 52). Moreover, recommendation 71 of the *Secured Transactions Guide* deals in detail with the issue of authorization in the context of the grantor's authorization for registration of an initial or amendment notice but not with the secured creditor's authorization for registration of an amendment or cancellation notice. Finally, recommendation 74 of the *Secured Transactions Guide*, which provides that cancelled notices are removed from the publicly searchable registry record, may also have a bearing on the effectiveness of the registration of an unauthorized cancellation notice (see paras. 33 and 34 below).

30. Legal systems differ on the approach they take to this question. In some legal systems, registration of an unauthorized amendment or cancellation notice is nonetheless effective with the result that a third-party searcher is entitled to rely on a "clean" search result regardless of the lack of authorization from the secured creditor. The policy underlying this approach is to avoid requiring the third-party searcher to go beyond the registry record in order to determine whether a security right ever existed in the case of a cancellation or whether an amendment purporting to delete an encumbered asset or a grantor was authorized. In these legal systems, the registry system is designed to protect the secured creditor against the risk of fraudulent amendments or cancellations by the grantor or a third party by incorporating an authorization mechanism into the process for registering

amendments and cancellations. For example, each secured creditor is assigned a unique user code which must be entered in all amendment or cancellation notices it submits for registration. If the secured creditor fails to preserve the confidentiality of its access code, it has no basis for a complaint if a third party uses that number to successfully submit an unauthorized cancellation or amendment.

31. An unauthorized amendment or cancellation may also result from the error of a law firm or other third-party service provider employed by the secured creditor to perform registration services on its behalf. For example, the secured creditor may have instructed the service provider to amend one notice and to cancel another and the service provider mistakenly cancels the wrong notice. In systems that adopt this first approach, the secured creditor bears the risk of third-party error in this scenario and is expected to either seek indemnity from the third-party service provider or to obtain insurance. As noted earlier, some legal systems that adopt the first approach also adopt a “fail safe” mechanism that provides secured creditors with the opportunity to reinstate a registered notice that was cancelled erroneously or without authority. Under this approach, the reinstatement restores the third-party effectiveness of the relevant security right as of the date of registration of the initial notice as against third parties other than third parties that acquire a right in the encumbered asset during the period after registration of the cancellation notice and before the reinstatement notice is registered. Some legal systems extend a similar approach to erroneous or unauthorized amendments in addition to cancellations.

32. In other legal systems, registration of an amendment or cancellation notice is not effective if it was not authorized by the secured creditor. The reason for this approach is that, in these legal systems, anybody may register an amendment or cancellation notice upon payment of the relevant fees. In open access registry systems of this kind it is thought that protecting a secured creditor that has properly registered an initial notice against the greater risk of unauthorized or fraudulent amendments and cancellations outweighs the need to ensure that the registry record can be fully relied upon by third parties. Legal systems that adopt this second approach also place the risk of unauthorized registrations by a law firm or other third-party service provider employed by the secured creditor on third-party searchers. The question of “authorization” in this scenario would typically be based on the State’s general law with respect to the power of agents and representatives to bind their principals. Third-party searchers under this second approach cannot rely fully on the registry record. This, however, does not mean that third-party searchers are not protected. It is assumed that prudent third-party searchers will protect themselves by contacting the secured creditor to verify whether the amendment or cancellation was authorized. In cases where the secured creditor fails or refuses to respond, these legal systems usually build in a procedure for compelling the secured creditor to respond.

33. In legal systems that adopt the second approach, all registered notices remain on the public registry record until they would have expired in the absence of a cancellation, notwithstanding the registration of a cancellation notice. Thus, searchers are expected to obtain direct confirmation from the secured creditor that the cancellation notice was authorized. In the registry system contemplated by the draft Registry Guide (see recs. 20 and 21), in line with the *Secured Transactions Guide* (see chap. IV, para. 109, and rec. 74), notices must be removed from the public registry record once a cancellation notice is registered. Consequently, in the

case of an unauthorized cancellation, if the second approach were adopted, searchers could not protect themselves by contacting the secured creditor to determine if the registration of the cancellation notice was authorized. Since the information in the registered notices to which the cancellation notice referred would have been archived, they would have no means of verifying by a search of the public registry record whether a security right may have historically existed in the relevant encumbered asset and, if so, the identity of the secured creditor.

34. On the other hand, the *Secured Transactions Guide* does not explicitly address the question of whether the registry is obligated to archive a notice where the registration of the cancellation notice was not authorized by the secured creditor. Recommendation 74 provides that the registry should “remove” information contained in a registered notice from the public registry record, if the registered notice “has been cancelled as provided in recommendation 72 or 73”. Those two recommendations provide for cancellation where no security right has been created, the security right has been extinguished or the registered notice has not been authorized by the grantor. Thus, it may be argued that the registry is not obligated to archive the relevant related notices where the registration of a cancellation notice was not authorized by the secured creditor.

35. Consequently, it would seem that it would not be inconsistent with the *Secured Transactions Guide* if an enacting State that adopted the second approach provided that the registry was not obligated to archive the information in registered notices in the event the secured creditor did not authorize the registration of a cancellation notice. However, in an open access system of the kind contemplated by the second approach, the registry has no means of verifying whether the registration of the cancellation notice was authorized. While the registry could simply not archive any registered notices despite registration of a cancellation notice, this would be contrary to recommendation 74 of the *Secured Transactions Guide*. Accordingly, to be consistent with recommendation 74, implementation of this second approach would require the registry system to modify the open access approach by building into the registration process for cancellation notices some mechanism for verifying whether the secured creditor has authorized the registration. It should be noted that it would not be sufficient for the registry simply to assign the secured creditor a secure access code for the purposes of registering cancellations. This would not catch cancellation notices erroneously submitted by a third-party service provider with whom the secured creditor had shared the access code for the purposes of performing registrations on its behalf. Some additional verification by the registry would be needed to ensure that the cancellation notice has been directly authorized by the secured creditor. Alternatively, the secured transactions law could specify that, where a cancellation notice that contains the secured creditor’s access code is registered, the registration is deemed to have been authorized by the secured creditor.

36. It should finally be noted that, if the second approach is adopted, the registry system also would need to be designed to retrieve a registered notice according to the name of the grantor even where an amendment notice has been registered purporting to delete that grantor. Otherwise, the notice would not be retrieved on a search result and third parties would not know that they need to contact the secured creditor or take other steps to determine whether the deletion was authorized by the secured creditor.

37. An enacting State alternatively might consider a third compromise approach under which a searcher who in fact relied on the registry record would be protected despite the lack of authorization for the registration for an amendment or cancellation, but the related security right would otherwise remain effective against other third parties. This third approach would protect a buyer or secured creditor that entered into a transaction with the grantor in reliance on a “clean” search result. However, the lack of authority for the registration could still be raised by the secured creditor as against third parties such as, for example, the grantor’s insolvency representative, who did not in fact rely on the registry record in the sense of entering into a particular transaction on the assumption that, because a cancellation or amendment notice had been registered, the relevant asset was unencumbered.

5. Compulsory amendment or cancellation

38. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 16-18), the *Secured Transactions Guide* permits a registration to be made before the security right to which it relates is created or any security agreement is concluded between the parties (see *Secured Transactions Guide*, rec. 67). If the negotiations are aborted after the notice is registered, or for some other reason no security agreement is ever entered into between the parties, the creditworthiness of the person named as the grantor in a registered notice may be adversely affected. The same is true where a security agreement has been entered into between the secured creditor and grantor named in a registered notice, but their secured financing arrangement has come to a final end or some of the information in the registered notice exceeds the scope of the grantor’s authorization for registration (for example, the description of the encumbered assets in the registered notice is broader than that authorized by the grantor in the security agreement). Accordingly, the *Secured Transactions Guide* recommends that the secured creditor should be legally obligated to register the necessary cancellation or amendment notice, as the case may be. In the event that the secured creditor fails to do so, the *Secured Transactions Guide* further recommends that the grantor should be entitled to send a formal demand to the secured creditor and that the enacting State should establish a summary judicial or administrative procedure to compel cancellation or amendment if the secured creditor fails to act on the request (see *Secured Transactions Guide*, rec. 72).

39. To implement these recommendations, the secured transactions law or the regulation of the enacting State should provide that a secured creditor is obliged to register an amendment or cancellation notice, as the case may be, where: (a) the registration of an initial or amendment notice has not been authorized by the grantor at all or to the extent described in the notice; (b) authorization has been withdrawn and no security agreement has been concluded; (c) the security agreement has been revised in a way that makes the information contained in the registered notice inaccurate; or (d) the security right to which the registered notice relates has been extinguished by payment or otherwise and there is no commitment to extend further credit (see draft Registry Guide, rec. 33, subpara. (a)).

40. If the secured creditor does not comply with that obligation on its own, the secured transactions law or the regulation should provide that the secured creditor must register the relevant amendment or cancellation notice within a short period of time after receiving a written request from the grantor (see *Secured Transactions*

Guide, rec. 72, subpara. (a), and draft Registry Guide, rec. 33, subpara. (c)). To address the possibility that the secured creditor neglects or refuses to respond to the grantor's request, the grantor should be entitled to seek an order compelling registration of the cancellation or amendment notice through a speedy and inexpensive judicial or administrative procedure, which should include appropriate safeguards for the secured creditor in the case of an unwarranted demand by the grantor (see *Secured Transactions Guide*, rec. 72, subpara. (b), and draft Registry Guide, rec. 33, subpara. (e)).

41. Depending on the option chosen by an enacting State in its secured transactions law or regulation, a compulsory amendment or cancellation could be registered by the registry staff at the request of either the grantor or a judicial or administrative officer specified by the enacting State. In either case, the relevant judicial or administrative order should have to be attached to the amendment or cancellation notice presented to the registry (see draft Registry Guide, rec. 33, subpara. (g)).

B. Recommendations 30-33

[Note to the Working Group: The Working Group may wish to consider recommendations 30-33, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.]

VI. Search criteria and search results

A. General remarks

1. Search criteria

42. As already explained (A/CN.9/WG.VI/WP.54/Add.2, paras. 21-23), under the approach recommended in the *Secured Transactions Guide*, information in the registry record must be indexed or otherwise organized so as to be searchable by reference to the identifier of the grantor. Accordingly, the regulation should provide that the identifier of the grantor is the principal criterion by which registration information may be searched and retrieved (see draft Registry Guide, rec. 34, subpara. (a)).

43. The registry should be designed to also allow notices to be searched and retrieved by reference to the unique registration number assigned by the registry to the initial notice and permanently associated with that notice and any related subsequent notices (see draft Registry Guide, rec. 34, subpara. (b)). This approach would give registrants an alternative search criterion to quickly and efficiently retrieve a registration for the purposes of entering an amendment or cancellation. Accordingly, the regulation should provide that the registration number assigned to an initial notice is an alternative search criterion (see draft Registry Guide, rec. 34, subpara. (b)).

44. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2, paras. 24-27), some States require the serial number of specified kinds of high value encumbered assets to be entered in an initial notice in order for the related security right to be effective against or have priority over certain types of competing claimants. The *Secured Transactions Guide* discusses but makes no recommendation with respect to this approach (see *Secured Transactions Guide*, chap. IV, paras. 34-36). If an enacting State decides to implement this approach, the regulation should provide guidance on what constitutes the correct serial number for the specified categories of serial numbered assets, and include that number as an alternative search criterion.

45. As already mentioned (see para. 22 above), a secured creditor should be able, either directly or through the registry staff to efficiently amend its identifier or address information in all registrations associated with that secured creditor through a single global amendment. However, the identifier of the secured creditor should not be a search criterion for searching by the public generally. The identifier of the secured creditor has limited relevance to the legal objectives of the registry system. Moreover, to allow public searching may violate the reasonable expectations of secured creditors; for example, because of the risk that a credit provider may undertake a search based on the secured creditor identifier to obtain the client lists of its competitors (see *Secured Transactions Guide*, chap. IV, para. 81).

2. Search results

46. The regulation should provide that a search result should either indicate that no registered notice was retrieved against the search criterion entered in the search request or include the registration information in all registered notices that match that criterion (see draft Registry Guide, rec. 35, subpara. (a)). A searcher may rely on the accuracy of a search result only if the searcher entered the correct grantor identifier or other search criterion in its search request (see draft Registry Guide, rec. 35, subpara. (b)).

47. As already noted (see A/CN.9/WG.VI/WP.54/Add.3, paras. 20-23), registration of a notice is effective only if the notice would be retrieved by a search of the registry record by a searcher using the correct identifier of the grantor as the search criterion. Some registry systems are designed to retrieve registrations only if the grantor identifier that was entered in a registered notice exactly matches the grantor identifier that was submitted by the searcher. Where registered notices are stored in an electronic database, some systems program the search logic so as to also retrieve registered notices that contain a grantor identifier that closely matches the grantor identifier entered by the searcher in the search request.

48. In a registry system that is designed to retrieve both exact and close matches, a registration may be considered effective even though the registrant made a minor error in entering the correct grantor identifier if the search in fact retrieves a registration with a minor error (see A/CN.9/WG.VI/WP.54/Add.3, paras. 20 and 21). This is because a search according to the correct grantor identifier may (if the search logic so provides) still retrieve the registration as an inexact but close match. Whether the error would nonetheless make the registration ineffective depends on such factors as whether: (a) a searcher would be able to readily identify the grantor by referring to additional information, such as the grantor's address or any additional information that the enacting State may require to be entered such as the grantor's birth date or identification number; and (b) the list of inexact matches

is not so lengthy as to prevent the searcher from reasonably determining whether the grantor which it is interested in is included in the list.

49. In deciding whether search results should also disclose close matches, enacting States should take into account that, while the close-match system may protect the registrant against some minor errors in entering the grantor identifier, it creates greater uncertainty for searchers. As a result, such a close-match system may require recourse to the courts to determine whether a searcher in the particular circumstances should have reasonably realized that a search result that included registrations in which the grantor's identifier is a close match referred to the relevant grantor. Accordingly, the regulation should provide that search results should reflect information in registered notices in which the grantor's identifier matches exactly the grantor identifier entered by a searcher. If the registry system is designed to also include information in registered notices in which the grantor's identifier closely matches the grantor identifier entered in the search request, the rules for determining what constitutes a sufficiently close match should be clearly stated (see draft Registry Guide, rec. 35, subpara. (b)). In some States, when a search using the registry's software retrieves a registration with a minor error, that is treated as a sufficiently close match.

50. The regulation should also provide that, upon request by a searcher and payment of the relevant fee, if any, the registry must issue an official search certificate that reflects a search result (see draft Registry Guide, rec. 33, subpara. (c)). In the case of an electronic search, a search certificate may be simply a printed version of the search result. Whether a search certificate is admissible in a court of the enacting State and, if so, its evidentiary value are matters for the procedural law of the enacting State. However, a search certificate should in principle be admissible as presumptive proof of its contents. It would then be up to the party challenging the certificate to provide evidence to the contrary (for example, by showing that the search certificate is a forgery or is an inaccurate or incomplete record of the search result to which it relates).

51. In some registry systems, search results include a "currency date" indicating that the search result only includes information in notices that were registered as of that date (as opposed to the actual date of the search result). "Currency dates" are included in search results in registry systems in which the registration of a notice becomes legally effective at the date and time when the notice is submitted to the registry. The "currency date" is meant to alert searchers to the possibility that a legally effective registration may have been submitted to the registry in the period between the "currency date" and the actual date of the search. As already mentioned (see A/CN.9/WG.VI/WP.54/Add.2, paras. 1-6), the *Secured Transactions Guide* recommends that a registration becomes legally effective only when the information in a notice submitted to the registry has been entered into the registry record so as to be publicly searchable (see *Secured Transactions Guide*, chap. IV, paras. 102-105, and rec. 70). Accordingly, under the registry system contemplated by the *Secured Transactions Guide*, there is no need to include a "currency date" in a search result: the "currency date" is the actual date of the search.

B. Recommendations 34 and 35

[*Note to the Working Group: The Working Group may wish to consider recommendations 34 and 35, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, the recommendations are not inserted here at this stage but will be inserted in the final text.*]

VII. Registration and search fees

A. General remarks

52. The *Secured Transactions Guide* recommends that registration and search fees should not be used to raise revenue for the enacting State but rather set on a pure cost-recovery basis (see *Secured Transactions Guide*, chap. IV, para. 37, and rec. 54, subpara. (i)). The reason for this approach is that excessive fees and transaction taxes will significantly deter utilization of the registry, thereby undermining the overall success of the enacting State's secured transactions law. In assessing the level of revenue from registry fees needed to achieve cost-recovery, account should be taken not only of the initial start-up costs related to the establishment of a registry but also of the costs necessary to fund its operation, including: (a) salaries of registry staff; (b) upgrades and replacements of hardware and software; (c) ongoing staff training; and (d) promotional activities and training for registry users.

53. Advances in information technology have reduced the difference between the relative start-up costs of establishing an electronic versus a paper-based registry record. In addition, the operation costs associated with an electronic record are lower, especially if the registry system permits registrants and searchers to electronically submit notices and search requests directly without the interposition of registry staff. If the electronic registry record is developed in partnership with a private entity, it may be possible for the private entity to make the initial capital investment in the registry infrastructure and recoup its investment by taking a percentage of the service fees charged to registry users once the registry is up and running.

54. In some States, in the interest of encouraging use of the registry by creditors, charge no fees or very low fees below the cost-recovery level for registration. While this approach may encourage creditors to take and register security rights in low-value and other transactions that might have otherwise been entered into on an unsecured basis, it means that the registry and the benefits it provides to creditors is being subsidized with general taxpayer revenue. In other States, only the registration of a cancellation notice is free of charge so as to encourage secured creditors to promptly register cancellations once the secured financing relationship with the grantor has come to an end. In yet other States, electronic searches (as opposed to registrations) are free of charge.

55. As already discussed (see A/CN.9/WG.VI/WP.54/Add.2. paras. 9 and 10), an enacting State may decide to permit registrants to self-select the period of effectiveness of a registered notice. Enacting States that adopt this approach may

wish to consider whether registration fees should be based on a sliding tariff related to the period of effectiveness selected by the registrant. This approach has the advantage of discouraging secured creditors from entering an inflated term in the registered notice out of an excess of caution.

56. As also already mentioned (A/CN.9/WG.VI/WP.54/Add.3, paras. 15-19), an enacting State may choose to require a registered notice to specify the maximum amount for which a security right may be enforced. In enacting States that adopt this approach, the fees charged by the registry for registration should not be related to the maximum amount specified in the notice since this approach would be contrary to the cost-recovery approach to setting fees recommended by the *Secured Transactions Guide* (see para. 52 above).

57. Any registration and search fees set by the enacting State should be set out in the regulation (see draft Registry Guide, rec. 36). It is for each enacting State to decide whether “the regulation” in this context means a formal regulation or more informal administrative guidelines that the registry can revise. The latter approach would provide greater flexibility to adjust the fees in response to later events such as, for example, the need to reduce the fees once cost of the initial investment has been recouped. However, this approach has the disadvantage that lack of formality may be abused by the registry to unjustifiably adjust the fees upwards.

58. In setting fees in a hybrid paper and electronic registry system, it may be reasonable for the enacting State to decide to charge higher fees to process paper-based notices and search requests because they must be processed by the registry staff, while electronic notices and search requests that are directly submitted to the registry do not require attention from the registry staff. Charging higher fees will also encourage the user community to eventually transition to using the direct electronic registration and search functionalities.

B. Recommendation 36

[Note to the Working Group: The Working Group may wish to consider recommendation 36, as reproduced in document A/CN.9/WG.VI/WP.54/Add.5. The Working Group may also wish to note that, for reasons of economy, this recommendation is not inserted here at this stage but will be inserted in the final text.]

(A/CN.9/WG.VI/WP.54/Add.5) (Original: English)
Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-third session

ADDENDUM

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Annex I

Terminology and recommendations

Terminology*

(a) “Address” means: (i) a physical address, including a street address and number, city, postal code and State; (ii) a post office box number, city, postal code and State; (iii) an electronic address; or (iv) an address that would be effective for communicating information;

(b) “Amendment” means the modification of information contained in a previously registered notice to which the amendment relates;

(c) “Cancellation” means the removal from the public registry record of the information contained in all previously registered notices to which the cancellation relates;

(d) “Designated field” means the space on the prescribed form of notice designated for entering the specified type of information;

* Section B of the Introduction to the *Secured Transactions Guide* on terminology and interpretation applies also to the draft Registry Guide, supplemented by the terminology and interpretation section of the Introduction to the draft Registry Guide.

- (e) “Grantor” means the person identified in the notice as the grantor;
- (f) “Law” means the law of the enacting State governing security rights in movable assets;
- (g) “Notice” means a communication in writing (paper or electronic) to the registry of information with respect to a security right; a notice may be an initial notice, an amendment notice or a cancellation notice;
- (h) “Registrant” means the person who submits a notice to the registry for registration [and may be the secured creditor or a third-party service provider];
- (i) “Registrar” means the person appointed pursuant to the law and the regulation to supervise and administer the operation of the registry;
- (j) “Registration” means the entry of information contained in a notice into the registry [record] [database];
- (k) “Registration number” means a unique number allocated to an initial notice by the registry and permanently associated with that notice and any related notice;
- (l) “Registry record” means the information in all registered notices that is stored electronically in the registry [record] [database] and consists of the record that is publicly accessible (public registry record) and the record that has been removed from the public registry record (registry archives);
- (m) “Regulation” means the body of rules implemented by the enacting State with respect to the registry, whether these rules are found in administrative guidelines or the substantive secured transactions law; and
- (n) “Secured creditor” means the person identified in the notice as the secured creditor [and may be the secured creditor or its representative].

Recommendations

I. Registry and registrar

Recommendation 1. Establishment of the registry

The regulation should provide that the registry is established for the purposes of receiving, storing and making accessible to the public information in registered notices with respect to security rights in movable assets.

Recommendation 2. Appointment of the registrar

The regulation should provide that [the person authorized by the enacting State or by the law of the enacting State] appoints the registrar, determines the registrar’s duties and monitors the registrar’s performance.

Recommendation 3. Functions of the registry

The regulation should provide that the functions of the registry include:

- (a) Providing access to the registry services in accordance with recommendations 4, 6, 7 and 9;
- (b) Publicizing the means of access to registry services, and the opening days and hours of any office of the registry in accordance with recommendation 5;
- (c) Providing the grounds for rejection of the registration of a notice or the performance of a search in accordance with recommendations 8 and 10;
- (d) Entering the information contained in a notice submitted to the registry into the registry [record] [database], and recording the date and time of each registration, in accordance with recommendation 11, and assigning a registration number to the initial notice in accordance with recommendation 12;
- (e) Indexing or otherwise organizing the information in the registry record so as to make it searchable in accordance with recommendation 16;
- (f) Providing registrants and secured creditors with a copy of the registered notice in accordance with recommendation 18;
- (g) Entering the information contained in an amendment notice into the registry [record] [database] in accordance with recommendation 19;
- (h) Removing the information contained in a registered notice from the public registry record upon the expiry of its period of effectiveness or registration of a cancellation notice in accordance with recommendation 20;
- (i) Archiving information removed from the public registry record in accordance with recommendation 21; and
- (j) Protecting the integrity of the information in the registry record in accordance with recommendation 17, subparagraph (b).

II. Access to the registry services**Recommendation 4. Public access to registry services**

The regulation should provide that any person may submit a notice or a search request to the registry [in accordance with recommendations 6 and 9].

[Note to the Working Group: To assist the reader in understanding the inter-relationship between recommendation 4, on the one hand, and recommendations 6 and 9, on the other, and to avoid inadvertently creating an inconsistency between them, the Working Group may wish to consider retaining the bracketed text.]

Recommendation 5. Operating days and hours of the registry

The regulation should provide that:

- (a) If access to registry services is provided through a physical office:
 - (i) Each office of the registry is open to the public during [the days and hours to be specified by the enacting State]; and
 - (ii) Information about any registry office locations and their opening days and hours is publicized on the registry's website, if any, or otherwise widely publicized, and the opening days and hours of registry offices are posted at each office;
- (b) If access to registry services is provided through electronic means of communication, access is available at all times; and
- (c) Notwithstanding subparagraphs (a) and (b) of this recommendation:
 - (i) The registry may suspend access to registry services in whole or in part for a period of time that is as short as practicable; and
 - (ii) Notification of the suspension and its expected duration is published in advance when feasible and otherwise as soon thereafter as reasonably practicable on the registry's website, if any, or otherwise widely publicized, and, if the registry provides access to its services through physical offices, the notification is posted at each office.

Recommendation 6. Access to registration services

The regulation should provide that any person may submit a[n initial] notice for registration if that person:

- (a) Uses the form prescribed by the registry;
- (b) Provides [information about] its identity in the manner prescribed by the registry; and
- (c) Has paid, or made arrangements to pay, to the satisfaction of the registry any fee prescribed by the registry.

[Note to the Working Group: The Working Group may wish to consider retaining: (a) the bracketed text in the chapeau as "notice" covers also amendment and cancellation notice and registry procedures may impose certain limitations (for example, require entry of a security code assigned to the registrant of the initial notice) on who may register an amendment or cancellation notice; and (b) the bracketed word in subparagraph (b), in view of the fact that a person provides information (e.g. a copy of a document) but not its identity as such, or alternative wording along the lines "identifies itself" or "establishes its identity" as long it is explained that no verification of identity beyond what is foreseen in recommendation 7 is required.]

Recommendation 7. Verification of identity, evidence of authorization or scrutiny of the contents of the notice not required

The regulation should provide that:

- (a) The registry maintains [information about] the identity of the registrant but does not require its verification;
- (b) The registry does not require evidence of the existence of authorization for registration of a notice; and
- (c) The registry does not conduct other scrutiny of the content of the notice. In particular, it is not the responsibility of the registry to ensure that information entered in a designated field is complete, accurate and legally sufficient.

[Note to the Working Group: In considering the bracketed text in subparagraph (a) of this recommendation, the Working Group may wish to note that the reference to the registry maintaining information would mean preserving in its records the information submitted by the registrant as to its identity (e.g. a copy of an identity card or a driver's licence or a record of the pertinent information on these documents).]

Recommendation 8. Rejection of the registration of a notice

The regulation should provide that:

- (a) The registry may reject the registration of a notice submitted to it for registration if the registrant failed to enter information in all the required designated fields or if the information entered is not legible; and
- (b) The registry provides the grounds for the rejection of the registration of a notice submitted to the registry as soon as practicable.

[Note to the Working Group: The Working Group may wish to note that the commentary explains that, in the case of an electronic registry, the wording "as soon as practicable" should mean "almost immediately", while, in the case of a registry in which the submission of paper notices is possible, the wording will mean "as soon as possible under the circumstances".]

Recommendation 9. Access to searching services

The regulation should provide that any person may submit a search request, if that person:

- (a) Uses the form prescribed by the registry; and
- (b) Has paid, or made arrangements to pay, to the satisfaction of the registry any fee prescribed by the registry.

Recommendation 10. Rejection of a search request

The regulation should provide that:

- (a) The registry may reject a search request if it fails to provide a search criterion in a legible manner; and

(b) The registry provides the grounds for the rejection of a search request as soon as practicable.

III. Registration

Recommendation 11. Time of effectiveness of the registration of a notice

The regulation should provide that:

(a) The registration of a notice is effective from the date and time when the information in the notice is entered into the registry [record] [database] so as to be accessible to searchers of the public registry record;

(b) The registry maintains a record of the date and time when each notice is entered into the registry [record] [database] so as to be accessible to searchers of the public registry record; and

(c) The registry enters into the registry [record] [database] and indexes or otherwise organizes information in a notice submitted to the registry for registration so as to make it accessible to searchers of the public registry record as soon as practicable or within [a short period of time to be specified by the enacting State] and in the order in which the notice was submitted to the registry.

[Note to the Working Group: The Working Group may wish to note that, in subparagraph (c) of this recommendation, the words “as soon as practicable” replaced the word “immediately”, as: (a) even, in the case of an electronic registry, registered notices would become searchable almost immediately; and (b) for consistency with the wording of recommendation 8, subparagraph (b). If the Working Group decides to retain this new wording, it may wish to include in the commentary an explanation along the lines of the explanation in the note to recommendation 8 and delete the alternative wording (“or within ...”).]

Recommendation 12. Registration number

The regulation should provide that the registry assigns a unique registration number to an initial notice [and that all notices related to that initial notice are assigned the same number].

[Note to the Working Group: The Working Group may wish to retain the bracketed text. While it appears repeating the thrust of the text used in the explanation of this term in the terminology, this may be necessary (or useful): (a) as the text has the form of a guide and the terminology is part of the commentary (not regulations with definitions); and (b) even if the text had the form of regulations with definitions, a distinction would need to be drawn between definitions and operative rules.]

Recommendation 13. Period of effectiveness of the registration of a notice

The regulation should provide that:

Option A

(a) The registration of an initial notice is effective for [the enacting State to insert the period of time specified in its law];

(b) The period of effectiveness may be extended for [an additional period of time specified in the law of the enacting State] at any time before it expires. The new period starts when the current period expires; and

[(c) An amendment notice other than an amendment notice referred to in subparagraph (b) of this recommendation does not extend the period of effectiveness.]

Option B

(a) The registration of an initial notice is effective for the period of time indicated in the designated field in the notice;

(b) The period of effectiveness may be extended or reduced for the period of time indicated in an amendment notice at any time before it expires. In the case of an extension, the new period starts when the current period expires; and

[(c) An amendment notice other than an amendment notice referred to in subparagraph (b) of this recommendation does not extend the period of effectiveness.]

Option C

(a) The registration of an initial notice is effective for the period of time indicated in the designated field in the notice, not exceeding [a long period of time, such as, for example, twenty years, to be specified by the enacting State].

(b) The period of effectiveness may be extended or reduced for the period of time indicated in an amendment notice not exceeding [a long period of time, such as, for example, twenty years, to be specified by the enacting State] at any time before the period of effectiveness of the registration expires. In the case of an extension, the new period starts when the current period expires.

[(c) An amendment notice other than an amendment notice referred to in subparagraph (b) of this recommendation does not extend the period of effectiveness.]

[Note to the Working Group: The Working Group may wish to note that the commentary explains that only an amendment notice that extends the period of effectiveness has that effect. Other amendment notices (e.g. modifying the description of the encumbered assets) do not extend the period of effectiveness. In view of that, the Working Group may wish to consider that subparagraph (c) in all three options is superfluous as stating the obvious that is, in any case, explained in the commentary. The Working Group may also wish to consider whether subparagraph (c) should state instead (or in addition, if current paragraph (c) is retained), in line with rec. 11, that an amendment notice becomes effective as of the time it is entered into the registry record so as to be accessible to searchers.]

Recommendation 14. Time when a notice may be registered

The regulation should provide that a[n initial or amendment] notice may be registered before or after the creation of the security right or the conclusion of the security agreement.

[Note to the Working Group: The Working Group may wish to consider retaining the bracketed text in the title and the text of this recommendation, as an initial or an amendment notice may be pre-registered. If the negotiations do not lead to an agreement, a cancellation notice must be registered anyway.]

Recommendation 15. Sufficiency of a single notice

The regulation should provide that the registration of a single notice is sufficient to achieve the third-party effectiveness of one or more than one security right created by the grantor in favour of the same secured creditor in the encumbered asset described in the notice, whether they exist at the time of registration or are created thereafter, and whether they arise from one or more than one security agreement between the same parties.

Recommendation 16. Indexing or other organization of information in the registry record

The regulation should provide that:

(a) The registry indexes or otherwise organizes information in an initial notice in the public registry record so as to make it searchable [by a searcher] according to the grantor identifier or the registration number assigned to the initial notice;

(b) The registry indexes or otherwise organizes information in an amendment notice in the public registry record so as to make it searchable [by a searcher] together with the initial and any related notice; and

(c) The registry indexes or otherwise organizes information in a cancellation notice in the registry archives so as to make it retrievable [by the registry] in accordance with recommendation 21 together with the initial and any related notice.

[Note to the Working Group: The Working Group may wish to consider retaining text along the lines of the bracketed text to avoid creating the implication that a searcher may have access to archived information.]

Recommendation 17. Integrity of the registry record

The regulation should provide that:

(a) Except as provided in recommendations 19 and 20, the registry does not amend information in or remove information from the registry record; and

(b) The registry protects the registry record from loss or damage, and provides for back-up mechanisms to allow reconstruction of the registry record.

[Note to the Working Group: The Working Group may wish to note that subparagraph (b) has been added to implement a decision of the Working Group (A/CN.9/764, para. 31). The Working Group may also wish to note that the commentary explains that this recommendation is intended to implement

recommendation 55, subparagraph (l), of the Secured Transactions Guide and is not intended to deal with liability which is a matter addressed in recommendation 56. The commentary also explains that the registry should be able to reconstruct information other than information in registered notices (e.g. accounts, user names, passwords, etc.).

Recommendation 18. Copy of registered notice

The regulation should provide that:

(a) The registry promptly transmits a copy of a registered notice to each secured creditor at the address set forth in the notice, indicating the date and time when the registration of the notice became effective and the registration number; and

(b) The secured creditor sends a copy of an initial notice to each grantor at the address set forth in the notice and a copy of an amendment notice to each grantor at the address set forth in the notice or at the current address known to the secured creditor within [a short period of time, such as thirty days, to be specified by the enacting State] after the secured creditor has received a copy of the registered notice.

Recommendation 19. Amendment of information in the public registry record

The regulation should provide that:

(a) Information in a registered notice may be amended by the secured creditor through the registration of an amendment notice in accordance with recommendation 30, 31 or 33; and

(b) The registration of an amendment notice does not result in the removal of information from the public registry record.

[Note to the Working Group: The Working Group may wish to note that the commentary explains that the grantor's consent is required for the following amendments: adding encumbered assets and increasing the amount of the secured obligation or, where applicable, the maximum amount for which the security right may be enforced. The commentary also explains that, as with the registration of an initial notice, on-record evidence of the grantor's authorization is not a pre-condition to registration of an amendment notice, and the grantor's authorization may be given before or after the registration either in the security agreement or in another off-record agreement. If authorization was not obtained, the grantor may seek the registration of an amendment notice through a summary judicial or administrative proceeding (see draft Registry Guide, rec. 33). The commentary also discusses the effectiveness of the registration of an amendment notice that was not authorized by the secured creditor but resulted from fraud or other misconduct by a third party (see A/CN.9/WG.VI/WP.54/Add.4, paras. 28-37). The Working Group may wish to consider whether it is sufficient to discuss this matter in the commentary or whether it should be addressed in a recommendation to be included in the draft Registry Guide.]

Recommendation 20. Removal of information from the public registry record

The regulation should provide that information in a registered notice is removed from the public registry record upon the expiry of its period of effectiveness or upon registration of a cancellation notice in accordance with recommendation 32 or 33.

Recommendation 21. Archival of information removed from the public registry record

The regulation should provide that information removed from the public registry record in accordance with recommendation 20 is archived for a period of at least [a long period of time, such as, for example, twenty years, to be specified by the enacting State] in a manner that enables the information to be retrieved in accordance with recommendation 16.

Recommendation 22. Language of a notice

The regulation should provide that:

- (a) The information in a notice should be expressed in [the language or languages to be specified by the enacting State]; and
- (b) The registry should specify and make publicly available the character set to be used.

IV. Registration of initial notices**Recommendation 23. Information required in an initial notice**

The regulation should provide that:

- (a) An initial notice must contain the following information in the designated field:
 - (i) The identifier of the grantor determined in accordance with recommendations 24-26, the address of the grantor [and any other information to be specified by the enacting State to assist in uniquely identifying the grantor];
 - (ii) The identifier of the secured creditor or its representative determined in accordance with recommendation 27 and the address of the grantor or its representative;
 - (iii) A description of the encumbered assets determined in accordance with recommendations 28 and 29;
 - [(iv) The period of effectiveness of the registration determined in accordance with recommendation 11;¹ and

¹ If the enacting State has chosen option B or C in recommendation 11 (see *Secured Transactions Guide*, rec. 69).

(v) The maximum monetary amount for which the security right may be enforced];² and

(b) If there is more than one grantor or secured creditor, the required information must be entered in the designated field separately for each grantor or secured creditor, either in the same notice or in separate notices.

Recommendation 24. Grantor identifier (natural person)

The regulation should provide that, if the grantor is a natural person:

(a) The grantor identifier is the name of the grantor;

(b) Where the grantor's name includes a family name and a given name, the name of the grantor consists of the grantor's family name and the grantor's given name, and each component of the name must be entered in the designated field for that component;

(c) Where the grantor's given name or family name consist of more than one word, the given name and the family name of the grantor consist of those words and they must be entered in the designated fields for the given and the family names;

(d) Where the grantor's name consists of only one word, the name of the grantor consists of that word and it must be entered in the designated field for the family name;

(e) The name of the grantor is determined as follows:

(i) If the grantor was born and the grantor's birth was registered in [the enacting State to insert its name] with a government agency responsible for the registration of births, the name of the grantor is the name as stated in the grantor's birth certificate or equivalent document issued by the government agency;

(ii) If the grantor was born but the grantor's birth was not registered in [the enacting State to insert its name], the name of the grantor is the name as stated in a valid passport issued to the grantor by [the enacting State to insert its name];

(iii) If neither subparagraph (e) (i) nor subparagraph (e) (ii) of this recommendation applies, the name of the grantor is the name as stated in [the enacting State should specify the type of official document, such as an identification card or driver's licence, issued to the grantor by the enacting State, that it considers the most appropriate source of the name to be used, and their hierarchical order];

(iv) If neither subparagraph (e)(i), nor subparagraph (e)(ii), nor subparagraph (e)(iii) of this recommendation applies but the grantor is a citizen of [the enacting State to insert its name], the name of the grantor is the name as stated in the grantor's certificate of citizenship;

(v) If neither subparagraph (e)(i), nor subparagraph (e)(ii), nor subparagraph (e)(iii), nor subparagraph (e)(iv) of this recommendation applies,

² If the secured transactions law of the enacting State requires it (see *Secured Transactions Guide*, rec. 57, subpara. (d)).

the name of the grantor is the name as stated in a valid passport issued by the State of which the grantor is a citizen and, if the grantor does not have a valid passport, the name of the grantor is the name as stated in the birth certificate or equivalent document issued to the grantor by the government agency responsible for the registration of births at the place where the grantor was born;

(vi) In a case not falling within subparagraphs (e) (i) to (v) of this recommendation, the name of the grantor is the name as stated in any two of the following valid official documents [the enacting State to specify documents other than the ones specified in subparagraph (e) (iii) of this recommendation, such as a social security, health insurance or tax card, issued to the grantor by the enacting State, and their hierarchical order].

Recommendation 25. Grantor identifier (legal person)

The regulation should provide that, if the grantor is a legal person, the grantor identifier is the name of the grantor that is specified as its name in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

[Recommendation 26. Grantor identifier (special cases)]

The regulation should provide that:

(a) If the encumbered assets are subject to insolvency proceedings, the grantor identifier is the name of the insolvent person determined in accordance with recommendation 24 or 25, with the specification in a separate field that the grantor is in insolvency proceedings;

(b) If the grantor is a syndicate or joint venture, the grantor identifier is the name of the syndicate or joint venture designated in the most recent [document, law or decree to be specified by the enacting State] constituting it determined in accordance with recommendation 24 or 25;

(c) [If the grantor is a trust or an estate, the grantor identifier is the name of the trust or the estate determined in accordance with recommendation 24 or 25, with the specification in a separate field that the grantor is a trust or estate.]

(d) If the grantor is an entity other than one already referred to in the preceding rules, the grantor identifier is the name of the entity as designated in the most recent [document, law or decree to be specified by the enacting State] constituting it determined in accordance with recommendation 24 or 25.]

[Note to the Working Group: The Working Group may wish to note that, the commentary explains that this recommendation appears within square brackets to indicate that its goal is to set out examples of special cases for enacting States to select and adapt to their own laws, as the treatment of these cases may differ from State to State. The Working Group may wish to consider referring instead in subparagraph (a) to a grantor that is subject to insolvency proceedings and the security right is created by the insolvency representative. The current text would apply even to security rights created by the grantor before commencement of insolvency proceedings and would appear requiring an amendment of the registered notice to indicate that the grantor is in insolvency proceedings. The Working Group

may wish to consider whether subparagraph (d) is necessary. It states the obvious as it provides that, in all other cases, the general rule stated in recommendation 24 or 25 applies.]

Recommendation 27. Secured creditor identifier

The regulation should provide that:

- (a) If the secured creditor or its representative is a natural person, the identifier is the name of the secured creditor or its representative determined in accordance with recommendation 24;
- (b) If the secured creditor or its representative is a legal person, the identifier is the name of the secured creditor or its representative determined in accordance with recommendation 25; and
- (c) If the secured creditor or its representative is a kind of person referred to in recommendation 26, the identifier is the name of the person determined in accordance with recommendation 26.

Recommendation 28. Description of encumbered assets

The regulation should provide that:

- (a) The encumbered assets must be described in the designated field of the notice in a manner that reasonably allows their identification;
- (b) Unless otherwise provided in the law, a generic description that refers to all assets within a category of movable assets includes all of the grantor's present and future assets within the specified category; and
- (c) Unless otherwise provided in the law, a generic description that refers to the grantor's movable assets includes all of the grantor's present and future movable assets.

Recommendation 29. Incorrect or insufficient information

The regulation should provide that:

- (a) The registration of an initial notice, or an amendment notice that amends the grantor's identifier or adds a grantor, is effective if the notice provides the grantor's correct identifier as set forth in recommendations 24-26 or, in the case of an incorrect identifier, if the notice would be retrieved by a search of the public registry record using the grantor's correct identifier;
- (b) Except as provided in subparagraph (a) of this recommendation, an incorrect or insufficient statement of the information required in a notice does not render the registration ineffective, unless the incorrect or insufficient statement would seriously mislead a reasonable searcher;
- (c) An incorrect identifier of a grantor in a notice does not render the registration ineffective with respect to other grantors correctly identified in the notice;

(d) An insufficient description of encumbered assets in a notice does not render the registration ineffective with respect to other encumbered assets sufficiently described in the notice; and

(e) An incorrect statement in a notice with respect to the period of effectiveness of the registration and the maximum amount for which the security right may be enforced does not render the registration ineffective, except to the extent that it seriously misled third parties that relied on the registered notice.

[Note to the Working Group: The Working Group may wish to consider whether paragraph (a) of this recommendation should refer to a search by the registry's standard search logic. In theory, a grantor identifier could always be found if enough wild cards were used. Alternatively, this matter might be explained in the commentary.]

V. Registration of amendment and cancellation notices

Recommendation 30. Information required in an amendment notice

The regulation should provide that:

(a) An amendment notice must contain the following information in the designated field:

(i) The registration number of the initial notice to which the amendment relates; and

(ii) If information is to be modified, the additional information in the manner provided for entering that kind of information in an initial notice in accordance with recommendation 23;

(b) An amendment notice that discloses a change in the grantor identifier must indicate the new grantor identifier in accordance with recommendations 24-26;³

(c) An amendment notice that discloses a transfer of all of the encumbered assets must indicate the identifier and address of the transferee as a grantor in accordance with recommendations 24-26;

(d) An amendment notice that discloses a transfer that relates to only part of the encumbered assets must indicate the identifier and address of the transferee as a grantor in accordance with recommendations 24-26 and describe the part of the encumbered assets transferred in accordance with recommendation 28;

(e) An amendment notice that discloses an assignment of the secured obligation must indicate the identifier and address of the assignee as a secured creditor in accordance with recommendation 27 and, in the case of a partial

³ This type of amendment is mandatory in the sense that the *Secured Transactions Guide* recommends that, if the secured creditor does not register the amendment notice within a specified short "grace period" (for example, 15 days) after the grantor's identifier has changed, its security right is ineffective against buyers, lessees, licensees and other secured creditors that acquire rights in the encumbered asset after the change in the grantor identifier and before the amendment is registered (see *Secured Transactions Guide*, rec. 61).

assignment, describe in the designated field the encumbered assets to which the partial assignment relates; and

(f) An amendment notice may relate to one or multiple items of information in a notice.

Recommendation 31. Global amendment of secured creditor information in multiple notices

Option A

The regulation should provide that a secured creditor named in multiple registered notices may amend the secured creditor information in all these notices with a single global amendment.

Option B

The regulation should provide that a secured creditor named in multiple registered notices may request the registry to amend the secured creditor information in all these notices with a single global amendment.

Recommendation 32. Information required in a cancellation notice

The regulation should provide that a cancellation notice must contain in the designated field the registration number of the notice to which the cancellation relates.

Recommendation 33. Compulsory amendment or cancellation

The regulation should provide that:

(a) The secured creditor is obligated to register an amendment or cancellation notice, as the case may be, if:

(i) The registration of an initial or amendment notice has not been authorized by the grantor at all or to the extent described in the notice;

(ii) The registration of an initial or amendment notice has been authorized by the grantor but the authorization has been withdrawn or no security agreement has been concluded;

(iii) The security agreement has been revised in a way that makes the information contained in the notice incorrect or insufficient; or

(iv) The security right to which the notice relates has been extinguished by payment or other performance of the secured obligation or otherwise and there is no further commitment by the secured creditor to extend credit;

(b) In the case of subparagraph (a)(ii) to (a)(iv) of this recommendation, the secured creditor may charge any fee agreed upon with the grantor;

(c) Not later than [a short period of time, such as fifteen days, to be specified by the enacting State] after receipt of a written request from the grantor, the secured creditor is obliged to comply with its obligation under subparagraph (a) of this recommendation;

(d) Notwithstanding subparagraph (b) of this recommendation, no further fee or expense may be charged or accepted by the secured creditor if it complies with a written request from the grantor in accordance with subparagraph (c) of this recommendation;

(e) If the secured creditor does not comply within the time period provided in subparagraph (c) of this recommendation, the grantor is entitled to seek an amendment or cancellation, as the case may be, through a summary judicial or administrative procedure;

(f) The grantor is entitled to seek an amendment or cancellation, as the case may be, through a summary judicial or administrative procedure even before expiry of the period stated in subparagraph (c) of this recommendation, provided that there are appropriate mechanisms to protect the secured creditor; and

(g) The amendment or cancellation notice in accordance with this recommendation is registered by

Option A

the registry promptly upon receipt of the notice with the relevant judicial or administrative order attached.

Option B

a judicial or administrative officer promptly upon issuance of the relevant judicial or administrative order with a copy thereof attached.

[Note to the Working Group: The Working Group may wish to note that the commentary explains that the security right may be extinguished in different ways, including performance, settlement, enforcement, set off, avoidance of the security agreement in insolvency or avoidance of the security agreement for other reason (e.g. illegality).]

VI. Searches

Recommendation 34. Search criteria

The regulation should provide that the criterion by which a search of the public registry record may be conducted is:

- (a) The grantor identifier; or
- (b) The registration number.

Recommendation 35. Search results

The regulation should provide that:

- (a) The registry provides a search result that indicates the date and time when the search was performed and either sets forth all information in each registered notice that matches the specified search criterion or indicates that no registered notice matched the search criterion;

(b) A search result reflects information in the public registry record that matches exactly the search criterion except [in cases, in which a search result may reflect information in the public registry record that closely matches the search criterion and the rules (search logic) used by the registry to determine what constitutes a close match, to be specified by the enacting State];

(c) Upon request made by searcher, the registry issues an official search certificate indicating the search result.

[Note to the Working Group: The Working Group may wish to note that the commentary sets out examples of rules for determining what constitutes a close match.]

VII. Fees

Recommendation 36. Fees for registry services

The regulation should provide that:

Option A

(a) [Subject to subparagraph (b) of this recommendation,] the following fees are payable for registry services:

- (i) Registrations:
 - a. Paper-based [...];
 - b. Electronic [...];
- (ii) Searches:
 - a. Paper-based [...];
 - b. Electronic [...];
- (iii) Certificates:
 - a. Paper-based [...];
 - b. Electronic;

(b) The registry may enter into an agreement with a person that satisfies all registry terms and conditions and establish a registry user account to facilitate the payment of fees.

Option B

The [administrative authority specified by the enacting State] may determine the fees and methods of payment for the purposes of the regulations by decree.

Option C

The [registry] [search] [electronic search] services are free of charge.

(A/CN.9/WG.VI/WP.54/Add.6) (Original: English)
Note by the Secretariat on a draft Technical Legislative Guide on the
Implementation of a Security Rights Registry, submitted to the
Working Group on Security Interests at its twenty-third session

ADDENDUM

Annex II, Examples of Registry Forms

Note by the Secretariat

Addendum

The Working Group may wish to consider the examples of registry forms contained in this note. The examples are presented as annex II of the draft Technical Legislative Guide on the Implementation of a Security Rights Registry, following annex I on terminology and recommendations. The Working Group may wish to consider whether examples of other forms should also be prepared (for example, schedules for entering additional information).

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF INITIAL NOTICE

(FORM A)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[Time of effectiveness of the registration:(dd).....(mm).....(yyyy).....(hour)*

REGISTRATION NUMBER]¹

A. GRANTOR INFORMATION

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

* In digits.

¹ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

2. LEGAL PERSON OR OTHER ENTITY

NAME.....

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS

3. INDICATE IF THE GRANTOR IS²

... an insolvent person

... a syndicate or joint venture

... a named trust or estate

[... an entity other than those mentioned above]

4. ADDITIONAL GRANTOR (if applicable)

(a) NATURAL PERSON

NAME:/...../...../

Family Name

First Given Name

Second Given Name

ADDITIONAL GRANTOR INFORMATION (OPTIONAL).....

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS).....

(b) LEGAL PERSON OR OTHER ENTITY

NAME

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

(c) INDICATE IF THE GRANTOR IS

... an insolvent person

... a syndicate or joint venture

... a named trust or estate

[... an entity other than those mentioned above]

² Note to the Working Group: The Working Group may wish to note that this part reflects the special cases dealt with in recommendation 26.

B. SECURED CREDITOR INFORMATION

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

2. LEGAL PERSON OR OTHER ENTITY

NAME.....

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS).....

3. ADDITIONAL SECURED CREDITOR (if applicable)

(a) NATURAL PERSON

NAME:...../...../...../

Family Name

First Given Name

Second Given Name

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

(b) LEGAL PERSON OR OTHER ENTITY

NAME

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

C. DESCRIPTION OF ENCUMBERED ASSETS

1. GENERAL

2. SERIAL NUMBER (OPTIONAL)

[D. PERIOD OF EFFECTIVENESS OF REGISTRATION(dd) (mm) (yyyy)]*³

³ If the enacting State has chosen option B or C in recommendation 13 (see *Secured Transactions Guide*, recommendation 69).

[E. MAXIMUM AMOUNT FOR WHICH SECURITY RIGHT IS ENFORCEABLE]⁴*

F. ADDITIONAL INFORMATION (OPTIONAL)

G. INDICATE IF THE REGISTRATION IS TRANSITIONAL, THE INDEXING CRITERION IN THE PRIOR REGISTRY AND THE DATE AND TIME OF EFFECTIVENESS OF THE REGISTRATION

[Note to the Working Group: The Working Group may wish to note that part G has been added to address transitional registrations. It is meant to preserve continuity of third-party effectiveness from the prior date of registration as contemplated by the transitional provisions that result in the application of the new law to existing security rights (see Secured Transactions Guide, rec. 231). Preserving the old data allows verification of the existence and date of registration under the old law in the event of a dispute and providing for the indication that this is a transitional registration ensures searchers know that the effective third-party effectiveness date is prior in time. The Working Group may wish to consider that it may not be worth going any further to deal with migration of data, taking into account that such migration may not be worth the cost and trouble, since old systems are typically document-registration systems and the registry might incur liability if does not extract the right information from the old records in entering it into the new registry record. A transitional registration puts the burden on the registrant to make the indication, which is a more efficient approach, and third parties can obtain verification from the old records if there is a dispute, which is rare. It should also be noted that old registry records may no longer be publicly searchable and records might be searchable only by registry staff if there is a request, which is also rare.]

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF AMENDMENT NOTICE

(FORM B)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

SELECT ONE OR MORE OF THE FOLLOWING:

- Add or delete a grantor or change/edit grantor information
- Add or delete a secured creditor or change/edit secured creditor information

⁴ If the secured transactions law of the enacting State requires it (see *Secured Transactions Guide*, recommendation 57, subpara. (d)).

- Add or delete an encumbered asset or change/edit the description of encumbered assets (including adding a description of assets that are proceeds of the original encumbered assets)
- [Extend the period of effectiveness of registration (if the enacting State has specified a universal period of effectiveness of registration or a maximum initial registration period)]
- [Extend or reduce the period of effectiveness of registration (if the enacting State permits secured creditors to specify the period of effectiveness of the registration)]
- [Change the maximum amount for which the security right is enforceable (if the enacting State permits it)]
- Edit secured creditor information in all such notices with a single global amendment

[Time of effectiveness of the registration:.....(dd)....(mm).....(yyyy).....(hour)*]⁵

A. REGISTRATION NUMBER OF INITIAL NOTICE.....

B. ADD GRANTOR

1. NATURAL PERSON

...../...../...../

Family Name

First Given Name

Second Given Name

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

2. LEGAL PERSON OR OTHER ENTITY

NAME

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

3. INDICATE IF THE GRANTOR IS

... an insolvent person

... a syndicate or joint venture

... a named trust or estate

[... an entity other than those mentioned above]

* In digits.

⁵ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

C. DELETE GRANTOR

1. NATURAL PERSON

NAME:

...../...../...../

Family Name

First Given Name

Second Given Name

2. LEGAL PERSON OR OTHER ENTITY

NAME

3. INDICATE IF THE GRANTOR IS

... an insolvent person

... a syndicate or joint venture

... a named trust or estate

[... an entity other than those mentioned above]

D. CHANGE OF GRANTOR INFORMATION

1. NATURAL PERSON

NAME:...../...../...../

Family Name

First Given Name

Second Given Name

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

.....

2. LEGAL PERSON OR OTHER ENTITY

NAME

ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

3. INDICATE IF THE GRANTOR IS

... an insolvent person

... a syndicate or joint venture

... a named trust or estate

[... an entity other than those mentioned above]

E. ADD SECURED CREDITOR

1. NATURAL PERSON

...../...../.....
 Family Name First Given Name Second Given Name
 ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

2. LEGAL PERSON OR OTHER ENTITY

NAME.....
 ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS).....

F. DELETE SECURED CREDITOR

1. NATURAL PERSON

...../...../.....
 Family Name First Given Name Second Given Name

2. LEGAL PERSON OR OTHER ENTITY

NAME

G. CHANGE SECURED CREDITOR INFORMATION

1. NATURAL PERSON

...../...../.....
 Family Name First Given Name Second Given Name
 ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS).....

2. LEGAL PERSON OR OTHER ENTITY

NAME.....
 ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

H. ADDITION, DELETION OR OTHER CHANGE OF DESCRIPTION OF ENCUMBERED ASSETS

.....

I. EXTEND PERIOD OF EFFECTIVENESS OF REGISTRATION (if the enacting State has specified a statutory period)*

[J. EXTEND OR REDUCE PERIOD OF EFFECTIVENESS OF REGISTRATION (if the enacting State permits secured creditors to specify the duration of the registration) ____ (dd) ____ (mm) ____ (yyyy)*]

[K. CHANGE MAXIMUM AMOUNT FOR WHICH SECURITY RIGHT MAY BE ENFORCED]*

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS

EXAMPLE OF MANDATORY AMENDMENT NOTICE

(FORM C)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[Time of effectiveness of the registration:(dd)....(mm).....(yyyy).....(hour)*]⁶

A. REGISTRATION NUMBER OF INITIAL NOTICE

B. ADD OR DELETE INFORMATION PURSUANT TO AN ORDER OF A JUDICIAL OR ADMINISTRATIVE AUTHORITY

.....

C. PERSON SUBMITTING AN AMENDMENT NOTICE PURSUANT TO A JUDICIAL OR ADMINISTRATIVE ORDER

NAME OF PERSON

TITLE

NAME OF JUDICIAL OR ADMINISTRATIVE AUTHORITY

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

D. ATTACH JUDICIAL OR ADMINISTRATIVE ORDER

* In digits.

⁶ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS
EXAMPLE OF CANCELLATION NOTICE
(FORM D)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[Time of effectiveness of the registration:(dd)....(mm).....(yyyy).....(hour)*]⁷

A. REGISTRATION NUMBER OF INITIAL NOTICE

REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS
EXAMPLE OF MANDATORY CANCELLATION NOTICE
(FORM E)

IT IS THE REGISTRANT'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[Time of effectiveness of the registration:(dd)....(mm).....(yyyy).....(hour)*]⁸

A. REGISTRATION NUMBER OF INITIAL NOTICE

B. PERSON SUBMITTING A CANCELLATION NOTICE PURSUANT TO A JUDICIAL OR ADMINISTRATIVE ORDER

NAME OF PERSON

TITLE

NAME OF JUDICIAL OR ADMINISTRATIVE AUTHORITY

ADDRESS (STREET ADDRESS, P.O. BOX, ELECTRONIC ADDRESS OR OTHER ADDRESS)

* In digits.

⁷ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

* In digits.

⁸ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

C. ATTACH JUDICIAL OR ADMINISTRATIVE ORDER**REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS****EXAMPLE OF SEARCH REQUEST FORM****(FORM F)**

IT IS THE SEARCHER'S RESPONSIBILITY TO ENSURE THAT ALL REQUIRED INFORMATION IS PROVIDED AND ENTERED IN THE DESIGNATED FIELD OF THE NOTICE IN A LEGIBLE MANNER.

[Time of effectiveness of the registration:(dd)....(mm).....(yyyy).....(hour)*]⁹

A. GRANTOR INFORMATION**1. NATURAL PERSON**

...../...../...../
 Family Name First Given Name Second
 Given Name
 ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

2. LEGAL PERSON OR OTHER ENTITY

NAME
 ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

3. ADDITIONAL GRANTOR (if applicable)**(a) NATURAL PERSON**

NAME:...../...../...../
 Family Name First Given Name Second Given Name
 ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

(b) LEGAL PERSON OR OTHER ENTITY

NAME
 ADDITIONAL GRANTOR INFORMATION (OPTIONAL)

* In digits.

⁹ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

B. REGISTRATION NUMBER OF INITIAL NOTICE.....**REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS****EXAMPLE OF A SEARCH RESULT¹⁰****(FORM G)****A. THE SEARCH WAS PERFORMED ON (dd)/..... (mm)/..... (yyyy).*****B. THE FOLLOWING NOTICES WERE FOUND:**
.....**C. NO NOTICES WERE FOUND.****REGISTRY OF SECURITY RIGHTS IN MOVABLE ASSETS****EXAMPLE OF REJECTION OF A REGISTRATION OR SEARCH REQUEST****(FORM H)**[.....(dd)....(mm).....(yyyy).....(hour)]¹¹**A. THE REGISTRATION OF THE NOTICE IS REJECTED BECAUSE:**

1. In the case of an initial notice, it failed to provide in a legible manner in the designated field:
 - (a) The identifier and address of the grantor,
 - (b) The identifier and address of the secured creditor or its representative,
 - (c) The description of the encumbered assets,
 - (d) [The period of effectiveness of the registration],
 - (e) [The maximum monetary amount for which the security right may be enforced].
2. In the case of an amendment notice, it failed to provide in a legible manner in the designated field:
 - (a) The registration number of the registered notice to which the amendment relates,
 - (b) If information is to be added, the additional information,

¹⁰ To be allocated by the registry. In an e-registry, a search certificate will be a printable version of the search result.

¹¹ To be allocated by the registry. In the case of an electronic registry, this information is automatically generated.

(c) If information is to be changed, the changed information.

3. In the case of a cancellation notice, it failed to provide in a legible manner in the designated field the registration number.

B. THE SEARCH REQUEST IS REJECTED BECAUSE IT FAILED TO PROVIDE IN A LEGIBLE MANNER IN THE DESIGNATED FIELD:

1. The grantor identifier or
2. The registration number.

E. Note by the Secretariat on a draft Model Law on Secured Transactions, submitted to the Working Group on Security Interests at its twenty-third session

(A/CN.9/WG.VI/WP.55 and Add.1-4)

[Original: English]

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Preamble

The purpose of this Law is:

- (a) To promote low-cost credit by enhancing the availability of secured credit;
- (b) To allow grantors to use the full value inherent in their assets to support credit;
- (c) To enable secured creditors to obtain security rights in a simple and efficient manner;
- (d) To provide for equal treatment of diverse sources of credit and of diverse forms of secured transactions;
- (e) To validate non-possessory security rights in all types of asset;
- (f) To enhance certainty and transparency by providing for registration of a notice of a security right in a general security rights registry;
- (g) To establish clear and predictable priority rules;
- (h) To facilitate efficient enforcement of a creditor's rights;
- (i) To allow parties maximum flexibility to negotiate the terms of their security agreement;
- (j) To balance the interests of all affected persons; and
- (k) To harmonize secured transactions laws, including conflict-of-laws rules relating to secured transactions.

[Note to the Working Group: The Working Group may wish to consider whether the commentary to the draft Model Law should, in line with the mandate

given to the Working Group by the Commission (see A/67/17, para. 105) clarify that the draft Model Law is intended to be a simple, short and concise model law to assist States in enacting the general recommendations of the UNCITRAL Legislative Guide on Secured Transactions (the “Secured Transactions Guide”), consistent with and without replacing the Secured Transactions Guide.]

Chapter I. General provisions

Article 1. Scope of application

Option A

1. Subject to paragraph 3 of this article, this Law applies to all rights in movable assets created by agreement that secure payment or other performance of an obligation, regardless of the form of the transaction or the terminology used by the parties, the type of the movable asset, the status of the grantor or secured creditor or the nature of the secured obligation, including:

(a) Security rights in all types of movable asset, tangible or intangible, present or future, including inventory, equipment and other tangible assets, contractual and non-contractual receivables, and contractual non-monetary claims;

(b) Security rights created or acquired by all legal and natural persons, including consumers, without, however, affecting rights under consumer-protection legislation;

(c) Security rights securing all types of obligation, present or future, determined or determinable, including fluctuating obligations and obligations described in a generic way; and

(d) All property rights created contractually to secure the payment or other performance of an obligation, including transfers of title to tangible assets for security purposes or assignments of receivables for security purposes, the various forms of retention-of-title sales and financial leases.

2. This Law also applies to:

(a) Security rights in proceeds of encumbered assets; and

(b) Subject to the exception provided in article 100, to outright transfers of receivables despite the fact that such transfers do not secure the payment or other performance of an obligation.

3. Notwithstanding paragraphs 1 and 2 of this article, this Law does not apply to:

(a) Rights to payment of funds credited to a bank account;

(b) Rights to receive the proceeds under an independent undertaking;

(c) Negotiable instruments and negotiable documents;

(d) Aircraft, railway rolling stock, space objects, ships as well as other categories of mobile equipment in so far as such asset is covered by a national law or an international agreement to which the State enacting legislation based on these articles (herein referred to as “the State” or “this State”) is a party and the matters covered by this Law are addressed in that national law or international agreement;

- (e) Intellectual property;
- (f) Securities;
- (g) Payment rights arising under or from financial contracts governed by netting agreements, except a receivable owed on the termination of all outstanding transactions;
- (h) Payment rights arising under or from foreign exchange transactions;
- (i) With the exception of articles 11, 15, 27, 32, 55, 98, 99, 109 and 120, immovable property;
- (j) Proceeds of an excluded type of asset even if the proceeds are of a type of asset to which this Law applies, but only to the extent that other law applies; and
- (k) [Other exception(s) to be added by the enacting State].

Option B

1. This Law applies to security rights in goods, inventory, equipment and receivables.
2. The security rights to which this Law applies may:
 - (a) Be created or acquired by all legal and natural persons, including consumers, without, however, affecting rights under consumer-protection legislation; and
 - (b) Secure all types of obligation, present or future, determined or determinable, including fluctuating obligations and obligations described in a generic way.
3. This Law also applies to:
 - (a) Security rights in proceeds of encumbered assets;
 - (b) Subject to the exception provided in article 100, to outright transfers of receivables despite the fact that such transfers do not secure the payment or other performance of an obligation; and
 - (c) All property rights created contractually to secure the payment or other performance of an obligation, including transfers of title to tangible assets for security purposes or assignments of receivables for security purposes, the various forms of retention-of-title sales and financial leases.

[Note to the Working Group: The Working Group may wish to note that option A is based on recommendation 2 of the Secured Transactions Guide, appropriately revised to exclude certain types of asset that are subject to asset-specific recommendations in line with the decision of the Commission to “prepare a simple, short and concise model law on secured transactions based on the general recommendations of the Secured Transactions Guide” (see A/67/17, para. 105). However, receivables are included pursuant to the decision of the Commission that the draft Model Law should be “consistent with all the texts prepared by UNCITRAL on secured transactions” (A/67/17, para. 105), including the United Nations Convention on the Assignment of Receivables in International Trade (the “United Nations Assignment Convention”). In view of the interdependence of

receivables with goods, equipment and inventory, excluding receivables would result in the application of different laws where, for example, inventory was sold and converted to receivables that were in turn used to buy new inventory. This approach would tend to have a negative impact on the availability and the cost of credit. In this connection, the Working Group may wish to note that, while the Convention applies only to contractual receivables, in line with the recommendations of the Secured Transactions Guide, the draft Model Law applies to non-contractual receivables as well.

In addition, the Working Group may wish to note that, to ensure that the draft Model Law is not inconsistent with the functional, integrated and comprehensive approach to secured transactions recommended in the Secured Transactions Guide (see chapter I, paras. 101-112). The commentary should explain that: (a) the draft Model Law is an economic way to implement the recommendations of the Secured Transactions Guide on core commercial assets (goods, equipment, inventory and receivables), without replacing the Secured Transactions Guide; and (b) States are encouraged to follow the functional, integrated and comprehensive approach and thus implement all the recommendations of the Secured Transactions Guide, including the asset specific, at least to the extent that they do not have any rules or modern rules on security rights in these types of asset.

Moreover, the Working Group may wish to note that option B is intended to reflect the same policy embodied in option A in a more economic way, that is, by referring directly to goods, equipment, inventory and receivables. This approach would make paragraph 3 and the relevant definitions of the terms included therein unnecessary.

If the Working Group decides to retain option A, it may wish to consider whether subparagraph 3 (j) is appropriate. For example, if intellectual property is sold for cash and the cash proceeds are used by the seller to buy inventory, the inventory would be proceeds of the intellectual property. Contrary to what subparagraph 3 (j) provides, the Working Group may wish to consider that the draft Model Law should apply to the inventory even if other law would cover the inventory (at least, in the case where the other law was insufficient, that is, for example, did not require registration of a notice in the general security rights registry). In addition, as a practical matter, subparagraph 3 (j) would require a secured creditor extending credit to a debtor against a security right in an encumbered asset to conduct an investigation into whether the encumbered asset is proceeds of assets that would not be subject to the draft Model Law. Such a rule would tend to increase the cost or reduce the availability of credit.]

Article 2. Definitions

For the purposes of this Law:

(a) “Acquisition secured creditor” means a secured creditor that has an acquisition security right. In the context of the unitary approach, the term includes a retention-of-title seller or financial lessor;

(b) “Acquisition security right” means a security right in goods, equipment or inventory that secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit otherwise provided to enable the grantor to acquire the asset;

(c) “Assignee” means a person to which an assignment of a receivable is made;

(d) “Assignment” means the creation of a security right in a receivable that secures the payment or other performance of an obligation, including an outright transfer of a receivable, without re-characterizing it as a secured transaction;

(e) “Assignor” means a person that makes an assignment of a receivable;

(f) “Attachment to a movable asset” means a tangible asset that is physically attached to another tangible asset but has not lost its separate identity;

(g) “Attachment to immovable property” means a tangible asset that is so physically attached to immovable property that, despite the fact that it has not lost its separate identity, it is treated as immovable property under the law of the State where the immovable property is located;

[Note to the Working Group: The Working Group may wish to note that the term “bank account” (and other types of asset not addressed in the draft Model law) and terms such as “insolvency court”, “insolvency estate” and “insolvency proceedings” have been deleted as they would normally be defined in other law of the enacting State, and not in its secured transactions law.]

(h) “Competing claimant” means a creditor of a grantor that is competing with another creditor of the grantor having a security right in an encumbered asset of the grantor and includes:

(i) Another creditor with a security right in the same encumbered asset (whether as an original encumbered asset or proceeds);

(ii) The seller or financial lessor of the same encumbered asset that has retained title to it;

(iii) Another creditor of the grantor that has a right in the same encumbered asset;

(iv) The insolvency representative in the insolvency proceedings in respect of the grantor; or

(v) Any buyer or other transferee (including a lessee or licensee) of the encumbered asset;

(i) “Consumer goods” means goods that a grantor uses or intends to use for personal, family or household purposes;

(j) “Debtor” means a person that owes performance of a secured obligation and includes a secondary obligor such as a guarantor of a secured obligation. The debtor may or may not be the person that creates the security right;

(k) “Debtor of the receivable” means a person liable for payment of a receivable and includes a guarantor or other person secondarily liable for payment of the receivable;

(l) “Encumbered asset” means a tangible or intangible asset that is subject to a security right. The term also includes a receivable that has been the subject of an outright transfer;

(m) “Equipment” means a tangible asset used by a person in the operation of its business;

(n) “Financial lease right” means a lessor’s right in a tangible asset (other than a negotiable instrument or negotiable document) that is the object of a lease agreement under which, at the end of the lease:

(i) The lessee automatically becomes the owner of the asset that is the object of the lease;

(ii) The lessee may acquire ownership of the asset by paying no more than a nominal price; or

(iii) The asset has no more than a nominal residual value.

The term includes a hire-purchase agreement, even if not nominally referred to as a lease, provided that it meets the requirements of subparagraph (i), (ii) or (iii);

(o) “Grantor” means a person that creates a security right to secure either its own obligation or that of another person, including a retention-of-title buyer, financial lessee or an assignor in an outright transfer of a receivable;

(p) “Insolvency representative” means a person or body, including one appointed on an interim basis, authorized in insolvency proceedings to administer the reorganization or the liquidation of the insolvency estate;

(q) “Intangible asset” means all forms of movable assets other than tangible assets and includes incorporeal rights, receivables and rights to the performance of obligations other than receivables;

(r) “Inventory” means tangible assets held for sale or lease in the ordinary course of a grantor’s business, as well as raw and semi-processed materials (work-in-process);

(s) “Knowledge” means actual rather than constructive knowledge;

(t) “Mass or product” means tangible assets other than money that are so physically associated or united with other tangible assets that they have lost their separate identity;

(u) “Notice” means a communication in writing;

[Note to the Working Group: The Working Group may wish to note that the commentary will refer to article 4 for the electronic equivalent of “writing” and “signed writing” and also to the term “notice” in the draft Registry Guide.]

(v) “Notification of the assignment” means a communication in writing that reasonably identifies the assigned receivable and the assignee;

(w) “Original contract” means, in the context of a receivable created by contract, the contract between the assignor and the debtor of the receivable from which the receivable arises;

(x) “Possession” means the actual possession only of a tangible asset by a person or an agent or employee of that person, or by an independent person that acknowledges holding it for that person. It does not include non-actual possession described by terms such as constructive, fictive, deemed or symbolic possession;

(y) “Priority” means the right of a person to derive the economic benefit of its security right in preference to a competing claimant;

(z) “Proceeds” means whatever is received in respect of encumbered assets, including what is received as a result of sale or other disposition or collection, lease or licence of an encumbered asset, proceeds of proceeds, civil and natural fruits, dividends, distributions, insurance proceeds and claims arising from defects in, damage to or loss of an encumbered asset;

(aa) “Receivable” means a right to payment of a monetary obligation, excluding a right to payment evidenced by a negotiable instrument, a right to receive the proceeds under an independent undertaking and a right to payment of funds credited to a bank account;

(bb) “Retention-of-title right” means a seller’s right in goods, equipment or inventory pursuant to an arrangement with the buyer by which ownership of the asset is not transferred (or is not transferred irrevocably) from the seller to the buyer until the unpaid portion of the purchase price is paid;

(cc) “Secured creditor” means a creditor that has a security right, including an assignee in an outright transfer of a receivable;

(dd) “Secured obligation” means an obligation secured by a security right;

(ee) “Secured transaction” means a transaction that creates a security right, including for convenience of reference an outright transfer of a receivable, without re-characterizing it as a secured transaction;

(ff) “Security agreement” means an agreement, in whatever form or terminology, between a grantor and a creditor that creates a security right, including for convenience of reference an agreement for the outright transfer of a receivable, without re-characterizing it as a security agreement;

(gg) “Security right” means a property right in a movable asset that is created by agreement and secures payment or other performance of an obligation, regardless of whether the parties have denominated it as a security right, including for convenience of reference the right of the assignee in an outright transfer of a receivable, without re-characterizing it as a security right and, [if the enacting State follows a unitary approach to acquisition financing, acquisition security rights and non-acquisition security rights] [but not a retention-of-title or financial lease right if the enacting State follows a non-unitary approach to acquisition financing]; and

(hh) “Tangible asset” means every form of corporeal movable asset, such as goods, inventory and equipment.

[Note to the Working Group: The Working Group may wish to note that the references to the unitary and non-unitary approach to secured transactions in the definitions contained in subparagraphs (a), (b), h (ii), (n), (o), (bb) have been deleted as it does not fit in a model law. The Working Group may wish to consider whether the unitary and the non-unitary approaches should be referred to within square brackets as is done in subparagraph (gg).]

Article 3. Party autonomy

1. Except as otherwise provided in articles 6, 7, 66, 79, 80, 103-132, 134-146, the secured creditor and the grantor or the debtor may derogate from or vary by agreement its provisions relating to their respective rights and obligations.
2. Such an agreement does not affect the rights of any person that is not a party to the agreement.

Article 4. Electronic communications

1. Where this Law requires that a communication or a contract should be in writing, or provides consequences for the absence of a writing, that requirement is met by an electronic communication if the information contained therein is accessible so as to be usable for subsequent reference.
2. Where this Law requires that a communication or a contract should be signed by a person, or provides consequences for the absence of a signature, that requirement is met in relation to an electronic communication if:
 - (a) A method is used to identify the person and to indicate that person's intention in respect of the information contained in the electronic communication; and
 - (b) The method used is either:
 - (i) As reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement; or
 - (ii) Proven in fact to have fulfilled the functions described in subparagraph 2 (a) of this article, by itself or together with further evidence.

[Note to the Working Group: The Working Group may wish to note that, with respect to the substance of article 4, the commentary will refer to article 9, paragraphs 2 and 3, of the United Nations Convention on the Use of Electronic Communications in International Contracts.]

(A/CN.9/WG.VI/WP.55/Add.1) (Original: English)
Note by the Secretariat on a draft Model Law on Secured
Transactions, submitted to the Working Group on Security Interests
at its twenty-third session

ADDENDUM

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Chapter II. Creation of a security right (effectiveness as between the parties)

Article 5. Creation of a security right

1. A security right in an asset is created by a security agreement.
2. In the case of an asset with respect to which the grantor has rights or the power to encumber at the time of the conclusion of the security agreement, the security right in that asset is created at that time.
3. In the case of an asset with respect to which the grantor acquires rights or the power to encumber thereafter, the security right in that asset is created when the grantor acquires rights in the asset or the power to encumber the asset.

Article 6. Minimum content of a security agreement

A security agreement must:

- (a) Reflect the intent of the parties to create a security right;
- (b) Identify the secured creditor and the grantor;
- (c) Describe the secured obligation;
- (d) Describe the encumbered assets in a manner that reasonably allows their identification[]; and
- (e) Indicate the maximum monetary amount for which the security right may be enforced, if the enacting State determines that such an indication would be helpful in order to facilitate subordinate lending].

Article 7. Form of a security agreement

1. A security agreement may be oral if accompanied by the secured creditor's possession of the encumbered asset.
2. If it is not accompanied by possession of the encumbered asset, the security agreement must be concluded in or evidenced by a writing that, by itself or in conjunction with the course of conduct between the parties, indicates the grantor's intent to create a security right.

Article 8. Obligations secured by a security right

A security right may secure any type of obligation, whether present or future, determined or determinable, conditional or unconditional, fixed or fluctuating.

Article 9. Assets subject to a security right

1. With the exception of [any limited and specific exceptions to be set out by the enacting State], a security right may encumber any type of asset, including:

- (a) Parts of assets and undivided rights in assets;
- (b) Assets that, at the time the security agreement is concluded, may not yet exist or that the grantor may not yet own or have the power to encumber; and
- (c) All assets of a grantor.

2. Except as provided in articles 13-15, this Law does not override provisions of any other law to the extent that they limit the creation or enforcement of a security right in, or the transferability of, specific types of asset.

Article 10. Continuation of a security right in proceeds

1. Unless otherwise agreed by the parties to a security agreement, a security right in an encumbered asset extends to its identifiable proceeds, including proceeds of proceeds.

2. Where proceeds in the form of money or funds credited to a bank account have been commingled with other assets of the same kind so that the proceeds are no longer identifiable, the amount of the proceeds immediately before they were commingled is nevertheless to be treated as identifiable proceeds after commingling.

3. If, at any time after commingling, the total amount of the asset is less than the amount of the proceeds, the total amount of the asset at the time that its amount is lowest plus the amount of any proceeds later commingled with the asset is to be treated as identifiable proceeds.

Article 11. Creation and continuation of a security right in an attachment

1. A security right may be created in a tangible asset that is an attachment at the time of creation of the security right or continues in a tangible asset that becomes an attachment subsequently.

2. A security right in an attachment to immovable property may be created under this Law or under the law governing immovable property.

Article 12. Continuation of a security right into a mass or product

1. A security right created in tangible assets before they are commingled in a mass or product continues in the mass or product.

2. The amount secured by a security right that continues in the mass or product is limited to the value of the encumbered assets immediately before they became part of the mass or product.

Article 13. Bulk assignments of receivables

1. An assignment of a contractual receivable that is not specifically identified, a future receivable or a part of or an undivided interest in a receivable is effective as between the assignor and the assignee and as against the debtor of the receivable as long as, at the time of the assignment or, in the case of a future receivable, at the time it arises, it can be identified to the assignment to which it relates.
2. Unless otherwise agreed, an assignment of one or more future receivables is effective without a new act of transfer being required to assign each receivable.¹

Article 14. Anti-assignment clauses

1. An assignment of a receivable is effective as between the assignor and the assignee and as against the debtor of the receivable notwithstanding an agreement between the initial or any subsequent assignor and the debtor of the receivable or any subsequent assignee limiting in any way the assignor's right to assign its receivables.
2. Nothing in this article affects any obligation or liability of the assignor for breach of the agreement mentioned in paragraph 1 of this article, but the other party to such an agreement may not avoid the original contract or the assignment contract on the sole ground of that breach. A person that is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.
3. This article applies only to assignments of receivables:
 - (a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;
 - (b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
 - (c) Representing the payment obligation for a credit card transaction; or
 - (d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.

Article 15. Creation of a security right in a personal or property right that secures a receivable

1. A secured creditor with a security right in a receivable has the benefit of any personal or property right that secures payment or other performance of the receivable automatically, without further action by either the grantor or the secured creditor.
2. If the personal or property right is an independent undertaking, the security right automatically extends to the right to receive the proceeds under the independent undertaking but does not extend to the right to draw under the independent undertaking.
3. This article does not affect a right in immovable property that under other law is transferable separately from a receivable that it may secure.

¹ For articles 13-15, see articles 8-10 of the United Nations Assignment Convention.

4. A secured creditor with a security right in a receivable has the benefit of any personal or property right that secures payment or other performance of the receivable notwithstanding any agreement between the grantor and the debtor of the receivable limiting in any way the grantor's right to create a security right in the receivable, or in any personal or property right securing payment or other performance of the receivable;
5. Nothing in this article affects any obligation or liability of the grantor for breach of the agreement mentioned in paragraph 4 of this article, but the other party to such an agreement may not avoid the contract from which the receivable arises, or the security agreement creating the personal or property security right on the sole ground of that breach. A person that is not a party to such an agreement is not liable on the sole ground that it had knowledge of the agreement.
6. Paragraphs 4 and 5 of this article apply only to security rights in receivables:
 - (a) Arising from an original contract that is a contract for the supply or lease of goods or services other than financial services, a construction contract or a contract for the sale or lease of immovable property;
 - (b) Arising from an original contract for the sale, lease or licence of industrial or other intellectual property or of proprietary information;
 - (c) Representing the payment obligation for a credit card transaction; or
 - (d) Owed to the assignor upon net settlement of payments due pursuant to a netting agreement involving more than two parties.
7. Paragraph 1 of this article does not affect any duties of the grantor to the debtor of the receivable.
8. To the extent that the automatic effects under paragraph 1 of this article and article 32 are not impaired, this article does not affect any requirement under other law relating to the form or registration of the creation of a security right in any asset, securing payment or other performance of a receivable that is not covered by this Law.

Chapter III. Effectiveness of a security right against third parties

Article 16. Achieving third-party effectiveness

A security right is effective against third parties only if it is created and one of the methods for achieving third-party effectiveness referred to in article 19, 21 or 22 has been followed.

Article 17. Effectiveness against the grantor of a security right that is not effective against third parties

A security right that has been created is effective between the grantor and the secured creditor even if it is not effective against third parties.

**Article 18. Continued third-party effectiveness
after a transfer of the encumbered asset**

After transfer of a right other than a security right in an encumbered asset, a security right in the encumbered asset that is effective against third parties at the time of the transfer continues to encumber the asset except as provided in article 50, and remains effective against third parties except as provided in article 39.

**Article 19. General method for achieving
third-party effectiveness: registration**

1. A security right is effective against third parties if a notice with respect to the security right is registered in the general security rights registry referred to in articles 33-47.
2. Registration of a notice does not create a security right and is not necessary for the creation of a security right.

Article 20. Alternatives and exceptions to registration

1. A security right may also be made effective against third parties by one of the following alternative methods:
 - (a) In tangible assets, by the secured creditor's possession, as provided in article 22;
 - (b) In movable assets, rights in which are subject to a specialized registration or title certificate system, by registration in the specialized registry or notation on the title certificate, as provided in article 23;
 - (c) In an attachment to a movable asset, rights in which are subject to a specialized registration or title certificate system, by registration in the specialized registry or notation on the title certificate, as provided in article 26; and
 - (d) In an attachment to immovable property, by registration in the immovable property registry, as provided in article 27.
2. A security right is effective against third parties automatically:
 - (a) In proceeds, if the security right in the original encumbered asset is effective against third parties, as provided in article 24;
 - (b) In an attachment to a movable asset, if the security right in the asset that becomes an attachment was effective against third parties before it became an attachment, as provided in article 25;
 - (c) In a mass or product, if the security right in processed or commingled assets was effective against third parties before they became part of the mass or product, as provided in article 28; and
 - (d) In movable assets, upon a change in the location of the asset or the grantor to this State, as provided in article 29.
3. A security right in a personal or property right that secures payment or other performance of a receivable is effective against third parties, as provided in article 32.

**Article 21. Different third-party effectiveness
methods for different types of asset**

Different methods for achieving third-party effectiveness may be used for different types of encumbered asset, whether they are encumbered pursuant to the same security agreement or not.

**Article 22. Third-party effectiveness of a security right
in a tangible asset by possession**

A security right in a tangible asset may be made effective against third parties by registration as provided in article 19 or by the secured creditor's possession.

**Article 23. Third-party effectiveness of a security right
in a movable asset subject to a specialized registration
or a title certificate system**

A security right in a movable asset that is subject to registration in a specialized registry or notation on a title certificate under other law may be made effective against third parties by registration as provided in article 19 or by:

- (a) Registration in the specialized registry; or
- (b) Notation on the title certificate.

**Article 24. Automatic third-party effectiveness of
a security right in proceeds**

1. If a security right in an encumbered asset is effective against third parties, a security right in any proceeds of the encumbered asset (including any proceeds of proceeds) is effective against third parties when the proceeds arise, provided that the proceeds are described in a generic way in a registered notice or that the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.
2. If the proceeds are not described in the registered notice as provided in paragraph 1 of this article and do not consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account, the security right in the proceeds continues to be effective against third parties for [a short period of time to be specified by the enacting State] days after the proceeds arise.
3. If the security right in such proceeds is made effective against third parties by one of the methods referred to in article 19 or 20 before the expiry of that time period, the security right in the proceeds continues to be effective against third parties thereafter.

**Article 25. Automatic third-party effectiveness
of a security right in an attachment**

If a security right in a tangible asset is effective against third parties at the time when the asset becomes an attachment, the security right remains effective against third parties thereafter.

**Article 26. Third-party effectiveness of a security right in
an attachment subject to a specialized registration
or a title certificate system**

A security right in an attachment to a movable asset that is subject to registration in a specialized registry or notation on a title certificate under other law may be made effective against third parties automatically as provided in article 25 or by:

- (a) Registration in the specialized registry; or
- (b) Notation on the title certificate.

**Article 27. Third-party effectiveness of a security right
in an attachment to immovable property**

A security right in an attachment to immovable property may be made effective against third parties automatically as provided in article 25 or by registration in the immovable property registry.

**Article 28. Automatic third-party effectiveness
of a security right in a mass or product**

If a security right in a tangible asset is effective against third parties when it becomes part of a mass or product, the security right that continues in the mass or product, as provided in article 12, is effective against third parties.

**Article 29. Continuity in third-party effectiveness
upon change of location to this State**

1. If a security right in an encumbered asset is effective against third parties under the law of the State in which the encumbered asset or the grantor is located (whichever determines the applicable law under the relevant conflict-of-laws provisions), and that location changes to this State, the security right continues to be effective against third parties under the law of this State for [a short period of time to be specified by the enacting State] days after the change.
2. If the requirements of the law of this State to make the security right effective against third parties are satisfied prior to the end of that period, the security right continues to be effective against third parties thereafter under the law of this State.
3. For the purposes of any rule of this State in which time of registration or other method of achieving third-party effectiveness is relevant for determining priority, that time is the time when registration or third-party effectiveness was achieved under the law of the State in which the encumbered asset or the grantor was located before its location changed to this State.

**Article 30. Continuity in third-party effectiveness of a security
right upon change of method of third-party effectiveness**

Third-party effectiveness of a security right is continuous notwithstanding a change in the method by which it is made effective against third parties, provided that there is no time when the security right is not effective against third parties.

**Article 31. Lapse in third-party effectiveness
or advance registration**

1. If a security right has been made effective against third parties and subsequently there is a period during which the security right is not effective against third parties, third-party effectiveness may be re-established, but only from the time when the new registration of a notice with respect to the security right becomes effective.
2. If registration made before creation of a security right as provided in article 42 expires as provided in article 44, it may be re-established, but registration takes effect only from the time when the new registration of a notice with respect to the security right becomes effective.

**Article 32. Third-party effectiveness of a security right
in a right that secures payment of a receivable**

1. If a security right in a receivable is effective against third parties, such third-party effectiveness extends to any personal or property right that secures payment or other performance of the receivable without further action by either the grantor or the secured creditor.
2. If the personal or property right is an independent undertaking, its third-party effectiveness automatically extends to the right to receive the proceeds under the independent undertaking, but the security right does not extend to the right to draw under the independent undertaking.
3. This article does not affect a right in immovable property that under other law is transferable separately from the receivable that it may secure.

(A/CN.9/WG.VI/WP.55/Add.2) (Original: English)
Note by the Secretariat on a draft Model Law on Secured
Transactions, submitted to the Working Group on Security Interests
at its twenty-third session

ADDENDUM

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Chapter IV. The registry system

Article 33. Operational framework of the registration and searching processes

1. The registry must make available to the public clear and concise guides to registration and searching procedures and disseminate widely information about the existence and role of the registry.
2. Registration is effected by registering a notice that provides the information specified in article 36, as opposed to requiring the submission of the original or a copy of the security agreement or other document.

3. The registry must accept a notice presented by an authorized medium of communication, except if:
 - (a) It is not accompanied by the required fee;
 - (b) It fails to provide a grantor identifier sufficient to allow indexing; or
 - (c) It fails to provide some information with respect to any of the other items required under article 36.
4. The registry does not require verification of the identity of the registrant or the existence of authorization for registration of the notice or conduct further scrutiny of the content of the notice.
5. The record of the registry is centralized and contains all notices with respect to security rights registered under this Law.
6. The information provided on the public record of the registry is accessible to searchers.
7. A search may be made without the need for the searcher to justify the reasons for the search.
8. Notices are indexed and can be retrieved by searchers according to the identifier of the grantor.
9. Fees for registration and for searching, if any, are set at a level no higher than necessary to permit cost recovery.
10. If possible, the registration system is electronic. In particular:
 - (a) Notices are stored in electronic form in a computer database;
 - (b) Registrants and searchers have immediate access to the registry record by electronic or similar means, including the Internet and electronic data interchange;
 - (c) The system is programmed to minimize the risk of entry of incomplete or irrelevant information; and
 - (d) The system is programmed to facilitate speedy and complete retrieval of information and to minimize the practical consequences of human error.
11. Registrants may choose among multiple modes and points of access to the registry.
12. The registry, to the extent it is electronic, operates continuously except for scheduled maintenance, and, to the extent it is not electronic, operates during reliable and consistent service hours compatible with the needs of potential registry users.

[Note to the Working Group: The Working Group may wish to note that articles 33-47 are based on recommendations 54-75 of the Secured Transactions Guide and the recommendations of the draft Registry Guide. With respect to article 33, the Working Group may wish to consider whether it should be aligned closely with recommendations 4-10 of the draft Registry Guide and whether some of the matters addressed in article 33 (and other articles) could be left to be dealt with in the recommendations of the draft Registry Guide and in the commentary of the draft Model Law. In addition, the Working Group may wish to consider whether

some of the matters that are addressed in the recommendations of the draft Registry Guide such as, for example, the difference between access to the registry services and rejection of a notice, the period of effectiveness of a registration, the information required in an initial notice as opposed to an amendment or cancellation notice, search criteria and search results should be addressed in the draft Model Law, although they were not addressed in any detail in the recommendations of the Secured Transactions Guide.]

Article 34. Security and integrity of the registry

In order to ensure the security and integrity of the registry, the operational and legal framework of the registry should reflect the following characteristics:

- (a) Although the day-to-day operation of the registry may be delegated to a private authority, the State retains the responsibility to ensure that it is operated in accordance with the governing legal framework;
- (b) [Information about] the identity of a registrant is requested and maintained by the registry;
- (c) The registrant is obligated to forward a copy of a notice to the grantor named in the notice, but failure to meet this obligation may result only in nominal penalties and any damages resulting from the failure that may be proven;
- (d) The registry is obligated to send promptly a copy of any changes to a registered notice to the person identified as the secured creditor in the notice;
- (e) A registrant can obtain a record of the registration as soon as the registration information is entered into the registry record; and
- (f) Multiple copies of all the information in the records of a registry are maintained and the entirety of the registry records can be reconstructed in the event of loss or damage.

[Note to the Working Group: The Working Group may wish to consider whether the matter addressed in subparagraph (a) of this article should be dealt with in the commentary rather than in the draft Model Law, and whether the matters addressed in the remaining subparagraphs should be addressed either in a general way or in a detailed way but more in line with the recommendations of the draft Registry Guide.]

Article 35. Responsibility for loss or damage

1. If the registry system permits direct registration and searching by registry users without the intervention of registry personnel, the responsibility of the registry for loss or damage is limited to system malfunction.
2. If the registry system permits the submission of paper notices, the registry is liable for any loss or damage caused by an error in the entry of the information contained in a notice in the registry record.

[Note to the Working Group: The Working Group may wish to note that this article is based on recommendation 56 of the Secured Transactions Guide, which, however, deals only with the matter addressed in paragraph 1 of this article. Paragraph 2 has been added to complete article 35. The Working Group may wish

to consider whether article 35 should be retained or the matter should be left to other law of the enacting State. If the Working Group decides to retain article 35, it may wish to consider its substance.]

Article 36. Required content of a notice

The following information only is required to be provided in the notice:

- (a) The identifier of the grantor, satisfying the standard provided in article 37 [and any other information to be specified by the enacting State to assist in uniquely identifying the grantor];
- (b) The identifier of the secured creditor or its representative, their addresses;
- (c) A description of the asset covered by the notice, satisfying the standard provided in article 40;
- (d) [If the enacting State implements option B or C in article 44, the period of effectiveness of the registration as provided in article 44;] and
- (e) [If the enacting State determines that an indication in the notice of the maximum monetary amount for which the security right may be enforced would be helpful in order to facilitate subordinate lending, a statement of that maximum amount].

[Note to the Working Group: The Working Group may wish to note that the reference to additional information in the notice to assist in uniquely identifying the grantor has been added in subparagraph (a) and deleted from article 37, paragraph 2. These changes are intended to reflect decisions of the Working Group with respect to recommendation 23, subparagraph (a) (i), of the draft Registry Guide so as to avoid making the additional information part of the grantor's identifier and thus a search criterion.]

Article 37. Grantor identifier

1. The registration of an initial notice, or an amendment notice that amends the grantor's identifier or adds a grantor, is effective if the notice provides the grantor's correct identifier in accordance with paragraphs 2 and 3 of this article, or, in the case of an incorrect statement, if it meets the requirements of article 41, paragraphs 1 and 2.
2. Where the grantor is a natural person, the identifier of the grantor for the purposes of effective registration is the grantor's name, as it appears in a specified official document.
3. Where the grantor is a legal person, the grantor's identifier for the purposes of effective registration is the name that appears in the most recent [document, law or decree to be specified by the enacting State] constituting the legal person.

[Note to the Working Group: The Working Group may wish to note that the changes to paragraphs 1, 2 and 3 of this article (compared with recommendations 58-60 of the Secured Transactions Guide on which they are based) are intended to align them respectively with recommendations 29, 23, subparagraph (a) (i), and 25 of the draft Registry Guide. The Working Group may wish to consider

whether an article along the lines of paragraphs 2 and 3 of this article should be added to deal with the identifier of the secured creditor, while the impact of an incorrect statement may still be dealt with in article 41.]

Article 38. Impact of a change of the grantor's identifier on the effectiveness of the registration

1. If, after a notice is registered, the identifier of the grantor changes and as a result the grantor's identifier set forth in the notice does not meet the standard provided in article 37, the secured creditor [may] [must] amend the notice to provide the new identifier in compliance with that standard.
2. If the secured creditor does not register the amendment within [a short period of time, such as thirty days, to be specified by the enacting State] days after the change, the security right is ineffective against:
 - (a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the change in the grantor's identifier but before registration of the amendment notice; and
 - (b) A person that buys, leases or licenses the encumbered asset after the change in the grantor's identifier but before registration of the amendment notice.

[Note to the Working Group: The Working Group may wish to consider that, while recommendation 61 of the Secured Transactions Guide leaves an amendment to the discretion of the secured creditor, an amendment must be made for the consequences described in paragraph 2 to be avoided.]

Article 39. Impact of a transfer of an encumbered asset on the effectiveness of the registration

Option A

1. If, after a notice is registered, the encumbered asset is transferred and a search against the transferee's name by a third party does not disclose the security right created by the transferor, the secured creditor must amend the notice to provide the transferee's identifier as a new grantor.
2. If the secured creditor does not register the amendment notice within [a short period of time to be specified by the enacting State] days after the transfer of the encumbered asset, the security right is ineffective against:
 - (a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before registration of the amendment notice; and
 - (b) A person that buys, leases or licenses the encumbered asset after its transfer but before registration of the amendment notice.

Option B

1. If, after a notice is registered, the encumbered asset is transferred and a search against the transferee's name by a third party does not disclose the security right created by the transferor, the secured creditor must amend the notice to provide the transferee's identifier as a new grantor.

2. If the secured creditor does not register the amendment notice within [a short period of time, such as fifteen days, to be specified by the enacting State] days after *the secured creditor acquires actual knowledge about* the transfer of the encumbered asset, the security right is ineffective against:

(a) A competing security right with respect to which a notice is registered or which is otherwise made effective against third parties after the transfer but before registration of the amendment notice; and

(b) A person that buys, leases or licenses the encumbered asset after its transfer but before registration of the amendment notice.

Option C

Registration of a notice in the security rights registry remains effective notwithstanding a transfer of the encumbered asset.

[Note to the Working Group: The Working Group may wish to note that: (a) article 39 reflects the three approaches to the issue discussed in the commentary of the Secured Transactions Guide (see chap. IV, paras. 78-80), as recommendation 62 of that Guide had left the matter to the discretion of each State; (b) the difference between options A and B lies in the text that appears in option B in italics; and (c) recommendation 244 of the Supplement on Security Rights in Intellectual Property reflects option C.]

Article 40. Description of an encumbered asset covered by a notice

The registration of an initial notice, or an amendment notice that affects the description of the encumbered assets, is effective if the notice describes the encumbered assets in a way that reasonably allows their identification, and if it does not, it meets the requirements of article 41, paragraph 3.

[Note to the Working Group: The Working Group may wish to note that this article, which is based on recommendation 63 of the Secured Transactions Guide, has been revised to be aligned with the formulation of article 37 and to deal with the description of the encumbered assets, leaving the consequences of an insufficient description to article 41, paragraph 3.]

Article 41. Consequences of an incorrect statement or insufficient description

1. An incorrect statement of the grantor identifier in a notice does not render the registration ineffective if the notice would be retrieved by a search of the registry record under the correct identifier.
2. An incorrect identifier of a grantor in a notice does not render the registration ineffective with respect to other grantors correctly identified in the notice.
3. An incorrect statement of the identifier or address of the secured creditor or its representative or a description of the encumbered asset that does not meet the requirements of article 40 in a notice does not render the registration ineffective unless the incorrect or insufficient statement would seriously mislead a reasonable searcher.

4. A description of certain encumbered assets that does not meet the requirements of article 40 does not render a registration ineffective with respect to other assets sufficiently described.

5. An incorrect statement in a notice with respect to the period of effectiveness of registration and the maximum amount for which the security right may be enforced, if applicable, does not render a registered notice ineffective except to the extent that it seriously misled third parties that relied on the registered notice.

[Note to the Working Group: The Working Group may wish to note that the changes made in this article (as compared to recommendations 64-66, on which it is based) are intended to align it with recommendation 29 of the draft Registry Guide. The Working Group may wish to note that the “seriously misleading test” in the context of paragraph 5 is objective, while the “seriously misleading test” of paragraph 3 is subjective (see Secured Transactions Guide, chap. IV, paras. 84 and 96) and consider whether this matter should be more explicitly reflected in this article and explained in the relevant commentary to be prepared.]

Article 42. Time when notice may be registered

A notice with respect to a security right may be registered before or after the creation of the security right or the conclusion of the security agreement.

Article 43. One notice sufficient for multiple security rights arising from multiple agreements between the same parties

The registration of a single notice is sufficient to achieve third-party effectiveness of one or more than one security right in the encumbered asset described in the notice, whether they exist at the time of registration or are created thereafter, and whether they arise from one or more than one security agreement between the same parties.

Article 44. Period of effectiveness of the registration of a notice

Option A

1. The registration of an initial notice is effective for [enacting State to insert the period of time specified in its law].
2. The period of effectiveness may be extended for [an additional period of time specified in the law of the enacting State] at any time before it expires. The new period starts when the current period expires.
- [3. An amendment notice other than an amendment notice referred to in paragraph 2 of this article does not extend the period of effectiveness.]

Option B

1. The registration of an initial notice is effective for the period of time indicated therein.
2. The period of effectiveness may be extended or reduced for the period of time indicated in an amendment notice at any time before it expires. In the case of an extension, the new period starts when the current period expires.

[3. An amendment notice other than an amendment notice referred to in paragraph 2 of this article does not extend the period of effectiveness.]

Option C

1. The registration of an initial notice is effective for the period of time indicated therein, not exceeding [a long period of time, such as, for example, twenty years, to be specified by the enacting State].

2. The period of effectiveness may be extended or reduced for the period of time indicated in an amendment notice not exceeding [a long period of time, such as, for example, twenty years, to be specified by the enacting State] at any time before the period of effectiveness of the registration expires. In the case of an extension, the new period starts when the current period expires.

[3. An amendment notice other than an amendment notice referred to in paragraph 2 of this article does not extend the period of effectiveness.]

[Note to the Working Group: The Working Group may wish to note that article 44 is based on recommendation 13 of the draft Registry Guide, which in turn is based on recommendation 69 of the Secured Transactions Guide.]

Article 45. Time of effectiveness of the registration of a notice

The registration of a notice becomes effective when the information contained in the notice is entered into the registry record so as to be [available] [accessible] to searchers of the public registry record.

[Note to the Working Group: The Working Group may wish to consider whether article 45 should include language along the lines of recommendations 11, subparagraphs (b) and (c) (the registry to record date and time of effectiveness and enter notices in the order they were received), and 12 (the registry to assign a registration number to the initial notice) of the draft Registry Guide. The Working Group may also wish to consider the bracketed text in this article in view of the formulation of recommendations 11, subparagraph (a), and 16 and of the draft Registry Guide.]

Article 46. Authority for registration of a notice

1. Registration of an initial notice is ineffective unless authorized by the grantor in writing.

2. Registration of an amendment notice that [describe the amendments] is ineffective unless authorized by the grantor.

3. Registration of a cancellation notice is ineffective unless authorized by the secured creditor or ordered by a judicial or administrative authority in accordance with article 47, paragraph 3.

4. The authorization may be given before or after registration.

5. A written security agreement is sufficient to constitute authorization for the registration.

[Note to the Working Group: The Working Group may wish to note that article 46 is based on recommendation 71 and consider addressing: (a) the issue of

authorization of an amendment notice by the grantor and/or secured creditor; (b) the impact of lack of such authorization by the secured creditor (or fraud) on the effectiveness of an amendment notice (see note to the Working Group after recommendation 19 in document A/CN.9/WG.VI/WP.54/Add.5; see also note to article 60 A/CN.9/WG.VI/WP.55/Add.3); and (c) the issue of authorization of a cancellation notice by the secured creditor.]

Article 47. Amendment and cancellation of a notice

1. The secured creditor is obliged to register an amendment or cancellation notice, as the case may be, if:

(a) The registration of an initial or amendment notice has not been authorized by the grantor at all or to the extent described in the notice;

(b) The registration of an initial or amendment notice has been authorized by the grantor but the authorization has been withdrawn or no security agreement has been concluded;

(c) The security agreement has been revised in a way that makes the information contained in the notice incorrect or insufficient; or

(d) The security right to which the notice relates has been extinguished by payment, other performance of the secured obligation or otherwise and there is no further commitment to extend credit.

2. The secured creditor is obliged to register an amendment or cancellation notice, to the extent appropriate, not later than [a short period of time, such as fifteen days, to be specified by the enacting State] after the secured creditor's receipt of a written request of the grantor if any of the circumstances described in paragraph 1 of this article have occurred and the secured creditor has not complied.

3. If the secured creditor does not comply within the time period provide in paragraph 2 of this article, the grantor is entitled to seek cancellation or appropriate amendment of the notice through a summary judicial or administrative procedure.

4. The grantor is entitled to seek an appropriate amendment or cancellation of the notice, as the case may be, even before the expiry of the time period stated in paragraph 2 of this article, provided that [there are appropriate mechanisms to protect the secured creditor].

5. The secured creditor is entitled to register an amendment or cancellation notice, to the extent appropriate, with respect to the relevant notice at any time.

6. Promptly after a notice has expired as provided in article 44 or has been cancelled as provided in paragraph 1-4 of this article the information contained in the notice should be removed from the public registry record.

7. The information provided in the expired or cancelled or amended notice and the fact of expiration or cancellation or amendment should be archived for [a long period of time such as, for example, twenty years, to be specified by the enacting State] years in a manner that enables the information to be retrieved in accordance with article [...].

8. In the case of an assignment of the secured obligation, the notice may be amended to indicate the name of the new secured creditor, but a notice not so amended remains effective.

[Note to the Working Group: The Working Group may wish to note that article 47 is based on recommendations 72-75 of the Secured Transactions Guide and recommendations 33, 20, 21 of the draft Registry Guide. The Working Group may wish to consider the bracketed text in paragraph 4, which is based on recommendation 72, subparagraph (c), of the Secured Transactions Guide and, without some explanation, does not fit in a model law. In addition, the Working Group may wish to consider whether paragraphs 5-7 should be presented as separate articles. Moreover, the Working Group may wish to consider whether the draft Model Law should include additional articles to reflect other recommendations of the draft Registry Guide, such as for example the recommendations on amendment and cancellation notices, indexing of information, search criteria and search results.]

(A/CN.9/WG.VI/ WP.55/Add.3) (Original: English)
Note by the Secretariat on a draft Model Law on Secured
Transactions, submitted to the Working Group on Security Interests
at its twenty-third session

ADDENDUM

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Chapter V. Priority of a security right

Article 48. Priority between security rights granted by the same grantor in the same encumbered asset

1. Priority between competing security rights granted by the same grantor in the same encumbered asset is determined as follows:
 - (a) As between security rights that were made effective against third parties by registration of a notice, priority is determined by the order of registration, regardless of the order of creation of the security rights;
 - (b) As between security rights that were made effective against third parties otherwise than by registration, priority is determined by the order of third-party effectiveness; and
 - (c) As between a security right that was made effective against third parties by registration and a security right that was made effective against third parties otherwise than by registration, priority is determined (regardless of when creation occurs) by the order of registration or third-party effectiveness, whichever occurs first.
2. This article is subject to the exceptions provided in articles 49 and 55-64, as well as in articles 103-111.

Article 49. Priority of a security right registered in a specialized registry or noted on a title certificate

1. A security right in an asset that is made effective against third parties by registration in a specialized registry or notation on a title certificate, as provided in article 23, has priority as against:
 - (a) A security right in the same asset with respect to which a notice is registered in the general security rights registry or which is made effective against third parties by a method other than registration in a specialized registry or notation on a title certificate, regardless of the order; and
 - (b) A security right that is subsequently registered in the specialized registry or noted on a title certificate.
2. If an encumbered asset is transferred or leased and, at the time of transfer or lease, a security right in that asset is effective against third parties by registration in a specialized registry or notation on a title certificate, as provided in article 23, the transferee or lessee takes its rights subject to the security right, except as provided in paragraphs 2-8 of article 50.

3. If the security right has not been made effective against third parties by registration in a specialized registry or notation on a title certificate, a transferee, or lessee takes its rights free of the security right.

**Article 50. Priority of rights of
transferees or lessees of an encumbered asset**

1. If an encumbered asset is transferred or leased and a security right in that asset is effective against third parties at the time of the transfer or lease, a transferee or lessee takes its rights subject to the security right except as provided in paragraphs 2-7 of this article.

2. A security right does not continue in an encumbered asset that the grantor sells or otherwise disposes of, if the secured creditor authorizes the sale or other disposition free of the security right.

3. The rights of a lessee of an encumbered asset are not affected by a security right if the secured creditor authorizes the grantor to lease or license the asset unaffected by the security right.

4. A buyer of a tangible asset sold in the ordinary course of the seller's business takes free of a security right in the asset, provided that, at the time of the sale, the buyer does not have knowledge that the sale violates the rights of the secured creditor under the security agreement.

5. The rights of a lessee of a tangible asset leased in the ordinary course of the lessor's business are not affected by a security right in the asset, provided that, at the time of the conclusion of the lease, the lessee does not have knowledge that the lease violates the rights of the secured creditor under the security agreement.

6. If a buyer acquires a right in an encumbered asset free of a security right, any person that subsequently acquires a right in the asset from the buyer also takes free of the security right.

7. If the rights of a lessee are not affected by a security right, the rights of a sub-lessee are also unaffected by the security right.

[Note to the Working Group: The Working Group may wish to note that article 50 is based on recommendations 79-82 of the Secured Transactions Guide and that references to licences and licensees have been deleted (in this article and other articles, such as article 49) as the draft Model Law is not intended to apply to intellectual property rights.]

Article 51. Priority of preferential claims

Only the claims of [any limited specific claims to be set out by the enacting State] have priority over a security right and only up to an amount of [a limited amount to be set out by the enacting State].

[Note to the Working Group: The Working Group may wish to note that article 51 is intended to reflect the substance of recommendation 83 of the Secured Transactions Guide.]

Article 52. Priority of rights of judgement creditors

1. Subject to article 108, a security right has priority as against the rights of an unsecured creditor, unless the unsecured creditor, under other law, obtained a judgement or provisional court order against the grantor and took the steps necessary to acquire rights in the encumbered asset by reason of the judgement or provisional court order before the security right was made effective against third parties.

2. The priority of the security right extends to credit extended by the secured creditor:

(a) Before the expiry of [a short period of time, such as thirty days, to be specified by the enacting State] days after the unsecured creditor notified the secured creditor that it had taken the steps necessary to acquire rights in the encumbered asset; or

(b) Pursuant to an irrevocable commitment in a fixed amount or an amount to be fixed pursuant to a specified formula of the secured creditor to extend credit, if the commitment was made before the unsecured creditor notified the secured creditor that it had taken the steps necessary to acquire rights in the encumbered asset.

**Article 53. Priority of rights of persons
providing services with respect to an encumbered asset**

If other law gives rights equivalent to security rights to a creditor that has provided services with respect to an encumbered asset, such rights are limited to the asset in the possession of that creditor up to the reasonable value of the services rendered and have priority as against security rights in the asset that were made effective against third parties by one of the methods referred to in article 19 or 20.

Article 54. Priority of a supplier's reclamation right

If other law provides that a supplier of tangible assets has the right to reclaim them, the right to reclaim is subordinate to a security right that was made effective against third parties before the supplier exercised its right.

**Article 55. Priority of a security right
in an attachment to immovable property**

1. A security right or any other right, such as the right of a buyer or lessee, in an attachment to immovable property that is created and made effective against third parties under immovable property law, as provided in articles 11 and 27, has priority as against a security right in that attachment that is made effective against third parties by one of the methods referred to in article 19 or 20.

2. A security right in a tangible asset that is an attachment to immovable property at the time the security right is made effective against third parties or that becomes an attachment to immovable property subsequently, which is made effective against third parties by registration in the immovable property registry as provided in article 27, has priority as against a security right or any other right, such as the right of a buyer or lessee, in the related immovable property that is registered subsequently in the immovable property registry.

**Article 56. Priority of a security
right in an attachment to a movable asset**

A security right or any other right, such as the right of a buyer or lessee, in an attachment to a movable asset that is made effective against third parties by registration in a specialized registry or by notation on a title certificate as provided in article 26 has priority as against a security right or other right in the related movable asset that is subsequently registered in the specialized registry or noted on the title certificate.

Article 57. Priority of a security right in a mass or product

1. If two or more security rights in the same tangible asset continue in a mass or product as provided in article 12, they retain the same priority as the security rights in the asset had as against each other immediately before the asset became part of the mass or product.
2. If security rights in separate tangible assets continue in the same mass or product and each security right is effective against third parties, the secured creditors are entitled to share in the aggregate maximum value of their security rights in the mass or product according to the ratio of the value of the respective security rights.
3. For purposes of the formula provided in paragraph 2 of this article, the maximum value of a security right is the lesser of the value determined pursuant to article 12 and the amount of the secured obligation.
4. An acquisition security right in a separate tangible asset that continues in a mass or product and is effective against third parties has priority as against a security right granted by the same grantor in the mass or product.

**Article 58. Irrelevance of
knowledge of the existence of a security right**

Knowledge of the existence of a security right on the part of a competing claimant does not affect priority.

[Note to the Working Group: The Working Group may wish to note that the commentary will refer to the impact of knowledge that a transaction violates the rights of a secured creditor (see article 50, paragraphs 4 and 5).]

Article 59. Subordination

A competing claimant entitled to priority may at any time subordinate its priority unilaterally or by agreement in favour of any other existing or future competing claimant.

**Article 60. Impact of continuity in
third-party effectiveness on priority**

1. For the purpose of article 48, the priority of a security right is not affected by a change in the method by which it is made effective against third parties, provided that there is no time when the security right is not effective against third parties.

2. If a security right is covered by a registered notice or made effective against third parties and subsequently there is a period during which the security right is neither covered by a registered notice nor effective against third parties, the priority of the security right dates from the earliest time thereafter when the security right is either covered by a registered notice or made effective against third parties.

[Note to the Working Group: The Working Group may wish to consider addressing the issue of the effectiveness of amendment and cancellation notices that are unauthorized by the secured creditor or are fraudulent (see also note to article 46 in document A/CN.9/WG.VI/WP.55/Add.2 and note to recommendation 19 of the draft Registry Guide in document A/CN.9/WG.VI/WP.54/Add.5).]

Article 61. Priority of security rights securing existing and future obligations

Subject to article 52, the priority of a security right extends to all secured obligations, regardless of the time when they are incurred.

Article 62. Extent of priority

[If the enacting State implements article 36, subparagraph (d)], the priority of the security right is limited to the maximum amount set out in the registered notice.

Article 63. Application of priority rules to a security right in a future asset

For the purposes of article 48, subparagraphs 1 (a) and (c), the priority of a security right extends to all encumbered assets covered by the registered notice, irrespective of whether they are acquired by the grantor or come into existence before, at or after the time of registration.

Article 64. Application of priority rules to a security right in proceeds

For the purposes of article 48, the time of third-party effectiveness or the time of registration of a notice as to a security right in an encumbered asset is also the time of third-party effectiveness or registration as to a security right in its proceeds.

Chapter VI. Rights and obligations of the parties to a security agreement

Article 65. Rights and obligations of the parties to a security agreement

The mutual rights and obligations of the parties are determined by:

- (a) The terms and conditions set forth in that agreement, including any rules or general conditions referred to therein;
- (b) Any usage to which they have agreed; and
- (c) Unless otherwise agreed, any practices they have established between themselves.

Article 66. Mandatory rules

1. The party in possession of an encumbered asset must take reasonable steps to preserve the asset and its value.
2. The secured creditor must return an encumbered asset in its possession if, all commitments to extend credit having been terminated, the security right has been extinguished by full payment or otherwise.

[Note to the Working Group: The Working Group may wish to note that article 47 deals with the secured creditor's duty to register a cancellation notice and consider whether that matter should be addressed instead in article 66 or also in article 66.]

Article 67. Non-mandatory rules

Unless otherwise agreed, the secured creditor is entitled:

- (a) To be reimbursed for reasonable expenses incurred for the preservation of an encumbered asset in its possession;
- (b) To make reasonable use of an encumbered asset in its possession and to apply the revenues it generates to the payment of the secured obligation; and
- (c) To inspect an encumbered asset in the possession of the grantor.

Article 68. Representations of the assignor

1. Unless otherwise agreed between the assignor and the assignee, the assignor represents at the time of conclusion of the contract of assignment that:
 - (a) The assignor has the right to assign the receivable;
 - (b) The assignor has not previously assigned the receivable to another assignee; and
 - (c) The debtor of the receivable does not and will not have any defences or rights of set-off.
2. Unless otherwise agreed between the assignor and the assignee, the assignor does not represent that the debtor of the receivable has, or will have, the ability to pay.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that articles 68-70 are based on recommendations 114-116 of the Secured Transactions Guide, which in turn are based articles 12-14 of the United Nations Assignment Convention.]

Article 69. Right to notify the debtor of the receivable

1. Unless otherwise agreed between the assignor and the assignee, the assignor or the assignee or both may send the debtor of the receivable notification of the assignment and a payment instruction, but after notification has been sent only the assignee may send such an instruction.

2. Notification of the assignment or a payment instruction sent in breach of any agreement referred to in subparagraph (a) of this article is not ineffective for the purposes of article 74 by reason of such breach.
3. Nothing in this article affects any obligation or liability of the party in breach of such an agreement for any damages arising as a result of the breach.

Article 70. Right of the assignee to payment

1. As between the assignor and the assignee, unless otherwise agreed and whether or not notification of the assignment has been sent:
 - (a) If payment in respect of the assigned receivable is made to the assignee, the assignee is entitled to retain the proceeds and tangible assets returned in respect of the assigned receivable;
 - (b) If payment in respect of the assigned receivable is made to the assignor, the assignee is entitled to payment of the proceeds and also to tangible assets returned to the assignor in respect of the assigned receivable; and
 - (c) If payment in respect of the assigned receivable is made to another person over whom the assignee has priority, the assignee is entitled to payment of the proceeds and also to tangible assets returned to such person in respect of the assigned receivable.
2. The assignee may not retain more than the value of its right in the receivable.

Chapter VII. Rights and obligations of the debtor of the receivable

Article 71. Protection of the debtor of the receivable

1. Except as otherwise provided in this Law, an assignment does not, without the consent of the debtor of the receivable, affect the rights and obligations of the debtor of the receivable, including the payment terms contained in the original contract.
2. A payment instruction may change the person, address or account to which the debtor of the receivable is required to make payment, but may not change:
 - (a) The currency of payment specified in the original contract; or
 - (b) The State specified in the original contract in which payment is to be made to a State other than that in which the debtor of the receivable is located.

[Note to the Working Group: The Working Group may wish to note that the commentary will clarify that articles 68-70 are based on recommendations 117-123 of the Secured Transactions Guide, which in turn are based articles 15-21 of the United Nations Assignment Convention.]

Article 72. Notification of the assignment

1. Notification of the assignment or a payment instruction is effective when received by the debtor of the receivable if it is in a language that is reasonably expected to inform the debtor of the receivable about its contents. It is sufficient if

notification of the assignment or a payment instruction is in the language of the original contract.

2. Notification of the assignment or a payment instruction may relate to receivables arising after notification.

3. Notification of a subsequent assignment constitutes notification of all prior assignments.

Article 73. Discharge of the debtor of the receivable by payment

1. Until the debtor of the receivable receives notification of the assignment, it is entitled to be discharged by paying in accordance with the original contract.

2. After the debtor of the receivable receives notification of the assignment, subject to paragraphs 3-8 of this article, it is discharged only by paying the assignee or, if otherwise instructed in the notification of the assignment or subsequently by the assignee in a writing received by the debtor of the receivable, in accordance with such payment instruction.

3. If the debtor of the receivable receives more than one payment instruction relating to a single assignment of the same receivable by the same assignor, it is discharged by paying in accordance with the last payment instruction received from the assignee before payment.

4. If the debtor of the receivable receives notification of more than one assignment of the same receivable made by the same assignor, it is discharged by paying in accordance with the first notification received.

5. If the debtor of the receivable receives notification of one or more subsequent assignments, it is discharged by paying in accordance with the notification of the last of such subsequent assignments.

6. If the debtor of the receivable receives notification of the assignment of a part of or an undivided interest in one or more receivables, it is discharged by paying in accordance with the notification or in accordance with this article as if the debtor of the receivable had not received the notification.

7. If the debtor of the receivable receives a notification as provided in paragraph 6 of this article and pays in accordance with the notification, it is discharged only to the extent of the part or undivided interest paid.

8. If the debtor of the receivable receives notification of the assignment from the assignee, it is entitled to request the assignee to provide within a reasonable period of time adequate proof that the assignment from the initial assignor to the initial assignee and any intermediate assignment have been made and, unless the assignee does so, the debtor of the receivable is discharged by paying in accordance with this article as if the notification from the assignee had not been received.

9. Adequate proof of an assignment referred to in paragraph 8 of this article includes but is not limited to any writing emanating from the assignor and indicating that the assignment has taken place.

10. This article does not affect any other ground on which payment by the debtor of the receivable to the person entitled to payment, to a competent judicial or other authority, or to a public deposit fund discharges the debtor of the receivable.

Article 74. Defences and rights of set-off of the debtor of the receivable

1. In a claim by the assignee against the debtor of the receivable for payment of the assigned receivable, the debtor of the receivable may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor of the receivable could avail itself as if the assignment had not been made and such claim were made by the assignor.
2. The debtor of the receivable may raise against the assignee any other right of set-off, provided that it was available to the debtor of the receivable at the time notification of the assignment was received by the debtor of the receivable.
3. Notwithstanding paragraphs 1 and 2 of this article, defences and rights of set-off that the debtor of the receivable may raise pursuant to article 14, paragraph 2, or article 15, paragraph 5, against the assignor for breach of an agreement limiting in any way the assignor's right to make the assignment are not available to the debtor of the receivable against the assignee.

Article 75. Agreement not to raise defences or rights of set-off

1. Subject to paragraph 3 of this article, the debtor of the receivable may agree with the assignor in a writing signed by the debtor of the receivable not to raise against the assignee the defences and rights of set-off that it could raise pursuant to article 74.
2. An agreement under paragraph 1 of this article, which may be modified only by an agreement in a writing signed by the debtor of the receivable and the effect of which as against the assignee is determined by article 76, paragraph 2, precludes the debtor of the receivable from raising against the assignee the defences and rights of set-off provided in paragraph 1 of this article.
3. The debtor of the receivable may not waive defences arising from fraudulent acts on the part of the assignee or based on the incapacity of the debtor of the receivable.

Article 76. Modification of the original contract

1. An agreement concluded before notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is effective as against the assignee, and the assignee acquires corresponding rights.
2. An agreement concluded after notification of the assignment between the assignor and the debtor of the receivable that affects the assignee's rights is ineffective as against the assignee unless:
 - (a) The assignee consents to it; or
 - (b) The receivable is not fully earned by performance and either the modification is provided for in the original contract or, in the context of the original contract, a reasonable assignee would consent to the modification.

3. Paragraphs 1 and 2 of this article do not affect any right of the assignor or the assignee arising from breach of an agreement between them.

**Article 77. Recovery of payments
made by the debtor of the receivable**

1. Failure of the assignor to perform the original contract does not entitle the debtor of the receivable to recover from the assignee a sum paid by the debtor of the receivable to the assignor or the assignee.
2. This does not affect any rights that the debtor of the receivable may have against the assignor.

[Note to the Working Group: The Working Group may wish to note that article 77 is based on recommendation 123 of the Secured Transactions Guide, which in turn is based on article 21 of the United Nations Assignment Convention. Paragraph 2 has been added to clarify that this article is not intended to deprive the debtor of the receivable of any rights it might have under other law to seek recovery of payments from its contractual partner, that is, the assignor.]

Chapter VIII. Enforcement of a security right

**Article 78. General standard of
conduct in the context of enforcement**

A person must enforce its rights and perform its obligations under the provisions on enforcement in good faith and in a commercially reasonable manner.

Article 79. Limitations on party autonomy

1. The general standard of conduct provided in article 78 cannot be waived unilaterally or varied by agreement at any time.
2. Subject to paragraph 1 of this article:
 - (a) The grantor and any other person that owes payment or other performance of the secured obligation may waive unilaterally or vary by agreement any of its rights under the provisions on enforcement, but only after default; and
 - (b) The secured creditor may waive unilaterally or vary by agreement any of its rights under the provisions on enforcement.
3. A variation of rights by agreement may not adversely affect the rights of any person not a party to the agreement.
4. A person challenging the effectiveness of the agreement on the ground that is inconsistent with paragraphs 1, 2, 3 or 4 of this article has the burden of proof.

Article 80. Liability

If a person fails to comply with its obligations under the provisions on enforcement, it is liable for damages caused by such failure.

Article 81. Judicial or other relief for non-compliance

The debtor, the grantor or any other interested person is entitled at any time to apply to a court or other authority for relief from the secured creditor's failure to comply with its obligations under the provisions on enforcement.

[Note to the Working Group: The Working Group may wish to note that, for the purposes of this and other articles (e.g. article 84), the commentary will give examples of interested persons, such as a secured creditor with a lower priority ranking than that of the enforcing secured creditor, a guarantor or a co-owner of the encumbered assets.]

Article 82. Expeditious judicial proceedings

Where the secured creditor, the grantor or any other person that owes performance of the secured obligation, or claims to have a right in an encumbered asset, applies to a court or other authority with respect to the exercise of post-default rights, the proceedings should be conducted in a reasonably expeditious manner.

[Note to the Working Group: If the Working Group decides to retain the expression "in a reasonably expeditious manner", it may wish to further clarify this expression in this article or in the relevant commentary. Alternatively the Working Group may wish to consider revising the formulation of this article.]

Article 83. Post-default rights of the grantor

After default, the grantor is entitled to exercise one or more of the following rights:

- (a) Pay in full the secured obligation and obtain a release from the security right of all encumbered assets, as provided in article 84;
- (b) Apply to a court or other authority for relief if the secured creditor is not complying with its obligations under the provisions of this law, as provided in article 81;
- (c) Propose to the secured creditor, or reject the proposal of the secured creditor, that the secured creditor acquire an encumbered asset in total or partial satisfaction of the secured obligation, as provided in paragraphs 3 and 4 of article 95; and
- (d) Exercise any other right provided in the security agreement or any law.

Article 84. Extinction of the security right after full satisfaction of the secured obligation

1. The debtor, the grantor or any other interested person is entitled to satisfy the secured obligation in full, including payment of the costs of enforcement up to the time of full satisfaction.
2. This right may be exercised until the earlier of the disposition, acquisition or collection of an encumbered asset by the secured creditor or the conclusion of an agreement by the secured creditor to dispose of the encumbered asset.

3. If all commitments to extend credit have terminated, full satisfaction of the secured obligation extinguishes the security right in all encumbered assets, subject to any rights of subrogation in favour of the person satisfying the secured obligation.

Article 85. Post-default rights of the secured creditor

After default, the secured creditor is entitled to exercise one or more of the following rights with respect to an encumbered asset:

- (a) Obtain possession of a tangible encumbered asset, as provided in articles 90 and 91;
- (b) Sell or otherwise dispose of, lease or license an encumbered asset, as provided in articles 92 and 93;
- (c) Propose that the secured creditor acquires an encumbered asset in total or partial satisfaction of the secured obligation, as provided in article 95;
- (d) Enforce its security right in an attachment, as provided in articles 99;
- (e) Collect on or otherwise enforce a security right in an encumbered asset that is a receivable, as provided in article 101; and
- (f) Exercise any other right provided in the security agreement (except to the extent inconsistent with the provisions of this Law) or any law.

Article 86. Judicial and extrajudicial methods of exercising post-default rights

1. After default, the secured creditor may exercise its rights provided in article 85 either by applying to a court or other authority, or without application to a court or other authority.
2. Extrajudicial exercise of the secured creditor's rights is subject to the general standard of conduct provided in article 78 and the requirements provided in articles 91-93 with respect to extrajudicial obtaining of possession and disposition of an encumbered asset.

Article 87. Cumulative post-default rights

The exercise of one post-default right does not prevent the exercise of another right, except to the extent that the exercise of one right has made the exercise of another right impossible.

Article 88. Post-default rights with respect to the secured obligation

The exercise of a post-default right with respect to an encumbered asset does not prevent the exercise of a post-default right with respect to the obligation secured by that asset, and vice versa.

Article 89. Right of higher-ranking secured creditor to take over enforcement

1. If a secured creditor has commenced enforcement by taking any of the actions described in the provisions on enforcement or a judgement creditor has taken the steps referred to in article 52, a secured creditor whose security right has priority as against that of the enforcing secured creditor or the enforcing judgement creditor is entitled to take control of the enforcement process at any time before the earlier of the final disposition or acquisition or collection of an encumbered asset or the conclusion of an agreement by the secured creditor to dispose of the encumbered asset.
2. The right to take control includes the right to enforce by any method available under articles 78-102.

Article 90. Secured creditor's right to possession of an encumbered asset

After default the secured creditor is entitled to possession of a tangible encumbered asset.

Article 91. Extrajudicial obtaining of possession of an encumbered asset

The secured creditor may elect to obtain possession of a tangible encumbered asset without applying to a court or other authority only if:

- (a) The grantor has consented in the security agreement to the secured creditor obtaining possession without applying to a court or other authority;
- (b) The secured creditor has given the grantor and any person in possession of the encumbered asset notice of default and of the secured creditor's intent to obtain possession without applying to a court or other authority; and
- (c) At the time the secured creditor seeks to obtain possession of the encumbered asset the grantor and any person in possession of the encumbered asset does not object.

Article 92. Extrajudicial disposition of an encumbered asset

1. After default, a secured creditor is entitled, without applying to a court or other authority, to sell or otherwise dispose of or lease an encumbered asset to the extent of the grantor's rights in the encumbered asset.
2. Subject to the standard of conduct provided in article 78, a secured creditor that elects to exercise this right may select the method, manner, time, place and other aspects of the disposition or lease.

**Article 93. Advance notice of
extrajudicial disposition of an encumbered asset**

1. After default, the secured creditor must give notice of its intention to sell or otherwise dispose of, lease or licence an encumbered asset without applying to a court or other authority.
2. The notice need not be given if the encumbered asset is perishable, may decline in value speedily or is of a kind sold on a recognized market.
3. The notice should be given in an efficient, timely and reliable way so as to protect the grantor or other interested parties, while, at the same time, avoiding having a negative effect on the secured creditor's remedies and the potential net realization value of the encumbered assets.
4. The notice must be given to:
 - (a) The grantor, the debtor and any other person that owes performance of the secured obligation;
 - (b) Any person with rights in the encumbered asset that, more than [to be specified] days before the sending of the notice by the secured creditor to the grantor, notifies in writing the secured creditor of those rights;
 - (c) Any other secured creditor that, more than [a short period of time to be specified] days before the notice is sent to the grantor, registered a notice with respect to a security right in the encumbered asset that is indexed under the identifier of the grantor; and
 - (d) Any other secured creditor that was in possession of the encumbered asset at the time when the enforcing secured creditor took possession of the asset.
5. The notice must be given in writing at least [a short period of time, such as fifteen days, to be specified by the enacting State] days before extrajudicial disposition takes place and must contain an accounting of the amount then owed and a reference to the right of the debtor or the grantor to obtain the release of the encumbered assets from the security right as provided in article 84.
6. The notice must be in a language that is reasonably expected to inform its recipients about its contents. It is sufficient if the notice to the grantor is in the language of the security agreement being enforced.

**Article 94. Distribution of proceeds
of disposition of an encumbered asset**

1. In the case of extrajudicial disposition of an encumbered asset:
 - (a) The enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation;
 - (b) Except as provided in subparagraph 1(c) of this article, the enforcing secured creditor must pay any surplus remaining to any subordinate competing claimant that, prior to any distribution of the surplus, notified the enforcing secured creditor of the subordinate competing claimant's claim, to the extent of the amount of that claim, and any balance remaining must be remitted to the grantor; and

(c) Whether or not there is any dispute as to the entitlement or priority of any competing claimant under this Law, the enforcing secured creditor may, in accordance with generally applicable procedural rules, pay the surplus to a competent judicial or other authority or to a public deposit fund for distribution.

2. Distribution of the proceeds realized by a judicial disposition or other officially administered enforcement process is to be made pursuant to [the general rules of the enacting State governing execution proceedings], but in accordance with the provisions of this Law on priority.

3. The debtor and any other person that owes payment of the secured obligation remain liable for any shortfall owing after application of the net proceeds of enforcement to the secured obligation.

Article 95. Acquisition of an encumbered asset in satisfaction of the secured obligation

1. After default, the secured creditor may propose in writing to acquire one or more of the encumbered assets in total or partial satisfaction of the secured obligation.

2. The proposal must be sent to:

(a) The grantor, the debtor and any other person that owes payment or other performance of the secured obligation, including a guarantor;

(b) Any person with rights in the encumbered asset that, more than [a short period of time such as fifteen days to be specified by the enacting State] days before the proposal is sent by the secured creditor to the grantor, has notified in writing the secured creditor of those rights;

(c) Any other secured creditor that, more than [a short period of time such as fifteen days to be specified by the enacting State] days before the proposal is sent by the secured creditor to the grantor, registered a notice with respect to a security right in the encumbered asset indexed under the identifier of the grantor; and

(d) Any other secured creditor that was in possession of the encumbered asset at the time the secured creditor took possession.

3. The proposal must specify the amount owed as of the date the proposal is sent and the amount of the obligation that is proposed to be satisfied by acquiring the encumbered asset.

4. The secured creditor may acquire the encumbered asset as provided in paragraph 1 of this article, unless the secured creditor receives an objection in writing from any person entitled to receive such a proposal within [a short period of time such as fifteen days to be specified by the enacting State] days, after the proposal is sent.

5. In the case of a proposal for the acquisition of the encumbered asset in partial satisfaction, affirmative consent by each addressee of the proposal is necessary.

6. The grantor may make such a proposal and if the secured creditor accepts it, the secured creditor must proceed as provided in paragraphs 2-5 of this article.

Article 96. Rights acquired through judicial disposition

If a secured creditor disposes of an encumbered asset through a judicial or other officially administered process, the rights acquired by the transferee are determined by [the general rules of the enacting State governing execution proceedings].

Article 97. Rights acquired through extrajudicial disposition

1. If a secured creditor sells or otherwise disposes of an encumbered asset without applying to a court or other authority, in accordance with this Law, a person that acquires the grantor's right in the asset takes the asset subject to rights that have priority as against the security right of the enforcing secured creditor, but free of rights of the enforcing secured creditor and any competing claimant whose right has a lower priority than that of the enforcing secured creditor.
2. The rule provided in paragraph 1 of this article applies to rights in an encumbered asset acquired by a secured creditor that has acquired the asset in total or partial satisfaction of the secured obligation.
3. If a secured creditor leases an encumbered asset without applying to a court or other authority, in accordance with this Law, a lessee is entitled to the benefit of the lease during its term, except as against rights that have priority over the right of the enforcing secured creditor.
4. If the secured creditor sells or otherwise disposes of or leases the encumbered asset not in accordance with articles 78-102, a good faith acquirer or lessee of the encumbered asset acquires the rights or benefits described in article 97.

Article 98. Intersection of movable and immovable property enforcement regimes

1. The secured creditor may elect to enforce a security right in an attachment to immovable property in accordance with articles 78-102 or [the law of the enacting State governing enforcement of encumbrances on immovable property].
2. If an obligation is secured by both a movable asset and immovable property of a grantor, the secured creditor may elect to enforce:
 - (a) The security right in the movable asset under the provisions of this Law on the enforcement of a security right in a movable asset and the encumbrance on the immovable property under [the law of the enacting State governing enforcement of encumbrances on immovable property]; or
 - (b) Both rights under [the law of the enacting State governing enforcement of encumbrances on immovable property].

Article 99. Enforcement of a security right in an attachment

1. A secured creditor with a security right in an attachment to immovable property is entitled to enforce its security right only if it has priority as against competing rights in the immovable property.
2. A creditor with a competing right in the immovable property that has lower priority than the security right of the enforcing secured creditor is entitled to pay off

the obligation secured by the security right of the enforcing secured creditor in the attachment.

3. The enforcing secured creditor is liable for any damage to the immovable property caused by the act of removal other than any diminution in its value attributable solely to the absence of the attachment.

4. A secured creditor with a security right in an attachment to a movable asset is entitled to enforce its security right in the attachment.

5. A creditor with a competing right in the movable asset that has higher priority than the security right of the enforcing secured creditor is entitled to take control of the enforcement process, as provided in article 89.

6. A creditor with a competing right in the movable asset that has lower priority than the security right of the enforcing secured creditor is entitled to pay off the obligation secured by the security right of the enforcing secured creditor in the attachment.

7. The enforcing secured creditor is liable for any damage to the movable asset caused by the act of removal other than any diminution in its value attributable solely to the absence of the attachment.

Article 100. Application of the chapter on enforcement to an outright transfer of a receivable

Articles 78-102 do not apply to the collection or other enforcement of a receivable assigned by an outright transfer with the exception of:

- (a) Articles 78 and 79 in the case of an outright transfer with recourse; and
- (b) Article 101.

Article 101. Enforcement of a security right in a receivable

1. In the case of a receivable assigned by an outright transfer, subject to articles 71-77, the assignee has the right to collect or otherwise enforce the receivable.

2. In the case of a receivable assigned otherwise than by an outright transfer, the assignee is entitled, subject to articles 71-77, to collect or otherwise enforce the receivable after default, or before default with the agreement of the assignor.

3. The assignee's right to collect or otherwise enforce a receivable includes the right to collect or otherwise enforce any personal or property right that secures payment of the receivable.

Article 102. Distribution of proceeds of disposition where the encumbered asset is a receivable

1. In the case of collection or other enforcement of a receivable, the enforcing secured creditor must apply the net proceeds of its enforcement after deducting costs of enforcement to the secured obligation.

2. The enforcing secured creditor must pay any surplus remaining to the competing claimants that, prior to any distribution of the surplus, notified the

enforcing secured creditor of the competing claimant's claim, to the extent of that claim, and any balance remaining must be remitted to the grantor.

(A/CN.9/WG.VI/WP.55/Add.4) (Original: English)
Note by the Secretariat on a draft Model Law on Secured
Transactions, submitted to the Working Group on Security Interests
at its twenty-third session

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Chapter IX. Acquisition financing

Option A: Unitary approach*

Article 103. An acquisition security right as a security right

An acquisition security right is a security right, and, as a result, all the articles governing security rights, including those on creation, third-party effectiveness, registration, priority (except as provided in articles 105-110), enforcement and the law applicable to a security right, apply to acquisition security rights.

Article 104. Third-party effectiveness and priority of an acquisition security right in consumer goods

An acquisition security right in consumer goods is effective against third parties upon its creation and, except as provided in article 106, has priority as against a competing non-acquisition security right created by the grantor.

Article 105. Priority of an acquisition security right in a tangible asset

Except as provided in article 106:

Alternative A**

(a) An acquisition security right in a tangible asset other than inventory or consumer goods has priority as against a competing non-acquisition security right created by the grantor, even if a notice with respect to that security right was registered in the general security rights registry before registration of a notice with respect to the acquisition security right, provided that:

- (i) The acquisition secured creditor retains possession of the asset; or
- (ii) A notice with respect to the acquisition security right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting States] after the grantor obtains possession of the asset;

(b) An acquisition security right in inventory has priority as against a competing non-acquisition security right created by the grantor, even if that security right became effective against third parties before the acquisition security right became effective against third parties, provided that:

- (i) The acquisition secured creditor retains possession of the inventory; or
- (ii) Before delivery of the inventory to the grantor:
 - a. A notice with respect to the acquisition security right is registered in the general security rights registry; and

* A State may adopt option A (unitary approach), that is, articles 103-111, or option B (non-unitary approach), that is, articles 112-126. The articles outside this chapter are generally applicable except to the extent modified by the articles in this chapter.

** A State may adopt alternative A or alternative B of article 105.

b. A secured creditor with an earlier-registered non-acquisition security right created by the grantor in inventory of the same kind is notified by the acquisition secured creditor that it has or intends to acquire an acquisition security right;

(iii) The notice referred to in subparagraph (b) (ii) b. of this article must describe the inventory sufficiently to enable the non-acquisition secured creditor to identify the inventory that is the object of the acquisition security right;

(c) A notice, sent pursuant to subparagraph (b) (ii) b. of this article, may cover acquisition security rights under multiple transactions between the same parties without the need to identify each transaction and is sufficient only for security rights in tangible assets of which the grantor obtains possession within a period of [a period of time, such as five years, to be specified by the enacting State] after the notice is given.

Alternative B

an acquisition security right in a tangible assets other than consumer goods has priority as against a competing non-acquisition security right created by the grantor, even if a notice of that security right was registered in the general security rights registry before registration of a notice of the acquisition security right, provided that:

(a) The acquisition secured creditor retains possession of the asset; or

(b) A notice relating to the acquisition security right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] after the grantor obtains possession of the asset.

Article 106. Priority of a security right registered in a specialized registry or noted on a title certificate

The priority of an acquisition security right under article 104 or 105 does not override the priority of a security right or other right registered in a specialized registry or noted on a title certificate as provided in article 49.

Article 107. Priority between competing acquisition security rights

The priority between competing acquisition security rights is determined according to the general priority rules applicable to non-acquisition security rights, unless one of the acquisition security rights is an acquisition security right of a supplier that was made effective against third parties within the period specified in article 105, in which case the supplier's acquisition security right has priority as against all competing acquisition security rights.

Article 108. Priority of an acquisition security right as against the right of a judgement creditor

An acquisition security right that is made effective against third parties within the period specified in article 105 has priority as against the rights of an unsecured creditor that would otherwise have priority as provided in article 52.

**Article 109. Priority of an acquisition security right
in an attachment to immovable property as against an
earlier registered encumbrance on the immovable property**

An acquisition security right in a tangible asset that becomes an attachment to immovable property has priority as against third parties with existing rights in the immovable property, other than an encumbrance securing a loan financing the construction of the immovable property, provided that notice of the acquisition security right is registered in the immovable property registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the asset becomes an attachment.

**Article 110. Priority of an acquisition
security right in proceeds of a tangible asset**

Alternative A*

1. An acquisition security right in proceeds of a tangible asset other than inventory or consumer goods has the same priority as the acquisition security right in that asset.
2. A security right in proceeds of inventory has the same priority as the acquisition security right in that inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account or rights to receive the proceeds under an independent undertaking.
3. The priority under paragraph 1 or 2 of this article is conditional on the acquisition secured creditor notifying secured creditors that, before the proceeds arise, registered a notice with respect to a security right in assets of the same kind as the proceeds.

Alternative B

if an acquisition security right in a tangible asset is effective against third parties, the security right in proceeds has the priority of a non-acquisition security right.

**Article 111. Acquisition security right
as a security right in insolvency proceedings**

In the case of insolvency proceedings with respect to the debtor, the provisions that apply to security rights apply also to acquisition security rights.

Option B: Non-unitary approach**

Article 112. Methods of acquisition financing

1. The regime of acquisition security rights in the context of the non-unitary approach is identical to that adopted in the context of the unitary approach.

* A State may adopt alternative A of article 110, if it adopts alternative A of article 105, or alternative B of article 110, if it adopts alternative B of article 105.

** A State may adopt option A (unitary approach), that is, articles 103-111, or option B (non-unitary approach), that is, articles 112-126.

2. All creditors, both suppliers and lenders, may acquire an acquisition security right in conformity with the regime governing acquisition security rights.
3. Acquisition financing based on retention-of-title rights and financial lease rights may be provided in accordance with article 188.
4. A lender may acquire the benefit of a retention-of-title right and a financial lease right through an assignment or subrogation.

**Article 113. Equivalence of a retention-of-title
right and a financial lease right to an acquisition security right**

The rules governing acquisition financing produce functionally equivalent economic results regardless of whether the creditor's right is a retention-of-title right, a financial lease right or an acquisition security right.

[Note to the Working Group: The Working Group may wish to consider whether articles 112 and 113 should be retained appropriately revised or deleted while the matters covered therein would be discussed in the commentary.]

**Article 114. Effectiveness of a
retention-of-title right and a financial lease right**

1. A retention-of-title right or a financial lease right in a tangible asset is not effective unless the sale or lease agreement is concluded in or evidenced by a writing that in conjunction with the course of conduct between the parties indicates the seller's or the lessor's intent to retain ownership.
2. The writing must exist not later than the time when the buyer or lessee obtains possession of the asset.

Article 115. Right of buyer or lessee to create a security right

1. A buyer or lessee may create a security right in a tangible asset that is the object of a retention-of-title right or a financial lease right.
2. The maximum amount for which the security right may be enforced is the asset's value in excess of the amount owing to the seller or financial lessor.

**Article 116. Third-party effectiveness of a
retention-of-title right or financial lease right in consumer goods**

A retention-of-title right or a financial lease right in consumer goods is effective against third parties upon conclusion of the sale or lease provided that the right is evidenced in accordance with article 114.

**Article 117. Third-party effectiveness
of a retention-of-title right in a tangible asset**

Alternative A*

1. An acquisition security right, a retention-of-title right or a financial lease right in tangible asset other than inventory or consumer goods is effective against third parties only if:
 - (a) The seller or lessor retains possession of the asset; or
 - (b) A notice relating to the right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the buyer or lessee obtains possession of the asset.
2. A retention-of-title right or a financial lease right in inventory is effective against third parties only if:
 - (a) The seller or lessor retains possession of the inventory; or
 - (b) Before delivery of the inventory to the buyer or lessee:
 - (i) A notice relating to the right is registered in the general security rights registry; and
 - (ii) A secured creditor with an earlier registered non-acquisition security right created by the buyer or lessee in inventory of the same kind is notified by the seller or lessor of its intention to claim a retention-of-title right or a financial lease right;
 - (c) The notice referred to in subparagraph 2 (b) (ii) of this article should describe the inventory sufficiently to enable the secured creditor to identify the inventory that is the object of the retention-of-title right or the financial lease right.
3. A notice sent pursuant to subparagraph 2 (b) (ii) of this article may cover retention-of-title rights and financial lease rights under multiple transactions between the same parties without the need to identify each transaction. The notice is effective only for rights in tangible assets of which the buyer or lessee obtains possession within a period of [a period of time, such as five years, to be specified] years after the notice is given.

Alternative B

an acquisition security right, a retention-of-title right or financial lease right in a tangible asset other than consumer goods is effective against third parties only if:

- (a) The seller or lessor retains possession of the asset; or
- (b) A notice relating to the right is registered in the general security rights registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the buyer or lessee obtains possession of the asset.

* A State may adopt alternative A or alternative B of article 117.

Article 118. One registration sufficient

1. Registration of a single notice in the general security rights registry is sufficient to achieve third-party effectiveness of a retention-of-title right or a financial lease right under multiple transactions between the same parties, whether concluded before or after the registration, which involve tangible assets that fall within the description contained in the notice.
2. The provisions of this Law on the registry system apply [with appropriate modifications as to terminology] to the registration of a retention-of-title right and a financial lease right.

Article 119. Effect of failure to achieve third-party effectiveness of a retention-of-title right or a financial lease right

If a retention-of-title right or a financial lease right is not effective against third parties, ownership of the asset as against third parties passes to the buyer or lessee, and the seller or lessor has a security right in the asset subject to the provisions of this Law applicable to security rights.

Article 120. Third-party effectiveness of a retention-of-title right or financial lease right in an attachment to immovable property

1. A retention-of-title right or a financial lease right in a tangible asset that becomes an attachment to immovable property is effective against third parties with rights in the immovable property that are registered in the immovable property registry only if it is registered in the immovable property registry not later than [a short time period, such as thirty days, to be specified by the enacting State] days after the asset becomes an attachment.
2. If a seller or lessor fails to register a notice of its retention-of-title right or financial lease right in a tangible asset that became an attachment to immovable property within the time period provided in paragraph 1 of this article, the retention-of-title right of the seller or the financial lease right of the lessor is deemed to be a security right.

Article 121. Existence of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right

A seller or lessor with a retention-of-title right or financial lease right in a tangible asset has a security right in proceeds of the asset.

Article 122. Third-party effectiveness of a security right in proceeds of a tangible asset subject to a retention-of-title right or financial lease right

1. A security right in proceeds referred to in article 121 is effective against third parties only if the proceeds are described in a generic way in the registered notice by which the retention-of-title right or financial lease right was made effective against third parties or the proceeds consist of money, receivables, negotiable instruments or rights to payment of funds credited to a bank account.
2. If the proceeds are not described in a generic way in the registered notice or do not consist of the types of asset referred to in paragraph 1 of this article, the security right in the proceeds is effective against third parties for [a short period of time,

such as thirty days, to be specified by the enacting State] days after the proceeds arise and continuously thereafter, if it was made effective against third parties by one of the methods referred to in article 18 or 20 before the expiry of that time period.

**Article 123. Priority of a security
right in proceeds of a tangible asset**

Alternative A*

1. If a retention-of-title right or financial lease right is effective against third parties, the security right in proceeds referred to in article 121 has priority as against another security right in the same asset.
2. If a retention-of-title right or financial lease right is effective against third parties, the security right in proceeds of inventory referred to in article 121 has the same priority as a retention-of-title or financial lease right in that inventory, except where the proceeds take the form of receivables, negotiable instruments, rights to payment of funds credited to a bank account and rights to receive the proceeds under an independent undertaking.
3. The priority referred to in paragraph 2 of this article is conditional on the seller or lessor notifying secured creditors that have registered a notice with respect to a security right in assets of the same kind as the proceeds before the proceeds arise.

Alternative B

1. If a retention-of-title right or financial lease right in a tangible asset is effective against third parties, the security right in proceeds referred to in article 121 has the priority of a non-acquisition security right if the security right in the proceeds is effective against third parties as provided in article 122.
2. The rule in paragraph 1 of this article applies also to the proceeds of a tangible asset subject to an acquisition security right.

**[Article 124. Enforcement of a
retention-of-title right or a financial lease right]**

1. Rules for the post-default enforcement of a retention-of-title right or a financial lease right in a tangible asset should deal with:
 - (a) The manner in which the seller or lessor may obtain possession of the asset;
 - (b) Whether the seller or lessor is required to dispose of the asset and, if so, how;
 - (c) Whether the seller or lessor may retain any surplus; and
 - (d) Whether the seller or lessor has a claim for any deficiency against the buyer or lessee.

* A State may adopt alternative A of article 123, if it adopts alternative A of article 117, or alternative B of article 123, if it adopts alternative B of article 117.

2. The regime that applies to the post-default enforcement of a security right applies to the post-default enforcement of a retention-of-title right or a financial lease right except to the extent necessary to preserve the coherence of the regime applicable to sale and lease.]

[Note to the Working Group: The Working Group may wish to note that article 124 is based on recommendation 200 of the Secured Transactions Guide and consider its substance as in its current formulation article 124 does not fit into a model law.]

**Article 125. Law applicable to a
retention-of-title right or a financial lease right**

The conflict-of-laws provisions of this Law that apply to security rights apply also to retention-of-title rights and financial lease rights.

**Article 126. Retention-of-title right or financial
lease right in insolvency proceedings**

In the case of insolvency proceedings with respect to the debtor,

Alternative A*

the provisions of this Law that apply to security rights apply also to retention-of-title rights and financial lease rights.

Alternative B

the provisions of this Law that apply to ownership rights of third parties apply also to retention-of-title rights and financial lease rights.

Chapter X. Conflict of laws

[Note to the Working Group: The Working Group may wish to consider whether chapter X should be retained in the draft Model Law. If the Working Group decided that chapter X should be deleted, the commentary could explain that States that wish to include conflict-of-laws provisions in their secured transactions (or other) law may implement the recommendations of the Secured Transactions Guide.]

Article 127. Law applicable to a security right in a tangible asset

1. Except as provided in paragraphs 2 to 4 and articles 128 and 131, the law applicable to the creation, third-party effectiveness and priority of a security right in a tangible asset is the law of the State in which the asset is located.

2. The law applicable to the issues mentioned in paragraph 1 of this article with respect to a security right in a tangible asset of a type ordinarily used in more than one State is the law of the State in which the grantor is located.

* A State may adopt alternative A or alternative B of article 126.

3. If a security right in a tangible asset is subject to registration in a specialized registry or notation on a title certificate providing for registration or notation of a security right, the law applicable to issues mentioned in paragraph 1 of this article is the law of the State under whose authority the registry is maintained or the title certificate is issued.

4. The law applicable to the priority of a security right in a tangible asset made effective against third parties by possession of a negotiable document as against a competing security right made effective against third parties by another method is the law of the State in which the document is located.

**Article 128. Law applicable to a security
right in a tangible asset in transit or to be exported**

A security right in a tangible asset in transit or to be exported from the State in which it is located at the time of the creation of the security right may be created and made effective against third parties under the law of the State of the location of the asset at the time of creation as provided in article 127, paragraph 1, or, provided that the asset reaches that State within [a short period of time, such as thirty days, to be specified by the enacting State] days after the time of creation of the security right, under the law of the State of its ultimate destination.

**Article 129. Law applicable
to a security right in an intangible asset**

The law applicable to the creation, effectiveness against third parties and priority of a security right in an intangible asset is the law of the State in which the grantor is located.

**Article 130. Law applicable to
receivables arising from a sale, lease or
security agreement relating to immovable property**

1. The law applicable to the creation, third-party effectiveness and priority of a security right in a receivable arising from a sale, lease or security agreement relating to immovable property is the law of the State in which the assignor is located.

2. Notwithstanding paragraph 1 of this article, the law applicable to a priority conflict involving the right of a competing claimant that is registered in an immovable property registry is the law of the State under whose authority the registry is maintained.

3. The rule in the preceding paragraph applies only if registration is relevant under that law to the priority of a security right in the receivable.

Article 131. Law applicable to the third-party effectiveness of a security right in specified types of asset by registration

If the State in which the grantor is located recognizes registration as a method of achieving effectiveness against third parties of a security right in a negotiable instrument or a right to payment of funds credited to a bank account, the law of the State in which the grantor is located is the law applicable to the issue whether third-party effectiveness has been achieved by registration under the laws of that State.

Article 132. Law applicable to a security right in proceeds

1. The law applicable to the creation of a security right in proceeds is the law applicable to the creation of the security right in the original encumbered asset from which the proceeds arose.
2. The law applicable to the third-party effectiveness and priority of a security right in proceeds is the law applicable to the third-party effectiveness and priority of a security right in an asset of the same kind as the proceeds.

Article 133. Law applicable to the rights and obligations of the grantor and the secured creditor

The law applicable to the mutual rights and obligations of the grantor and the secured creditor arising from their security agreement is the law chosen by them and, in the absence of a choice of law, by the law governing the security agreement.

Article 134. Law applicable to the rights and obligations of third-party obligors and secured creditors

The law applicable to a receivable also is the law applicable to:

- (a) The relationship between the debtor of the receivable and the assignee of the receivable;
- (b) The conditions under which an assignment of the receivable may be invoked against the debtor of the receivable, including whether an anti-assignment agreement may be asserted by the debtor of the receivable, the obligor or the issuer; and
- (c) Whether the obligations of the debtor of the receivable have been discharged.

Article 135. Law applicable to enforcement of a security right

Subject to article 140, the law applicable to issues relating to the enforcement of a security right:

- (a) In a tangible asset is the law of the State where enforcement takes place; and
- (b) In an intangible asset is the law applicable to the priority of the security right.

Article 136. Meaning of “location” of the grantor

1. For the purposes of the conflict-of-laws provisions of this Law, the grantor is located in the State in which it has its place of business.
2. If the grantor has a place of business in more than one State, the grantor’s place of business is that place where the central administration of the grantor is exercised.
3. If the grantor does not have a place of business, reference is to be made to the habitual residence of the grantor.

Article 137. Relevant time for determining location

1. Except as provided in paragraph 2 of this article, references to the location of the assets or of the grantor in the conflict-of-laws provisions refer, for creation issues, to the location at the time of the putative creation of the security right and, for third-party effectiveness and priority issues, to the location at the time the issue arises.
2. If the rights of all competing claimants in an encumbered asset were created and made effective against third parties before a change in location of the asset or the grantor, references in the conflict-of-laws provisions to the location of the asset or of the grantor refer, with respect to third-party effectiveness and priority issues, to the location prior to the change in location.

Article 138. Exclusion of renvoi

A reference in the conflict-of-laws provisions to “the law” of another State as the law applicable to an issue refers to the law in force in that State other than its conflict-of-laws provisions.

Article 139. Public policy and internationally mandatory rules

1. The application of the law determined under the conflict-of-laws provisions may be refused only if the effects of its application would be manifestly contrary to the public policy of the forum.
2. The conflict-of-laws provisions do not prevent the application of those provisions of the law of the forum which, irrespective of conflict-of-laws provisions, must be applied even to international situations.
3. Paragraphs 1 and 2 of this article do not permit the application of the provisions of the law of the forum to the third-party effectiveness and priority of a security right.

Article 140. Impact of commencement of insolvency proceedings on the law applicable to security rights

1. Subject to paragraph 2 of this article, the law the commencement of insolvency proceedings does not displace the conflict-of-laws provisions that determine the law applicable to the creation, third-party effectiveness, priority and enforcement of a security right [and, if the enacting State adopts the non-unitary approach, a retention-of-title right and financial lease right].

2. The rule in paragraph 1 of this article is subject to the effects on such issues of the application of the insolvency law of the State in which insolvency proceedings are commenced to issues such as avoidance, treatment of secured creditors, ranking of claims or distribution of proceeds.

**Article 141. Special rules for situations in which
the applicable law is the law of a multi-unit State**

1. In situations in which the law applicable to an issue is the law of a multi-unit State subject to paragraph 2 of this article, references to the law of a multi-unit State are to the law of the relevant territorial unit, as determined on the basis of the location of the grantor or of an encumbered asset or otherwise under the conflict-of-laws provisions of this Law, and, to the extent applicable in that unit, to the law of the multi-unit State itself.
2. If, under its conflict-of laws provisions, the applicable law is that of a multi-unit State or one of its territorial units, the internal conflict-of laws provisions in force in the multi-unit State or territorial unit determine whether the substantive provisions of law of the multi-unit State or of a particular territorial unit of the multi-unit State apply.

XI. Transition

Article 142. Effective date

1. The effective date, at which this Law comes into force, is [a date to be specified by the enacting State] [six months after [a date to be specified by the enacting State]].
2. From its effective date, this Law applies to all transactions within its scope, whether entered into before or after that date, except as provided in articles 143-146.

**Article 143. Inapplicability of the law to actions
commenced before the effective date**

1. This Law does not apply to a matter that is the subject of litigation or alternative binding dispute resolution proceedings that were commenced before the effective date.
2. If enforcement of a security right has commenced before the effective date, the enforcement may continue under the law in force before the effective date.

Article 144. Creation of a security right

The law in force before the effective date determines whether a security right was created before the effective date.

Article 145. Third-party effectiveness of a security right

1. A security right that is effective against third parties under the law in force before the effective date remains effective against third parties until the earlier of:
 - (a) The time it would cease to be effective against third parties under the law in force before the effective date; and
 - (b) The expiration of a transition period of [a period of time, such as six months, to be specified by the enacting State] months after the effective date.
2. If the requirements for third-party effectiveness under this Law are satisfied before third-party effectiveness would have ceased under the preceding sentence, third-party effectiveness is continuous.

Article 146. Priority of a security right

1. Subject to paragraphs 3 and 4 of this article, this Law governs the priority of a security right.
2. The time when a security right referred to in article 145 was made effective against third parties or became the subject of a registered notice under the law in force before the effective date is the time to be used in determining the priority of that right.
3. The priority of a security right is determined by the law in force before the effective date if:
 - (a) The security right and the rights of all competing claimants arose before the effective date of this Law; and
 - (b) The priority status of none of these rights has changed since the effective date of this Law.
4. The priority status of a security right has changed if:
 - (a) It was effective against third parties on the effective date of this Law as provided in article 145 and later ceased to be effective against third parties; or
 - (b) It was not effective against third parties on the effective date of this Law and later became effective against third parties.

VI. PROCUREMENT

A. Note by the Secretariat on guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement

(A/CN.9/770)

[Original: English]

1. Article 4 of the 2011 UNCITRAL Model Law on Public Procurement¹ envisages promulgation of procurement regulations to fulfil the objectives and to implement the provisions of the Model Law. Various provisions of the Model Law expressly indicate that they should be supplemented by procurement regulations. The Guide to Enactment of the UNCITRAL Model Law on Public Procurement adopted by the Commission at its forty-fifth session, in 2012,² notes that in addition the enacting State may decide to supplement other provisions of the Model Law with procurement regulations even though those provisions do not expressly refer to the procurement regulations. Suggestions about the content of the procurement regulations are found throughout the Guide.

For ease of reference, it was considered useful to consolidate the provisions of the Model Law and the Guide highlighting the main issues for the procurement regulations in a single document and to make available such document on the UNCITRAL website as a supplement to the Guide. This Note introduces a proposal for such a document for consideration by the Commission.

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

² *Ibid., Sixty-seventh Session, Supplement No. 17 (A/67/17), para. 46.*

Guidance on procurement regulations to be promulgated in accordance with article 4 of the UNCITRAL Model Law on Public Procurement

I. Introduction

1. The 2011 UNCITRAL Model Law on Public Procurement¹ (article 4 [\[**hyperlink**\]](#)) envisages that enacting States will promulgate procurement regulations to fulfil the objectives and to implement the provisions of the Model Law. The purpose of the procurement regulations is to complete the legislative framework for the procurement system, both to fill in the details of procedures authorized by the Model Law and to take account of the specific, possibly changing, circumstances at play in the enacting State.
2. Various provisions of the Model Law expressly indicate that they should be supplemented by procurement regulations. Furthermore, the enacting State may decide to supplement other provisions of the Model Law even though they do not expressly refer to the procurement regulations. In both cases, the procurement regulations should not contradict the Model Law or undermine the effectiveness of its provisions.
3. The main examples of procedures for which the elaboration of more detailed rules in the procurement regulations may be useful include: the manner of publication of various types of information (articles 5, 6, 18 (2), 23, 33 (1) and 34 (5) [\[**hyperlinks**\]](#)); measures to secure authenticity, integrity and confidentiality of information communicated during the procurement proceedings (article 7 (5) [\[**hyperlink**\]](#)); grounds for limiting participation in procurement (article 8 [\[**hyperlink**\]](#)); calculation of margins of preference and application of socioeconomic policies in evaluation of submissions (article 11 [\[**hyperlink**\]](#)); estimation of the value of the procurement (article 12 [\[**hyperlink**\]](#)); requirements as regards the duration of a standstill period (article 22 (2) (c) [\[**hyperlink**\]](#)); requirements as regards the documentary record of procurement proceedings (article 25 (1) (w) and (5) [\[**hyperlink**\]](#)); the maximum duration of closed framework agreements (article 59 (1) (a) [\[**hyperlink**\]](#)); code of conduct (article 26 [\[**hyperlink**\]](#)); and limitation of the quantity of procurement carried out in cases of urgency using competitive negotiations or single-source procurement (that is, the quantity is limited to that required to deal with the urgent circumstances) (see the commentary to the relevant provisions of article 30 (4) and (5) in the Guide [\[**hyperlink**\]](#)).
4. In addition to the use of regulations as a matter of best practice, failure to issue procurement regulations as envisaged in the Model Law may deprive the procuring entity of authority to take the particular actions in question. These cases include: limitation of participation in procurement proceedings (article 8 [\[**hyperlink**\]](#)); authority and procedures for application of a margin of preference in favour of domestic suppliers or contractors (article 11 [\[**hyperlink**\]](#)); and use of request for quotations, since that method of procurement may be used only for procurement

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

whose value is below threshold levels set out in the procurement regulations (article 29 (2) [[**hyperlink**](#)]).

5. As noted in the Guide to Enactment of the Model Law, adopted by the Commission at its forty-fifth session, in 2012,² reference to the “procurement regulations” should be interpreted in accordance with the legal traditions of the enacting State; the notion may encompass any tool used in the enacting State to implement its statutes. Those legal traditions may also delineate issues that are more commonly addressed through guidance.³ This document does not purport to address these issues. It consolidates all provisions of the Model Law and the Guide that highlight the main issues that should be considered for the procurement regulations in order to fulfil the objectives and to implement the provisions of the Model Law.

6. The relevant provisions are grouped per subject. First, general subjects are discussed that are relevant to several articles of the Model Law (such as socioeconomic policies, classified information). This is followed by the discussion of subjects relevant to specific articles of Chapter I of the Model Law, in the order of articles of that Chapter. The discussion of issues relevant to various methods and techniques of procurement is grouped per a method and technique of procurement. The document is finalized by issues highlighted for the procurement or other applicable regulations in the context of challenge proceedings.

7. Since the document addresses only main issues, it is not intended to be exhaustive as regards issues to be addressed in the procurement regulations. In particular, consistent with the scope of the Model Law and the Guide to Enactment, this document does not address issues of procurement planning and contract management other than those directly relevant to the pertinent provisions of the Model Law. Detailed regulation of these phases of the procurement cycle in the procurement regulations of the enacting States may be warranted.

8. In addition, as noted in the Guide,⁴ the Model Law and the procurement regulations to be promulgated in accordance with its article 4 alone are not sufficient to ensure the effective functioning of the procurement system of the enacting State. Some measures are to be taken in other branches of law while others are of an institutional and administrative nature. The Guide notes measures that are to be taken outside the procurement law framework in order to ensure effective implementation of the Model Law.⁵ These measures are not discussed in this document.

² Ibid., *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 46. The text of the Guide is available at the date of this document from www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html.

³ Para. 2 of the commentary to article 4.

⁴ Paras. 58-81 of Part I.

⁵ Ibid.

II. General subjects

A. Socioeconomic policies in procurement

9. Socioeconomic policies that can or must be pursued through procurement are to be set out in the procurement regulations or other provisions of the law of the enacting State (see article 2 (o) of the Model Law [[*hyperlink*](#)] and the commentary in the Introduction to Chapter I [[**hyperlink**](#)], and in the commentary to articles 2 (o) and 8-11 [[**hyperlinks**](#)], in the Guide).

10. Where they are to be set out in the procurement regulations, the latter must address, *inter alia*, and as applicable:

(a) Situations in which the procuring entity may or must limit the participation of certain categories of suppliers or contractors in procurement proceedings (e.g. declare procurement domestic only) (see article 8 and the relevant commentary [[**hyperlinks**](#)]);

(b) Any margin of preference that can be applied for the benefit of domestic suppliers or contractors or for domestically produced goods or any other preference when evaluating submissions, and the method of its calculation and application (see article 11 and the relevant commentary [[**hyperlinks**](#)]);

(c) Any socioeconomic policies that can or must be factored in qualification requirements (e.g. environmental, ethical and other standards), in the description of the subject matter of the procurement, and in the design of evaluation criteria (i.e. to give credit for compliance with socioeconomic policies beyond any required minimum) (see articles 9-11 and the relevant commentary [[**hyperlinks**](#)]);

(d) A particular socioeconomic policy that will justify the use of single-source procurement (see article 30 (5) (e) and the relevant commentary [[**hyperlinks**](#)]);

(e) Constraints on procuring entities, in particular by prohibiting the *ad hoc* adoption of policies at the discretion of the procuring entity.

11. Where these policies are not set out in the procurement regulations, the procurement regulations should at least direct readers to other relevant laws and rules, so that the procuring entities are aware of any mandatory socioeconomic criteria to be applied and of the extent of their discretion in applying other socioeconomic criteria while suppliers or contractors are assured that application of socioeconomic policies in the procurement of the enacting State is taking place on a transparent and objective basis.

12. The Guide alerts enacting States about implications of pursuing socioeconomic policies in procurement and cautions against providing a broad list of socioeconomic criteria or circumstances in which a margin of preference may be applied.⁶

⁶ Paras. 9-27 of Part I, paras. 26-33 of the Introduction to Chapter I, and paras. 7-13 of the commentary to article 11.

B. Classified information

13. The authority granted to procuring entities to take special measures and impose special requirements for the protection of classified information, including granting public disclosure exemptions, applies only to the extent permitted by the procurement regulations or by other provisions of law of the enacting State (see article 2 (1) and the relevant commentary [\[**hyperlinks**\]](#)).

14. When the procurement regulations address these issues, they must identify types of procurement in which the procuring entity may or must take measures and impose requirements for the protection of classified information. In addition, the procurement regulations must address, inter alia:

(a) Measures that may be taken. Examples of the measures that may be invoked include the protection of certain parts of the record from disclosure, exemptions from a public notice of the procurement and contract award, and the use of direct solicitation (see articles 7 (3) (b), 24, 25 (4) and 35 (2) and the relevant commentary [\[**hyperlinks**\]](#)); and

(b) Requirements that may be imposed to protect classified information on suppliers and contractors and subcontractors, such as certain methods and tools for transmission of information (e.g. encryption) (see articles 7 (3) (b) and 24 (4) and the relevant commentary [\[**hyperlinks**\]](#)).

C. Low-value procurement

15. Article 22 (3) (b) exempts low-value procurement from the mandatory application of a standstill period [\[**hyperlink**\]](#) and article 23 (2) exempts such procurement from the requirement for public notice of the contract award [\[**hyperlink**\]](#). (Chapter II also contains an upper threshold for the use of request for quotations under article 29 (2) [\[**hyperlink**\]](#).) In all these cases, the Model Law defers to the procurement regulations the identification of the threshold to be applied. This is because it is not possible for the Model Law to set out a single threshold for low-value procurement that will be appropriate for all enacting States, and the appropriate thresholds for each State may change with inflation and as other economic circumstances also change. It is for the body that issues the procurement regulations to consider the appropriate value or values for all such thresholds.

16. In other instances where references to low-value procurement are found, the Model Law does not require explicit thresholds in the procurement regulations. For example, invitations to pre-qualification and tendering proceedings need not be published internationally where the procuring entity decides that, in view of the low value of the subject matter of the procurement, only domestic suppliers or contractors will be interested in presenting submissions (articles 18 (2) and 33 (4) [\[**hyperlinks**\]](#)). In addition, one of the grounds justifying the use of one type of restricted tendering and direct solicitation in request for proposals procedures is that the time and cost required to examine and evaluate a large number of submissions would be disproportionate to the value of the subject matter of the procurement (see articles 29 (1) (b) and 35 (2) (b) and the relevant commentary [\[**hyperlinks**\]](#)).

17. The agency or body issuing the procurement regulations should consider the appropriate approach to what is treated as “low-value” procurement, notably as to whether there can and should be one amount below which procurement is treated as low-value. For example, should the procurement regulations fix one threshold for all instances where the procurement law refers to a low-value threshold (including the upper limit for the use of request for quotations), whether that value should apply to all instances of “low-value procurement” references found in the law (even those that do not contain explicit references to a low-value threshold, as explained above), or whether circumstances indicate that different thresholds and amounts are appropriate.

D. Fees charged for participating in the procurement proceedings

18. As noted in the Guide,⁷ ideally, no fees should be charged for access to, and use of, the procuring entity’s communications systems. The procurement regulations should therefore discourage such fees as a disincentive to participate in the procurement proceedings, contrary to the principles and objectives of the Model Law. Where the decision is to charge fees for the use of the communications system, the procurement regulations should require that the fee must be transparent, justified, reasonable and proportionate and not discriminate or restrict access to the procurement proceedings. The procurement regulations may require publicizing the amount of the applicable fee and justifications for charging it, and identify it as a temporary measures (e.g. until costs of introducing the new communications system are recovered).

19. The related issue is charging fees for obtaining the pre-qualification and/or solicitation documents. When a price is charged for obtaining those documents, the procurement regulations must contain provisions preventing the procuring entity from applying excessively high charges for the documents. They could do so by requiring that the price to be charged for the documents is to enable the procuring entity to recover its costs incurred in fact in providing the documents, for example, by printing and mailing them. The procurement regulations should illustrate what should not be attempted to be recovered through the price charged for the documents, such as development costs (including consultancy fees and advertising costs).

E. Issues of outsourcing and centralized purchasing

20. The procurement regulations should address measures in the design and the use of the procurement system that may produce discriminatory impact and other undesirable consequences. Approaches to the design and the use of the procurement system, such as any involvement of third parties in the design of the communication system and the use of proprietary systems, would have a direct impact on the participation of suppliers or contractors in the procurement proceedings. They would also affect such decisions across the procurement system as charging fees for the use of the procurement system as well as decisions of the procuring entities on their procurement strategies generally and in individual procurement.

⁷ Para. 12 of the commentary to article 7.

21. The procurement regulations must specifically address the issues of outsourcing of procurement functions, in particular risks of organizational conflicts of interest if third-party IT and service providers are remunerated on a fee-per-use basis for the maintenance and operation of e-purchasing platforms, such as electronic reverse auctions (ERAs) or open framework agreements, outsiders' influence on procurement strategies and problems with building and retaining sufficient skills and expertise in the procuring entity, needed among others for supervision of the activities of such third-party providers.

22. Where centralized purchasing agencies act as agents for one or more procuring entities and centralized purchasing is encouraged to allow for the economies of scale, the procurement regulations must ensure that such arrangements can operate in a transparent and an effective fashion. The procurement regulations should put measures for assessing the relative merits of such purchasing, standardization and accommodating different needs for individual procurements and across sectors of the overall government procurement market. They should address issues of organizational conflicts of interest (centralized purchasing entities may have an interest in increasing their fee earnings by keeping prices high and promoting purchases that go beyond the needs of the procuring entity). Where the centralized purchasing agency undertakes planning for future procurement, the procurement regulations must call for a closer interaction between the agency with the likely end-users before the procedure commences to allow for a better decision on the appropriate extent of standardization and accommodating varying needs (the quality of information from the end-users will be critical. The needs of individual ministries or agencies may themselves not be identical, with the result that some obtain better value for money than others if those needs are standardized without sufficient analysis.)

III. Subjects to be addressed in procurement regulations in the context of specific articles of Chapter I of the Model Law (General provisions) [\[hyperlink**\]](#), in the order of articles**

Article 5. Publication of legal texts [\[hyperlink**\]](#)**

1. The procurement regulations must specify the manner and medium of publication of legal texts covered by paragraph (1) of article 5 or refer to legal sources that address publicity of statutes, regulations and other public acts. If the manner and the medium are to be specified in the procurement regulations, the latter must also:

- (a) Provide for a centralized medium and manner of publication at a common place, readily and widely accessible (the "official gazette" or equivalent);
- (b) Specify that information posted in a single centralized medium must be authentic and authoritative and have primacy over information that may appear in other media. It must also remain readable, comprehensible and capable of interpretation and retention;
- (c) Establish rules to define the relationship of that single centralized medium with other media where such information may appear and provide for rules of publication in other official media (e.g. prohibition of publication in different

media before information is published in the centralized medium, and the requirement that the same information published in different media must contain the same data);

(d) Address the subject of fees (as in section II.D above, ideally, no fees should be charged for access to laws, regulations and other legal texts of general application in connection with procurement covered by the procurement law, and all amendments thereto).

2. The procurement regulations must also spell out the meaning of the requirements for documents promptly to be made “accessible” and “systematically maintained”. In practical terms, the requirement for the information to be “accessible” means that the information must be capable of being accessed, and read without having to request access. It implies proactive actions from designated State authorities (such as publication in official media) to ensure that the intended information reaches the public. The requirement for “systematic maintenance” means that the designated State authority must ensure that the information is in fact up-to-date and so reliable: the manner in which this obligation is discharged should be itself documented so that compliance can be monitored.

3. If the enacting State wishes to encourage the publication of other texts of relevance and practical use and importance to suppliers and contractors (such as procurement guidelines or manuals and other documents that provide information about important aspects of domestic procurement practices and procedures and may affect the general rights and obligations of suppliers and contractors), the procurement regulations should specify such additional texts and conditions of publication that should apply to them.

4. Unless this is already addressed in other provisions of law of the enacting State, the procurement regulations must specify which State organs are responsible for fulfilling the obligations under this article.

Article 6. Information on possible forthcoming procurement [\[hyperlink**\]](#)**

1. The procurement regulations should address the desirable content of information intended to be published under the article. The Guide notes in this respect that making available abundant, irrelevant or misleading information, rather than carefully planned, useful and relevant information, may compromise the purpose of issuing this type of information.⁸ Examples of information to be included are: a time frame that information regarding planned procurement should cover, which may be a half-year or a year or other period; the content of an advance notice of possible future procurement; and difference between this type of notice and other types of advance notices of the procurement, such as a notice seeking expressions of interest that is usually published in conjunction with request-for-proposals proceedings or an advance notice of the procurement required in most cases of direct solicitation under articles 34 and 35 of the Model Law [\[**hyperlinks**\]](#).

2. The procurement regulations should also address other conditions for publication, such as the place and means of publishing information, taking into account issues highlighted for the procurement regulations under article 5 above [\[**hyperlink**\]](#).

⁸ Para. 2 of the commentary to article 6.

3. Consistently with what is said in the Guide on this point,⁹ the procurement regulations should avoid imposing a requirement to publish this type of information. The procurement regulations should instead stipulate the default rule to publish this type of information, unless there are considerations indicating to the contrary: it should be left to the procuring entity to decide on a case-by-case basis on whether such information should be published.

4. The procurement regulations may provide incentives for publication of such information, such as a possibility of shortening a period for presenting submissions in pre-advertised procurements. The procurement regulations may also refer to cases when publication of such information would in particular be desirable, such as when complex construction procurements are expected or when procurement value exceeds a certain threshold.

Article 7. Communications in procurement [\[hyperlink**\]](#)**

1. The procurement regulations are to explain the notions “in common use” and “fully and contemporaneously” in the requirements of the article that means of communication must be in common use by suppliers or contractors concerned (e.g. that allow efficient and affordable connectivity and interoperability) and that the means of communication used in meetings must in addition be capable of ensuring full and contemporaneous participation in meetings, i.e. ability to follow all proceedings of the meeting and to interact with other participants when necessary (see article 7 (4) [\[**hyperlink**\]](#)). The procurement regulations must address characteristics of means of communication that can be used by the procuring entity in particular types of procurement to satisfy those requirements. Alternatively, the procurement regulations may illustrate by practical examples and references which technological solutions existing in the enacting State at a given time would meet those requirements and how. Another approach would be for the procurement regulations to require, where the decision is made by the procuring entity to use non-paper-based means of communication, the use of specific means of communication that would meet these requirements of the Model Law, in the light of prevailing conditions in the enacting State at any certain point of time.

2. The procurement regulations should establish clear rules as regards requirements for “writing”, “signature”, “authenticity”, “security”, “integrity” and “confidentiality” of submissions and when necessary develop functional equivalents for the non-paper-based environment. They should also address legal solutions aimed at achieving adequate usability, reliability, traceability and verification of information generated in the procurement proceedings and securing the authenticity, integrity and confidentiality of such information as appropriate. Caution should be exercised not to tie legal requirements to a given state of technological development and not to impose higher security measures than otherwise would be applicable in the paper-based environment since these measures can discourage the participation of suppliers or contractors in non-paper-based procurement.

3. Other specific issues to be addressed in the procurement regulations are: (a) the scope of the exceptions in paragraph (2) of the article to the form requirement and the practical implementation of the provisions; and (b) issues

⁹ Para. 7 of the commentary to article 6.

arising from the use of more than one form and means of communication in any given procurement proceedings.

4. As the Guide notes,¹⁰ other aspects and relevant branches of law are relevant to article 7, in particular those related to electronic commerce, records management, court procedure, competition, data protection and confidentiality, intellectual property and copyright. In addition, reliability of procurement proceedings should be addressed as part of a comprehensive good governance framework dealing with personnel, management and administration issues in the procuring entity and the public sector as a whole.

Article 8. Participation by suppliers or contractors ^[hyperlink**]**

1. The procurement regulations or other provisions of law of the enacting State must set out the exceptional conditions under which the procuring entity may limit the participation of certain categories of suppliers or contractors in procurement proceedings.

2. As noted in the Guide,¹¹ a decision to impose a limitation on participation in procurement proceedings may be taken in different situations. Such a situation may arise because of socioeconomic policies of the State (e.g. set-aside programmes for small and medium-sized enterprises (SMEs) or entities from disadvantaged areas) as noted in section II.A above. Other issues of concern to the State, such as safety and security, may justify the limitation of participation, for example because of the implementation of United Nations Security Council's sanctions regimes. The application of the article would therefore not necessarily lead to the limitation of participation on the basis of nationality (such as to the domestic procurement). The procurement regulations should address the variety of situations intended to be covered by this article as explained in the Guide.

3. As further noted in the Guide,¹² an enacting State, when formulating policies involving exceptional measures under article 8, must consider their consequences in the light of the State's international obligations, taking into account that any limitation of participation of suppliers or contractors in procurement proceedings risks violating free-trade commitments of States under relevant international instruments, such as the Agreement on Government Procurement of the World Trade Organization (WTO GPA).¹³

4. The procurement regulations may provide for a sample of a declaration to be issued by the procuring entity under paragraph (3) of the article. They may also specify the time frame within which the procuring entity must provide its reasons for limiting the participation of suppliers or contractors in the procurement

¹⁰ Para. 13 of the commentary to article 7.

¹¹ Para. 2 of the commentary to article 8.

¹² Para. 7 of the commentary to article 8.

¹³ The plurilateral Agreement on Government Procurement of the World Trade Organization (the GPA), negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996. On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). Both texts are available at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

proceedings to a person upon his/her request, as required under paragraph (5) of the article.

5. In the context of paragraphs (4) and (5) of the article, the procurement regulations may impose on the procuring entity a requirement to substantiate the reasons and circumstances on which it relied in making its decision to limit participation with legal justifications.

Article 9. Qualifications of suppliers and contractors [\[hyperlink**\]](#)**

1. Unless other provisions of law of the enacting State already do so, the procurement regulations must specify ethical and other standards applicable in the enacting State that are appropriate and relevant in the circumstances of various types of procurement (see paragraph (2) (b) of the article and the relevant commentary [\[**hyperlinks**\]](#)).

2. They should also specify appropriate documentary evidence or other information that may be requested by the procuring entity for ascertainment of qualifications of suppliers or contractors (see paragraph (3) of the article and the relevant commentary [\[**hyperlinks**\]](#)). Such documentary evidence may comprise audited annual reports (to demonstrate financial resources), inventories of equipment and other physical facilities, licences to engage in certain types of activities and certificates of compliance with applicable standards and confirming legal standing.

3. The procurement regulations may also specifically authorize a self-declaration from suppliers or contractors that they are qualified to participate in the given procurement proceedings. In such case, the procurement regulations should specify situations when such self-declaration would be sufficient. For example, it may be sufficient to rely on this type of declaration at the opening of simple stand-alone ERAs as long as it is envisaged that a proper verification of compliance of the winning supplier or contractor with the applicable qualification criteria will take place after the auction.

4. In some jurisdictions, standard qualification requirements are found in procurement regulations, and the pre-qualification/pre-selection/solicitation documents may simply cross-refer to those regulations. For reasons of transparency and fair, equal and equitable treatment, the Model Law requires all requirements to be set out in the relevant documents (see paragraph (4) of the article and the relevant commentary [\[**hyperlinks**\]](#)); however, the policy goals of paragraph (4) may be satisfied where the documents refer to the qualification requirements in legal sources that are transparent and readily available (such as by using [hyperlinks](#)). The procurement regulations must authorize this approach if it is appropriate in the enacting State.

5. The procurement regulations must authorize or require the use of any qualification criteria, requirement or procedures that are not objectively justifiable and discriminate against or among suppliers or contractor for the procuring entity to be able to use such criteria, requirement or procedures in the ascertainment of qualifications of suppliers or contractor (see paragraph (6) of the article in conjunction with article 8 (see above for the latter) and the relevant commentary [\[**hyperlinks**\]](#)). They could also provide examples of other requirements imposed by the procuring entities in practice that may intentionally or inadvertently distort or

restrict participation by suppliers or contractors in the procurement proceedings, and should therefore be avoided.

6. The procurement regulations may provide examples of materially inaccurate or materially incomplete information that would permit the procuring entity to disqualify the supplier or contractor submitting such information (see paragraph (8) (b) of the article and the relevant commentary [\[**hyperlinks**\]](#)).

7. The procurement regulations may restrict the application of paragraph (8) (d) by specifying that in most procurement (with the exception perhaps of complex and time-consuming multi-stage procurement), the reconfirmation of the qualifications of suppliers or contractors that have been pre-qualified at a later stage of the procurement proceedings should take place only with respect to the supplier or contractor presenting the successful submission (see paragraph (8) (d) of the article and the relevant commentary [\[**hyperlinks**\]](#)).

8. Other branches of law are relevant to the implementation of article 9, in particular those related to insolvency, taxation and legalization as well as corporate and criminal law. Compliance with other standards applicable in an enacting State referred to in paragraph (2) (b) of the article may involve security clearances, environmental considerations, international labour law and human rights standards and sustainability issues outside the procurement law framework. Coherence between the procurement regulations and regulations that may exist in such other branches of law must therefore be ensured.

Article 10. Rules concerning description of the subject matter of the procurement and the terms and conditions of the procurement contract or framework agreement [\[hyperlink**\]](#)**

1. The procurement regulations must specify situations where a detailed description of the subject matter of procurement at the outset of the procurement proceedings would not be possible and the procuring entity would therefore be permitted to provide the minimum requirements instead (for example, in request-for-proposals-with-dialogue proceedings and framework agreement procedures) (see paragraph (1) (b) and the relevant commentary [\[**hyperlinks**\]](#)).

2. The procurement regulations must authorize or require the use of any criteria, requirement or procedures that may restrict the participation of suppliers or contractors in or their access to the procurement proceedings for the procuring entity to be able to use such criteria, requirement or procedures in the description of the subject matter of the procurement and/or examination of submissions (see paragraph (2) of the article in conjunction with article 8 (see above for the latter) and the relevant commentary [\[**hyperlinks**\]](#)). They could also provide examples of other requirements imposed by the procuring entities in practice that may intentionally or inadvertently distort or restrict participation by suppliers or contractors in the procurement proceedings, and should therefore be avoided.

3. The procurement regulations may usefully discuss the extent of the procuring entity's discretion to use trademark or trade name, patent, design or type, specific origin or producer in the description of the subject matter of the procurement (see paragraph (4) of the article and the relevant commentary [\[**hyperlinks**\]](#)). They should: (a) address very narrow circumstances described in paragraph (4) of the article that authorize such use (where there is no other sufficiently precise or

intelligible way of describing the characteristics of the subject matter of the procurement); (b) call for output-based description as a general rule; (c) emphasize the need to describe the salient features of the subject matter being sought where the input-based description must be used; and (d) require to include the words “or equivalent” in the description of the subject matter of procurement where reference to trademark or trade name, patent, design or type, specific origin or producer is unavoidable or desirable in order to improve suppliers’ or contractors’ understanding of the procuring entity’s needs. As the Guide notes, where there is a generally used industry standard (which may be reflected in standardized trade terms), permitting the use of a brand name or a trademark instead of a very long and technical description may improve suppliers’ or contractors’ understanding of the procuring entity’s needs. However, in such cases, monitoring of the procuring entity’s willingness to accept equivalents will be a necessary safeguard, and guidance on how suppliers or contractors are to demonstrate equivalence, and objectivity in this regard, will be required.¹⁴ The procurement regulations should therefore address ways of demonstrating and assessing equivalence and require the procuring entity to accept equivalents.

4. The procurement regulations shall set out standardized features, requirements, symbols and terminology to be used by the procuring entity in formulating the description of the subject matter of the procurement or refer to the source where such standardized features, requirements, symbols and terminology could be found. The same applies to standardized trade terms and standardized conditions to be used by the procuring entity in formulating the terms and conditions of the procurement and the procurement contract or the framework agreement and in formulating other relevant aspects of various procurement documents: they should be set out in the procurement regulations or the latter should refer to the source where they could be found. (See paragraph (5) of the article and the relevant commentary [\[**hyperlinks**\]](#).)

Article 11. Rules concerning evaluation criteria and procedures [\[hyperlink**\]](#)**

1. The procurement regulations may expand or detail the illustrative list of evaluation criteria provided for in paragraph (2) of the article. They should however avoid setting an exhaustive list of evaluation criteria or requiring the use of a specific criterion or a group of criteria, other than price, since not all evaluation criteria would be applicable in all situations and it would not be possible to provide for an exhaustive list of evaluation criteria for all types of procurement, regardless of how broadly they are drafted. The approach of the Model Law, as stated in the Guide, is that procuring entity can apply evaluation criteria even if they do not fall under the broad categories listed in paragraph (2) of the article as long as the evaluation criteria meet the requirement set out in paragraph (1) of the article — they must relate to the subject matter of the procurement.¹⁵ The procurement regulations may however call for issuance by designated authorities of rules and/or guidance to assist procuring entities in designing appropriate and relevant evaluation criteria.

¹⁴ Para. 5 of the commentary to article 10.

¹⁵ Para. 3 of the commentary to article 11.

2. The procurement regulations should address situations where evaluating the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement will be relevant (see paragraph (2) (c) of the article and the relevant commentary [\[**hyperlinks**\]](#)). This would be typically in request-for-proposals proceedings because the latter have traditionally been used for procurement of “intellectual type of services” (such as architectural, legal, medical, engineering). In this type of procurement, the cost is not a significant evaluation criterion. Instead, the emphasis will be placed on the service-provider’s experience and reliability for the specific assignment, the quality of the understanding of the assignment under consideration and of the methodology proposed, the qualifications, professional and managerial competence of the key staff delivering the service, transfer of knowledge, if such transfer is relevant to the procurement or is a specific part of the terms and conditions of the procurement, and when applicable, the extent of participation by nationals among key staff in the performance of the services.

3. The procurement regulations should clarify that these evaluation criteria may be in addition to a minimum requirement for skills and experience expressed as qualification criteria under article 9 [\[**hyperlink**\]](#). Whereas by virtue of article 9 the procuring entity will reject proposals of suppliers or contractors that do not meet a minimum requirement for skills and experience, the procuring entity will evaluate skills and experience of qualified suppliers or contractors admitted to the dialogue stage: the procuring entity will be able to weigh, for example, the required experience of one service provider against experience of others and on the basis of such a comparison, it may be more, or less, confident in the ability of one particular supplier or contractor than in that of another to implement the project. The procurement regulations should therefore explain the use of these criteria as minimum standards in ascertainment of qualifications of suppliers or contractors under article 9 of the Model Law [\[**hyperlink**\]](#) and the use of these criteria under for example articles 11 and 49 [\[**hyperlinks**\]](#) that would lead to the assessment by the procuring entity of these criteria on a competitive basis.

4. Unless this is done in other provisions of law of the enacting States, the procurement regulations must set out any exceptional criteria that procuring entity is authorized or required to take into account in evaluating submissions, which will ordinarily not relate to the subject matter of the procurement and will thus unlikely be permitted as evaluation criteria under paragraph (2) of the article (see paragraph (3) (a) of the article and the relevant commentary [\[**hyperlinks**\]](#)). See also under “Socioeconomic policies in procurement” in section II.A above [\[**hyperlink**\]](#)). In specifying such criteria, references to broad categories, such as environmental considerations, should be avoided since an overlap with criteria covered by paragraph (2) of the article may occur. For example, the environmental requirements for the production of the subject matter of the procurement relates to that subject matter, and can therefore be included as an evaluation criterion under paragraph (2): no authorization under the procurement regulations or other laws is required. Some other environmental considerations are not so related but may need to be considered if this is required or authorized by law of the enacting State.

5. The procurement regulations should also regulate how the criteria under paragraph (3) (a) may be used in individual procurements to ensure that they are

applied in an objective and transparent manner. Since environmental standards in particular may have the effect of excluding foreign suppliers or contractors (where, for example, national standards are higher than those prevailing in other States), the procurement regulations should address, or call for issuance of specific guidance on, the use of environmental standards to ensure that procuring entities may apply such standards without risk of disruptive challenge procedures.

6. Unless addressed in other provisions of law of the enacting States, the procurement regulations must authorize or require the use of any margin of preference that can be applied for the benefit of domestic suppliers or contractors or for domestically produced goods or any other preference when evaluating submissions (see paragraph (3) (b) of the article and the relevant commentary [\[**hyperlinks**\]](#). See also under “Socioeconomic policies in procurement” in section II.A above [\[**hyperlink**\]](#)). The procurement regulations should establish criteria for identifying a “domestic” supplier or contractor and for qualifying goods as “domestically produced” (e.g., that they contain a minimum domestic content or value added). In this regard, the provisions of the WTO GPA on offsets and price preference programmes, available as negotiated transitional measures to developing countries, may assist States in understanding how the concepts of “domestic” suppliers or contractors and “local content” have been applied in practice.

7. Furthermore, the procurement regulations should fix the amount of the margin of preference, which might be different for different subject matter of procurement (goods, construction and services). They must also provide for a method and rules concerning the calculation and application of a margin of preference. (Various publicly-available sources, including those of the World Bank, provide examples of applying margins of preference in practice.) That method of calculation and application may envisage applying a margin of preference to price or the quality factors alone or to the overall ranking of the submission when applicable; the enacting State will wish to decide how to balance quality considerations and the pursuit of socioeconomic policies. As noted in the Guide,¹⁶ the cumulative effect of application of socioeconomic criteria and margins of preference and the risks of inadvertent duplication should be considered carefully.

8. The procurement regulations must provide an illustrative list of situations where expressing all non-price evaluation criteria in monetary terms would not be practicable or appropriate, such as in request for proposals with dialogue (article 49 of the Model Law [\[**hyperlink**\]](#)). The procurement regulations must also spell out ways of quantifying non-price evaluation criteria in monetary terms where to do so is practicable. (See paragraph (4) of the article and the relevant commentary [\[**hyperlinks**\]](#).) They should also address situations where the procuring entity may list evaluation criteria in descending order of importance (see paragraph (5) (c) of the article and the relevant commentary [\[**hyperlinks**\]](#)), such as in request-for-proposals-with-dialogue proceedings under article 49 of the Model Law [\[**hyperlink**\]](#).

¹⁶ Para. 9 of the commentary to article 11.

Article 12. Rules concerning estimation of the value of procurement
[hyperlink**]**

The procurement regulations should elaborate on the rules on estimation of the value of the procurement. They should in particular clarify how a series of repeated low-value procurements over a given period should be aggregated for the purposes of applicable thresholds. They should also provide essential safeguards against the artificial division of the subject matter of the procurement for the purpose, for example, of justifying the use of restricted tendering on the ground set out in article 29 (1) (b) [**hyperlink**], i.e. that the time and cost required to examine and evaluate a large number of tenders would be disproportionate to the value of the subject matter of the procurement.

Article 13. Rules concerning the language of documents [**hyperlink**]

1. In States in which solicitation documents are issued as a rule in more than one language, the procurement regulations should include a rule, unless the procurement law of the enacting State already does so, to the effect that a supplier or contractor should be able to base its rights and obligations on either language version. The procuring entity may also be called upon to make it clear in the solicitation documents that both or all language versions are of equal weight, or whether any language is to prevail in cases of inconsistency.
2. Where the text in square brackets in the first paragraph of the article is retained, the procurement regulations should specify exemptions to the general rule to publish documents issued by the procuring entity in the procurement proceedings in a language customarily used in international trade. Those exemptions encompass the circumstances referred to in article 33 (4) [**hyperlink**]: domestic procurement (see the commentary to article 8 [**hyperlink**]) and low-value procurement where, in the view of the procuring entity, only domestic suppliers or contractors are likely to be interested in presenting submissions. (See section II.C of this document for the discussion of issues to be addressed in procurement regulations in the context of low-value procurement [**hyperlink**].)

Article 14. Rules concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions [**hyperlink**]

1. The procurement regulations may address legal consequences that may arise out of non-compliance by suppliers or contractors with the procuring entity's requirements concerning the manner, place and deadline for presenting applications to pre-qualify or applications for pre-selection or for presenting submissions (for example, the procuring entity must return a submission presented late or that otherwise does not comply with the applicable requirements (see for example article 40 (3) and the commentary thereto [**hyperlinks**])).
2. The procurement regulations must require the procuring entity to ensure that any changes to information covered by the article are to be brought to the attention of suppliers or contractors to which the pre-qualification, pre-selection or solicitation documents were originally provided (see paragraph (5) of the article and articles 15 (2) and 18 (6) and the commentary thereto [**hyperlinks**]). If those documents were made available to an unknown group of suppliers or contractors

(e.g. through a download from a website), the procurement regulations must require that information on the changes made must, at a minimum, appear in the same place at which they could be downloaded.

3. The procurement regulations should establish minimum periods of time that the procuring entity must allow (particularly where its international commitments may so require) for suppliers or contractors to prepare their applications or submissions. These minimum periods should be established in the light of each procurement method, the means of communication used and whether the procurement is domestic or international. Such a period must be sufficiently long in international and complex procurement to allow suppliers or contractors reasonable time to prepare their applications or submissions. The establishment of the ultimate period in the context of each procurement is left up to the procuring entity, taking into account the circumstances of the given procurement, such as the complexity of the procurement, the extent of subcontracting anticipated, and the time needed for transmitting applications or submissions.

4. The procurement regulations should address situations when the extension of the originally stipulated deadline is mandatory under the law and where it is permitted and would be desirable. The Model Law requires the procuring entity to extend the deadline: (a) where clarifications or modifications, or minutes of a meeting of suppliers or contractors are provided shortly before the submission deadline; and (b) where any amendment to the information about procurement published at the outset of the procurement renders that information materially inaccurate (see article 15 (3) and the commentary thereto [\[**hyperlink**\]](#)). In other cases, the extension of the deadline is optional. To mitigate the risks of abuse in the exercise of the discretion by the procuring entity, the procurement regulations should establish some measures of control. For example, in the context of paragraph (4) of the article, they could address “circumstances beyond [the supplier’s or contractor’s] control” that would prevent one or more suppliers or contractors from presenting their applications or submissions on time, how those circumstances should be demonstrated, and the default response from the procuring entity in such situations. While flexibility should be preserved, such minimum measures of control would help mitigate risks of favouritism.

5. The procurement regulations may specify that the extension of the deadline is in particular desirable in situations where the procuring entity faces risks of numerous challenges if it fails to extend the deadline, for example in cases of failures in the procuring entity’s communication system. The procurement regulations should regulate other aspects of failures in communication systems and the allocation of risks.

Article 15. Clarifications and modifications of solicitation documents **[\[**hyperlink**\]](#)**

1. The procurement regulations must address the application of the article in situations where the solicitation documents were provided to an unidentified group of suppliers or contractors (e.g. through the download of documents from a publicly-available website). They should specify that the obligation of the procuring entity to inform individual suppliers or contractors of all clarifications and modifications of solicitation documents applies to the extent that the identities of the suppliers or contractors are known to the procuring entity. Where they are not

known, the clarifications and modification must at a minimum appear where downloads were offered. The procurement regulations must therefore be clear that proactive actions are required from the side of the procuring entity — permitting suppliers or contractors to have access to clarifications or modifications upon request would be inadequate: suppliers or contractors would have no way of discovering that a clarification or modification had been made.

2. The procurement regulations must call for prompt actions by the procuring entity under this article so that clarifications and modifications could be taken into account by suppliers or contractors in time before the deadline for presenting submissions.

3. The procurement regulations must also address the concept of information becoming “materially inaccurate”, referred to in paragraph (3) of the article, and differentiate it from the concept of “material change” occurring in the procurement. While the former requires the publication of amended information in the same place where the original information appeared and the extension of the deadline for presenting submissions, the latter would require the cancellation of the proceedings and beginning of the new procurement. Both are threshold concepts. If the information as a result of changes made became sufficiently inaccurate to compromise the integrity of the competition and the procurement process, one may say that the information became materially inaccurate. If as a result of such changes, the pool of potential suppliers or contractors is affected (for example, as a result of changing the manner of presenting submissions from paper to electronic in societies where electronic means of communication are not widespread), it may be concluded that a “material change” in the procurement has taken place. A “material change” in the procurement is also highly likely to arise when, as a result of clarifications and modifications of the original solicitation documents, the subject matter of the procurement has changed so significantly that the original documents no longer put prospective suppliers or contractors fairly on notice of the true requirements of the procuring entity.

4. The procurement regulations, in the context of paragraph (4) of the article, should clarify that the provisions do not prevent the procuring entity from addressing at the meeting with suppliers or contractors any requests for clarification of the solicitation documents submitted to it either before or at the meeting, and its responses thereto. The obligation to preserve the anonymity of the source of the request will apply to all such requests.

Article 16. Clarification of qualification information and of submissions

[hyperlink**]**

1. The procurement regulations must draw difference between this article and the preceding article: whereas clarifications under the preceding article are triggered by suppliers or contractors, clarifications under this article are triggered by the procuring entity. They should also clarify how a clarifications procedure under this article is different from negotiations (the article explicitly prohibits negotiations between the procuring entity and a supplier or contractor with respect to qualification information or submissions except for proposals submitted under articles 49, 50, 51 and 52 of the Model Law (see paragraphs (4) and (5) of the article)).

2. The procurement regulations should address points in time when the need for clarification of qualification information or submissions may arise in various methods of procurement. They should also specify to which methods of procurement some provisions of the article would not apply. For example, paragraph (2) requires the procuring entity to correct purely arithmetical errors that are discovered during the examination of submissions. They however are not applicable to some procurement methods, such as to request for quotations where correction of arithmetical errors would be prohibited under article 46 (2) [\[**hyperlink**\]](#), and to request for proposals with consecutive negotiations where they would simply be irrelevant since the financial aspects of proposals are crystallized during negotiations. They would not apply either to the auction stage of ERAs where purely arithmetical errors may lead to the automatic rejection by the system of the bid containing such an error or to suspension or termination of an auction under article 56 (5) [\[**hyperlink**\]](#).
3. The procurement regulations should provide for an illustration of clarifications permissible under the article. In particular, they should address risks of substantive changes that may occur as a result of seeking clarifications or correcting arithmetical errors, which is prohibited under the article. Provision of an illustrative list of prohibited changes would be desirable (the article refers in this context to changes that would make an unqualified supplier or contractor qualified or unresponsive submission responsive and to changes in price).
4. The procurement regulations should build procedural safeguards to mitigate the risks of discriminatory practices, for example by requiring the procuring entity to put on the record any arithmetical errors discovered during the examination and evaluation process and steps taken in connection with them.
5. The procurement regulations should address the manner of seeking clarifications under the article, drawing on the procedures for investigating abnormally low submissions under article 20 [\[**hyperlink**\]](#). The use of a written procedure must be required pursuant to article 7 of the Model Law [\[**hyperlink**\]](#).

Article 17. Tender securities [\[hyperlink**\]](#)**

1. The procurement regulations should stipulate cases justifying request for tender securities and illustrate cases where a tender security could be considered an excessive safeguard by the procuring entity.¹⁷ They should explain that circumstances of some procurement may themselves offer the required security to the procuring entity, such as in ERAs. The relative value of the procurement may also indicate that encouraging other measures to achieve the desired discipline in bidding may be the more appropriate course. The procurement regulations may provide examples where alternatives to a tender security, such as a bid securing declaration should be considered¹⁸ and where benefits of requesting tender securities may be illusory, for example in request for proposals with dialogue or ERAs where suppliers or contractors cannot be forced to stay in the process of dialogue or bidding (e.g. in ERAs, bidders cannot be obliged to change any aspects of their bids and can simply abstain from the bidding), so the tender security may in fact be worthless, or at best, not cost-effective.

¹⁷ For the guidance on this point, see paras. 4 and 5 of the commentary to article 17 in the Guide.

¹⁸ See para. 12 of the commentary to article 17 in the Guide.

2. Where requesting tender securities may be justified, the procurement regulations should address how the requirements will work in practice and its implications on the bidding process, in particular the price of the tender. The procurement regulations should also explain that in some procurement methods there could be a particular point in time when requesting tender securities may be appropriate, for example, in two-stage tendering this will be in the context of presentation of final tenders rather than of initial tenders.

3. Where applicable, the procurement regulations should refer to any law of the enacting State that prohibits the acceptance by the procuring entity of the tender security that is not issued by an issuer in the enacting State. The procurement regulations must call for prompt actions by the procuring entity under this article.

Article 18. Pre-qualification proceedings [\[hyperlink**\]](#)**

The procurement regulations are to stipulate the place where the invitation to pre-qualification is to be published (the official gazette or website). As explained in section II.C above in the context of low-value procurement, the procurement regulations are to provide detail of how to interpret “low-value” procurement for the purpose of exempting it from the publication of an invitation to pre-qualification internationally. The procurement regulations should also explain in this context that low value alone is not a justification for excluding international participation of suppliers or contractors per se (by contrast with domestic procurement set out in article 8 [\[**hyperlink**\]](#)): international suppliers or contractors can participate in a procurement that has not been advertised internationally if they so choose, for example, if they respond to a domestic advertisement or one on the Internet.¹⁹

Article 19. Cancellation of the procurement [\[hyperlink**\]](#)**

The procurement regulations should provide detailed guidance to procuring entities on the scope of their discretion to cancel the procurement proceedings and potential liability both under the procurement law and any other provisions of law of the enacting State that may confer liability for administrative acts.

Article 20. Rejection of abnormally low submissions [\[hyperlink**\]](#)**

1. The procurement regulations must refer to applicable law that may require the procuring entity to reject the submission, for example, if criminal acts (such as money-laundering) or illegal practices (such as non-compliance with minimum wage or social security obligations or collusion) are involved, and in doing so differentiate those cases from those covered by the article. They should also explain the notion of abnormally low submission, in particular in the context of international bidding.

2. The procurement regulations must also regulate which type of information the procuring entity may require for the price explanation procedure referred to in the article and in paragraphs 4 to 8 of the commentary to the article in the Guide. The procurement regulations may retain the flexibility to reject or accept the abnormally low submission, which recognizes that the assessment of performance risk is

¹⁹ In this context, see paras. 5 and 6 of the commentary to article 18 in the Guide.

inherently highly subjective, or they may alternatively decide to circumscribe the discretion to accept or reject such submissions.

Article 21. Exclusion of a supplier or contractor from the procurement proceedings on the grounds of inducements from the supplier or contractor, an unfair competitive advantage or conflicts of interest [\[hyperlink**\]](#)**

1. The procurement regulations should assist the procuring entity in assessing whether or not a factual basis for exclusion of a supplier or contractor from the procurement proceedings on the basis of an inducement, an unfair competitive advantage or conflicts of interest has arisen, to guard against any abusive application of the article.

2. The Model Law does not require definitions of the concepts covered by the article. If an enacting State decides to define them, it may wish to take into account the considerations raised in the commentary to the article in the Guide. Where there are relevant legal definitions of these concepts in an enacting State, the procurement regulations should call for their dissemination as part of the legal texts governing procurement in accordance with article 5 of the Model Law [\[**hyperlink**\]](#). Where there are no definitions, examples of what will and will not constitute practices intended to be covered by the article should be provided in the procurement regulations. For example, the procurement regulations should prohibit consultants involved in drafting the solicitation documents from participating in the procurement proceedings where those documents are used. They should also regulate participation of subsidiaries in the same procurement proceedings. In some jurisdictions, practice is to define an inducement by reference to a *de minimis* threshold; enacting States that wish to take this approach are encouraged to ensure that the threshold is appropriate in the prevailing circumstances.

3. References in the procurement regulations to other branches of law of the enacting State, such as anti-monopoly legislation, most likely will be necessary to avoid unnecessary confusion, inconsistencies and incorrect perceptions about anti-corruption policies of the State.

Article 22. Acceptance of the successful submission and entry into force of the procurement contract [\[hyperlink**\]](#)**

1. The procurement regulations must establish the minimum duration of the standstill period. A number of general considerations should be taken into account in establishing this minimum duration, including the impact that the duration of the standstill period would have on the overall objectives of the Model Law. Although the impact of a lengthy standstill period on costs would be considered and factored in by suppliers or contractors in their submissions and in deciding whether to participate, the period should be sufficiently long to enable any challenge to the proceedings to be filed. Enacting States may wish to set more than one standstill period for different types of procurement, reflecting the complexity of assessing whether or not the applicable rules and procedures have been followed, but should note that excessively long periods of time may be inappropriate in the context of ERAs and open framework agreements, which presuppose speedy awards and in which the number and complexity of issues that can be challenged are limited. On the other hand, the situation in infrastructure procurement may require a longer period of consideration. The length of the standstill period may appropriately be

reflected in working or calendar days, depending on the length and likely intervention of non-working days. It should be borne in mind that the primary aim of the standstill period is to allow suppliers or contractors sufficient time to decide whether to challenge the procuring entity's intended decision to accept the successful submission. The standstill period is, therefore, expected to be as short as the circumstances allow, so as not to interfere unduly with the procurement itself. If a challenge is submitted, the provisions in Chapter VIII of the Model Law would address any suspension of the procurement procedure and other appropriate remedies.

2. The procurement regulations should illustrate urgent public interest considerations that may justify non-application of the standstill period and ensure consistency in this regard with justifications for lifting the prohibition against bringing the procurement contract into force under article 65 [\[**hyperlink**\]](#) and justifications for lifting automatic suspension under article 67 [\[**hyperlink**\]](#) (see section X below for the discussion of these issues). As noted in connection with low-value procurement in section II.C above, the procurement regulations should also consider aligning the low-value threshold that would exempt low-value procurement from application of the standstill period under paragraph (3) (b) of article 22 [\[**hyperlink**\]](#) with other thresholds, such as those justifying an exemption from public notices of contract awards (under article 23 (2) [\[**hyperlink**\]](#)) and the use of request-for-quotations proceedings (under article 29 (2) [\[**hyperlink**\]](#)).

3. The procurement regulations should indicate the type of circumstances in which a written procurement contract may be required, taking into account that such a requirement may be particularly burdensome for foreign suppliers or contractors, and where the enacting State imposes measures for proving the authenticity of the signature. Similarly, the procurement regulations should identify the type of circumstances in which the approval by another authority of the procurement contract before its entry into force would be required (e.g. only for procurement contracts above a specified value).

4. The procurement regulations should guide the decision on the appropriate course of action when the winning supplier or contractor fails to enter into a procurement contract when required, and discuss avoiding abuse of the discretion conferred to the procuring entity to cancel the procurement or to award the contract to the next successful submission. The considerations raised in the similar context under articles 43 and 57 below are relevant here.

5. The procurement regulations may usefully discuss issues of debriefing: while maintaining it as an option for the procuring entity, the procurement regulations may emphasize the value of debriefing in particular in the context of framework agreements where repeated procurements can benefit from improved submissions. They should provide for the minimum safeguards of due process and transparency and address those safeguards in particular in the context of the need to preserve confidentiality of commercially sensitive information during the debriefing.²⁰

²⁰ For the guidance on the issues of debriefing, see paras. 23 to 27 of the commentary to article 22 in the Guide.

Article 23. Public notice of the award of a procurement contract or framework agreement [\[hyperlink**\]](#)**

1. The procurement regulations are to provide for the manner of publication of information covered by the article²¹ and regulate in detail the manner of periodic publication of cumulative notices of awards under the framework agreement.
2. The procurement regulations will set out a monetary value threshold below which the publication requirement would not apply. In doing so, as noted in section II.C above, the procurement regulations must ensure consistency in treating low-value procurement in the enacting State. The procurement regulations could usefully explain in this context that, while the exemption from publication in paragraph (2) covers low-value procurement contracts awarded under a framework agreement, it is most unlikely to cover framework agreements themselves, as the cumulative value of procurement contracts envisaged to be awarded under a framework agreement would probably exceed any low-value threshold.

Article 24. Confidentiality [\[hyperlink**\]](#)**

1. The procurement regulations must set out, if not an exhaustive list of information covered by paragraph (1) of the article, at least its legal sources, in particular of such notions as information whose non-disclosure is necessary for the protection of the essential security interests of the enacting State and information whose disclosure may “impede fair competition”. These notions, if not regulated, may be construed very broadly by the procuring entity for the purpose of exempting certain information from disclosure on the ground of confidentiality. Other branches of law may identify certain information as classified and the procurement regulations must cross-refer to them; in other cases, the procurement regulations themselves should clearly limit the scope of the relevant notions referred to in paragraph (1) of the article.
2. As noted in section II.B above, the procurement regulations may discuss measures to be taken by the procuring entity with respect to suppliers or contractors and their subcontractors to protect classified information in the context of a specific procurement additional to the general legal protection under paragraph (1). The procurement regulations should also explain situations when such measures may be justified or required by law because of the sensitive nature of the subject matter of the procurement or by the existence of classified information even if the subject matter itself is not sensitive (for example, when the need arises to ensure confidentiality of information about a delivery schedule or the location of delivery), or both. Cross-references in the procurement regulations to other branches of law may be required.

Article 25. Documentary record of procurement proceedings [\[hyperlink**\]](#)**

1. The procurement regulations should provide for robust record requirements to ensure accuracy and comprehensiveness of the record in order to make the use of the records by aggrieved suppliers or contractors and other competent bodies for the purpose of challenge, audit, control and oversight meaningful and effective. They

²¹ For the minimum standards for publication of this type of information, see the commentary to article 5 in the Guide.

must address such issues as the form and means in which the record must be maintained, the time of putting information and documents on the record and the scope of disclosure of the relevant information in the record to various groups of persons interested in gaining access thereto.

2. The procurement regulations should require the procuring entity to grant prompt access to the relevant parts of the records to authorized persons since delaying disclosure until, for example, the entry into force of the procurement contract might deprive suppliers and contractors of a meaningful remedy. Since the disclosure of some information (e.g. more detailed information concerning the conduct of the procurement proceedings) may be challenged by suppliers or contractors on the ground that its disclosure impedes fair competition and legitimate commercial interests of those suppliers or contractors, the procurement regulations may require the procuring entity in some particularly sensitive procurement to notify suppliers or contractors in the solicitation documents of its intention to disclose portions of the record concerning the conduct of the procurement proceeding relevant to suppliers or contractors.

3. As discussed in the context of article 24 above, the procurement regulations must set out, if not an exhaustive list of information covered by paragraph (4) of the article, at least its legal sources, in particular of such notions as information whose non-disclosure is necessary for the protection of the essential security interests of the enacting State and information whose disclosure may “impede fair competition”. They may be construed very broadly by the procuring entity for the purpose of not disclosing certain information from the record on the basis of confidentiality. Other branches of law may identify certain information as classified and the procurement regulations must cross-refer to them, in other cases, the procurement regulations themselves should clearly limit the scope of the relevant notions referred in paragraph (4) of the article.

4. The procurement regulations must set out all information to be included in the record of procurement proceedings in addition to that explicitly listed in the law itself (see in this context article 25 (1) (w) [\[**hyperlink**\]](#)). For example, the procurement regulations may require recording the submission of late tenders in the documentary record of procurement proceedings and putting on the record any minor deviations and errors and oversights discovered during the examination and evaluation of tenders and steps taken in connection with them.

5. If the enacting State considers that applicable internal rules and guidance should also be stored with the record and documents for a particular procurement, the procurement regulations or rules or guidance from the public procurement agency or other body may so require.

Article 26. Code of conduct [\[hyperlink**\]](#)**

1. Depending on the legal traditions of enacting States, a code of conduct specifically for the procurement personnel may be enacted as part of the administrative law framework of the State, at the level and as part of the procurement regulations.

2. When they are enacted separately from the procurement regulations and if appropriate, the procurement regulations must provide for the manner of the code of

conduct to be promptly made accessible to the public and systematically maintained.²²

IV. Subjects to be addressed in procurement regulations in the context of general issues raised by provisions of Chapter II of the Model Law (Methods of procurement and their conditions for use; solicitation and notices of the procurement) **[hyperlink**]****

1. The procurement regulations are to identify a publication where the invitation to tender or to present other submissions are to be advertised or where an advance notice of the procurement is to appear. The procurement regulations are also to determine the means and manner of the publication of those invitations and notices. There may be paper or electronic media or combination of both, as further explained in the commentary to article 5 in the Guide.
2. The procurement regulations are to provide for rules of publication of the invitation to tender or to present other submissions internationally, i.e. in the media with international circulation and in the manner and language which will ensure that the invitation will reach and be understood by an international audience of suppliers and contractors.
3. The procurement regulations may additionally require procuring entities to publish the invitation to tender or to present other submissions by additional means that would promote widespread awareness by suppliers and contractors of procurement proceedings. These might include, for example, posting the invitation on official notice boards, a contracts bulletin and circulating it to chambers of commerce, to foreign trade missions in the country of the procuring entity and to trade missions abroad of the country of the procuring entity. Where the procuring entity uses electronic means of advertisement and communication, the procurement regulation may allow including in the invitation a web link to the solicitation documents themselves.
4. The procurement regulations must address in detail exceptions to the general rule on publication of the invitation internationally — domestic procurement or where procurement in view of its low value, in the judgement of the procuring entity, is unlikely to be interest on the part of foreign suppliers or contractors. The issues to be addressed in the context of low-value procurement are discussed in section II.C above. As noted there, the procurement regulations must ensure consistency in determining what constitutes low-value procurement for the purpose of applying relevant exemptions of the Model Law. It is important for the procurement regulations to explain in this regard that in both cases in which the exemption from international publication applies, the procuring entity may still solicit internationally; where it does not solicit internationally but foreign suppliers or contractors wish to participate (if they have seen an advertisement on the Internet, for example), they must be permitted to do so.

²² See in this context the commentary in the Guide to article 5 (1) of the Model Law, in which a similar requirement applies to legal texts of general application.

5. As noted in the context of article 8 above, the procurement regulations must specify any grounds for the use of domestic procurement; if those grounds are found in other provisions of law of the enacting State, the procurement regulations must cross-refer to them.

V. Subjects to be addressed in procurement regulations in the context of specific articles of Chapter III of the Model Law (Open tendering) [\[hyperlink**\]](#), in the order of the articles**

Article 38. Provision of solicitation documents [\[hyperlink**\]](#)**

The considerations as regards the fee that may be charged for the solicitation documents are addressed in section II.D above and relevant in the context of this article.

Article 39. Contents of solicitation documents [\[hyperlink**\]](#)**

1. If the solicitation documents must contain at a minimum information in addition to that listed in the law, the procurement regulations must specify it or refer to other provisions of law of the enacting State where such information may be listed.
2. In the context of paragraph (g) of the article, where SME promotion is a socioeconomic policy of the government concerned, the procurement regulations may encourage procuring entities to consider whether to allow in the solicitation documents for partial submissions.

Article 40. Presentation of tenders [\[hyperlink**\]](#)**

1. The procurement regulations should provide for guidance or call for issuance of guidance as regards various aspects of submission of tenders in non-paper-based environment. They need to require that the procuring entity's system, at a minimum, has to guarantee that no person can have access to the content of tenders after their receipt by the procuring entity prior to the time set up for formal opening of tenders. It must also guarantee that only authorized persons clearly identified to the system will have the right to open tenders at the time of formal opening of tenders and will have access to the content of tenders at subsequent stages of the procurement proceedings. The system must also be set up in a way that allows traceability of all operations in relation to presented tenders, including the exact time and date of receipt of tenders, verification of who accessed tenders and when, and whether tenders supposed to be inaccessible have been compromised or tampered with. Appropriate measures should be in place to verify that tenders would not be deleted or damaged or affected in other unauthorized ways when they are opened and subsequently used. Standards and methods used should be commensurate with risk. A strong level of authentication and security can be achieved by various commercial technologies that are available at any given time but this will not be appropriate for

low-risk small-value procurement. The choice should therefore be based on the cost-benefit analysis.²³

2. In situations where the system of receipt of tenders makes it impossible to establish the time of receipt with precision, the procuring entity may need to have an element of discretion to establish the degree of precision to which the time of receipt of tenders presented would be recorded. However, the procurement regulations should regulate this element of discretion by reference to the applicable legal norms in electronic commerce, in order to prevent abuse and ensure objectivity.

3. It is recognized that failures in automatic systems, which may prevent suppliers or contractors from presenting their tenders before the deadline, may inevitably occur. The procurement regulations must address these situations and provide options for the procuring entity to address them. For example, as the commentary to article 40 in the Guide states, where a failure occurs, the procuring entity has to determine whether the system can be re-established sufficiently quickly to proceed with the procurement and if so, to decide whether any extension of the deadline for presenting tenders would be necessary. If, however, the procuring entity determines that a failure in the system will prevent it from proceeding with the procurement, the procuring entity can cancel the procurement and announce new procurement proceedings. Failures in automatic systems occurring due to reckless or intentional actions by the procuring entity, as well as decisions taken by the procuring entity to address issues arising from failures of automatic systems, can give rise to a challenge by aggrieved suppliers and contractors under Chapter VIII of the Model Law.²⁴

Article 42. Opening of tenders [\[hyperlink**\]](#)**

1. The procurement regulations must address in detail the means and manner of presence of suppliers and contractors at the opening of tenders, either in person or virtually. The procurement regulations must require the procuring entity in situations where it decides to use non-paper-based means of communication in the procurement proceedings exclusively or in combination with paper-based means, to set up modalities for the opening of tenders (the place, manner, time and procedures for the opening of tenders) that would allow for the physical and virtual presence of suppliers or contractors. The procurement regulations may list factors that must be taken into account in those situations, such as time difference, the need to supplement any physical location for opening of tenders with any means of ensuring presence of those who cannot be present at the physical location or opting for a virtual location.²⁵

2. As noted in the context of article 7 above, the procurement regulations must address such notions as means of communication being “in common use” and ensuring “full and contemporaneous participation in the meetings”. In addressing the latter notion, the procurement regulations may draw on the explanation found in paragraph 3 of the commentary to article 42 in the Guide: “fully and

²³ Para. 3 of the commentary to article 40 in the Guide.

²⁴ Para. 6 of the commentary to article 40 in the Guide.

²⁵ For a further discussion of the relevant requirements, see the commentary to article 7 (4) in the Guide.

contemporaneously” means that suppliers or contractors must be given a contemporaneous opportunity to receive all and the same information given out during the opening. The information concerned includes the announcements made in accordance with paragraph (3) of the article. Suppliers or contractors must also be able to intervene where any improprieties or inaccuracies are observed, to the extent that they would be able to do so if they were physically present. Regardless of the method used, all pertinent information must be communicated to suppliers or contractors sufficiently in advance to enable them, in accordance with the provisions of article 7 (4), to participate in the opening of tenders.

3. The procurement regulations must also set out specific safeguards for automated opening of tenders, such as: (a) that only authorized persons clearly identified to the system will have the right to set or change in the system the time for opening tenders in accordance with paragraph (1) of the article, without compromising the security, integrity and confidentiality of tenders; (b) only such persons will have the right to open tenders at the set time. The procurement regulations may require that at least two authorized persons should by simultaneous action perform opening of tenders. “Simultaneous action” in this context means that the designated authorized persons within almost the same time span shall open the same components of a tender and produce logs of what components have been opened and when; (c) before the tenders are opened, the system should confirm the security of tenders by verifying that no unauthorized access has been detected; (d) the authorized persons should be equipped with appropriate means to verify the authenticity and integrity of tenders and their timely presentation without the capability of making any changes; (e) measures should be in place to prevent the integrity of tenders from being compromised, to prevent their deletion or to prevent the destruction of the system when the system opens them, such as through virus or similar infection; (f) the system must also be set up in a way that provides for the traceability of all operations during the opening of tenders, including the identification of the individual that opened each tender and its components, and the date and time each was opened; and (g) the system must also guarantee that the tenders opened will remain accessible only to persons authorized to acquaint themselves with their contents and data (such as to members of an evaluation committee or auditors at subsequent stages of the procurement proceedings).²⁶

Article 43. Examination and evaluation of tenders [\[hyperlink**\]](#)**

1. The procurement regulations should explain such notions as minor deviations, errors and oversights as compared to arithmetical errors which correction is addressed in article 16 of the Model Law [\[**hyperlink**\]](#). The procurement regulations must emphasize that any deviations or errors or oversights that can be corrected without touching on the substance of the tender should be acceptable, such as those that do not materially alter or depart from the characteristics, terms, conditions and other requirements set out in the solicitation documents. In no case, however, can there be a correction of errors or oversights that involves a substantive change to the submissions concerned, such as changes that would make an unqualified supplier or contractor qualified or unresponsive submission responsive. The procurement regulations should provide practical examples of acceptable and unacceptable deviations, errors and oversights.

²⁶ Paras. 6 and 7 of the commentary to article 42 in the Guide.

2. The procurement regulations should provide for the rules for quantification of minor deviations and errors and oversights and for taking them into account appropriately in the examination and evaluation of tenders so that tenders may be compared objectively and fairly.
3. The procurement regulations need to build procedural safeguards to mitigate the risks of discriminatory practices in applications of provisions on correction and quantification of minor deviations and errors and oversights, for example by requiring the procuring entity to put on the record any minor deviations and errors and oversights discovered during the examination and evaluation process and steps taken in connection with them.
4. To address exhaustively all issues of errors or omissions in submissions and possible clarification and corrections either by the procuring entity or a supplier or contractor, the procurement regulations may need to refer to contract law and other branches of law of an enacting State as well as reflect the provisions of an international agreement to which the enacting State may be a party, such as the WTO GPA.
5. With reference to paragraphs (5) and (6) of the article, the procurement regulations must guide the procuring entity as regards the options available under the article if the winner fails to demonstrate its qualifications again: either to cancel the procurement proceedings or award the procurement contract to the next successful tender. The procuring entity should be required to assess the consequences of cancelling the procurement, in particular the costs of an alternative procurement method. The procuring entity should not be encouraged always to opt for the next successful tender. The cancellation of the procurement may be required for example where collusion between the supplier or contractor presenting the successful tender and the supplier or contractor presenting the next successful tender is suspected since this may lead to the acceptance of the tender with the abnormally high price. The procurement regulations must require the procuring entity to put on the record details of the procedures envisaged in paragraphs (5) and (6) of the article if they have taken place and the decisions taken by the procuring entity and reasons therefor.

VI. Subjects to be addressed in procurement regulations in the context of methods of procurement referred to in Chapter IV of the Model Law (Procedures for restricted tendering, request for quotations and request for proposals without negotiation) [hyperlink**](#)**

Restricted tendering and direct solicitation in request for proposals

1. In the context of the use of restricted tendering or request for proposals for procurement of items available from only a limited number of suppliers or contractors, the procurement regulations must address the question of market definition and the safeguard that the procuring entity must invite all potential suppliers or contractors capable to deliver the procured items. In this context they

should regulate the requirement of an advance notice of the procurement and its implications on the procurement, in particular that if previously unknown suppliers or contractors respond to the advance notice they must be permitted to submit a tender or proposal unless they are disqualified or otherwise do not comply with the terms of the notice. The procurement regulations must require open tendering with public and unrestricted solicitation or pre-qualification where the extent of the market is not fully known or understood, in particular as regards the pool of overseas suppliers or contractors and the extent of their interest in procurement proceedings of the enacting State.

2. The procurement regulations should address measures to mitigate the risks of an additional administrative burden and delays in the procurement should an additional supplier or contractor emerge, in the light of articles 14 and 15 [\[**hyperlinks**\]](#) that require providing sufficient time for suppliers or contractors to present their submissions. The procurement regulations may require including in the advance notice a statement requesting interested suppliers or contractors to identify themselves to the procuring entity before the date upon which the solicitation documents will be issued and provided to the suppliers or contractors known to the procuring entity.

3. As regards direct solicitation used to avoid the disproportionate costs of examining a large number of tenders or proposals as against the value of the procurement, the procurement regulations must address both a reasonable minimum of suppliers or contractors, such as five, to ensure effective competition, and the objective manner of selection of the suppliers or contractors to be invited to participate, such as “first-come, first-served”, the drawing of lots, rotation or other random choice in a commodity-type market.

Request for quotations

1. The procurement regulations must elaborate on conditions and rules for the use of this procurement method taking into account that ensuring adequate transparency is a key issue, given that procurement under this method is not required to be preceded by a notice of the procurement and may fall below the threshold for an individual public announcement of the contract award under article 23 [\[**hyperlink**\]](#). The procurement regulations should spell out the type of the items to be procured through this procurement method. They could require using recognized trade terms, in particular INCOTERMS, or other standard trade descriptions in common use — such as those in the information technology and communications markets — so that the off-the-shelf items for which the method is designed can be defined by reference to industry standards.

2. The procurement regulations should require the procuring entity always to consider alternatives to request for quotations, especially where e-purchasing became the norm. Electronic methods of requesting quotations may generally be particularly cost-effective for low-value procurement and ensuring also more transparent selection.

3. Where no alternatives are available, the procurement regulations must regulate the manner in which the participants are to be identified, to ensure that the selection of participants in request-for-quotations proceedings is not carried out in a way so

as to restrict market access or to allow abuse of the procedures. Examples of abuse include the selection of two suppliers or contractors whose prices are known to be high, or two suppliers or contractors that are geographically remote, so as to direct the procurement towards a third, chosen supplier or contractor, or suppliers or contractors belonging to a corporate group or that are otherwise under some form of common financial and managerial control. The procurement regulations may require the comparison of historical offers and rotation among suppliers or contractors, where the same items may be procured occasionally. The use of electronic catalogues as a source of quotations may in particular be considered to offer better opportunity for transparency in the selection of suppliers or contractors from which to request quotations, in that such selection can be evaluated against those suppliers or contractors offering relevant items in catalogues. Although not required in the Model Law, the procurement regulations may also require publication of an advance notice of the procurement as in other cases of direct solicitation. The procurement regulations may put in place special oversight procedures that should identify the winning suppliers or contractors under this method, so that repeat awards can be evaluated.

Request for proposals without negotiation

1. In addition to those issues highlighted in connection with restricted tendering and direct solicitation in request for proposals above, the procurement regulations should explain the purpose of this procurement method and with reference to examples illustrate the situations when it could usefully be used. They should also delineate clearly the scope of “technical, quality and performance” characteristics of the proposals from their “financial aspects”. Practical examples of elements of proposals that might fall into one or other category are provided in the commentary to request for proposals without negotiation in the Guide.²⁷
2. The procurement regulations must specify which minimum information not listed in the law must be included by the procuring entity in the solicitation documents. Where such information is specified in other provisions of law of the enacting State, the procurement regulations must cross-refer to them.
3. The considerations as regards the price charged for the solicitation documents are addressed in section II.D above and relevant in the context of article 47 (2) (h) and (i). The procurement regulations should therefore address them in the context of this procurement method as well.
4. If the procurement law of the enacting State allows that, the procurement regulations may provide for a variation of this procurement method that may be appropriate for the procurement of a simpler subject matter: the procuring entity may select the successful proposal on the basis of the price of the proposals that meet or exceed the minimum technical, quality and performance requirements, provided that the statement of the evaluation criteria in the invitation and request for proposals have so provided. This approach may be appropriate in situations where the procuring entity does not need to evaluate technical, quality and performance characteristics of proposals and assign any scores but rather establishes a threshold

²⁷ Para. 2 of the commentary in the Guide to General description and main policy issues of request for proposals without negotiation.

by which to measure technical, quality and performance characteristics of proposals at such a high level that all the suppliers or contractors whose proposals attain a rating at or above the threshold can in all probability perform the procurement contract at a more or less equivalent level of competence. There should also be no need in such cases to evaluate any financial aspects of proposals other than price.

VII. Subjects to be addressed in procurement regulations in the context of methods of procurement referred to in Chapter V of the Model Law (Procedures for two-stage tendering, request for proposals with dialogue, request for proposals with consecutive negotiations, competitive negotiations and single-source procurement) [**hyperlink****]**

General

1. The procurement regulations can assist in enhancing objectivity in the assessment of the circumstances that necessitate the use of a Chapter V procurement method. Since this assessment will take place at the procurement planning stage, the procurement regulations should build in appropriate safeguards at that stage, including by requiring that the procurement planning stage is to be fully documented and recorded.
2. The procurement regulations should address external expert assistance that can be provided centrally or from other sources to the procuring entity in building capacity to engage successfully in discussions, dialogue or negotiations with the private sector, to explain the procuring entity's needs in a way that can be fully and equally understood by all participants, and to assess the resulting tenders and offers such that its needs are properly met.
3. The procurement regulations should also provide for managerial tools, structures and procedural safeguards for the use of procurement methods involving interaction with the market, in particular those aimed at avoiding the possibility of abuse and corruption. In particular, in procurement involving delicate issues or highly competitive contracts, the procurement regulations should provide for oversight measures, including post-procedure audit, and the presence of observers coming from outside the procuring entity's structure during the procedures, to assess the use of the methods in practice. These measures should aim at preventing favouring certain suppliers or contractors, for example by providing different information to each of them during the discussions, dialogue or negotiations, and at mitigating the risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors.

Two-stage tendering

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that necessitate the use of this procurement method. They could usefully provide examples of its successful use, such as in procurement of high-technology items, such as large passenger aircraft or

communication systems, technical equipment and infrastructure procurement, including large complex facilities or construction of a specialized nature. More generally, the procurement regulations may instruct the procuring entity to consider the use of this method where it is evident at the procurement planning stage that obtaining best value for money is unlikely if the procuring entity draws up a complete description of the procurement setting out all the technical specifications, all quality and performance characteristics of the subject matter, all relevant competencies of the suppliers or contractors, and all terms and conditions of the procurement, without examining what the market can offer.

2. The procurement regulations should guide the procuring entity on all exceptions that should be made in applying general provisions of open tendering contained in Chapter III of the Model Law to two-stage tendering. Examples of such exceptions are provided in paragraphs 1 to 3 of the commentary to the procedures of two-stage tendering in the Guide.

3. The procurement regulations may elaborate on the provisions of the Model Law as regards presentation, examination and rejection of initial tenders. They in particular may list grounds for rejection of initial tenders, drawing on the list in article 43 (2) of the Model Law [\[**hyperlink**\]](#) as appropriate (noting that the grounds touching upon prices of the tenders would not be applicable since initial tenders do not include price).

4. The procurement regulations should explain the purpose for and nature of the discussion held in this procurement method, in particular that discussion does not involve binding negotiations or bargaining of any type and may concern any aspect of initial tenders that were not rejected but price. The procurement regulations may usefully emphasize that holding the discussions is an option, not an obligation: the procuring entity may be able to refine and finalize the terms and conditions of the procurement without holding the discussion, on the basis of the initial tenders received.

5. The procurement regulations should explain the notion of extending an equal opportunity to discuss to all suppliers or contractors concerned. An “equal opportunity” in this context means that the suppliers or contractors are treated as equally as the requirement to avoid disclosure of confidential information and the need to avoid collusion allow. The procurement regulations must build measures that would allow the monitoring of the compliance of the procuring entity with this requirement of the law, for example the requirement to record and preserve the details of the discussions with each supplier or contractor.

6. The procurement regulations must alert that the risks of revealing, inadvertently or otherwise, commercially sensitive information of competing suppliers or contractors may arise not only at the stage of discussions but also in the formulation of the revised set of the terms and conditions of the procurement. In conformity with the requirements of article 24 [\[**hyperlink**\]](#), the procuring entity must respect the confidentiality of the suppliers’ or contractors’ technical proposals throughout the process. The procurement regulations must provide practical guidance for achieving that, such as by prohibiting the procuring entity from revealing the source of information used in formulating the revised technical, quality and performance characteristics of the subject matter and by requiring them

to avoid using in the revised terms and conditions of the procurement requirements, symbols and terminology peculiar to only one supplier or contractor.

Request for proposals with dialogue

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that necessitate the use of this procurement method. They could usefully provide examples of its successful use, such as in procurement aimed at seeking different, often innovative, solutions to technical issues. The method may be appropriate for example in the procurement of architectural, construction and infrastructure works where achieving energy-saving and other sustainable procurement goals are sought. In those cases, there could be many possible solutions to the procuring entity's needs: the material may vary, and may involve the use of one source of energy as opposed to another (wind vs. solar vs. fossil fuels). The complexity need not be at the technical level: in infrastructure projects, for example, there may be different locations and types of construction as the main variables. A tailor-made solution may be needed in less complex projects, for example, a communication system for the archiving of legal records, which may need particular features such as long-term accessibility, and where technical excellence is an issue. In all these cases, the attractiveness of solutions and personal skill and expertise of the suppliers or contractors can be evaluated only through dialogue; the dialogue is essential in order to identify and obtain the best solution to the procurement needs. The opportunity cost of not engaging in dialogue with suppliers or contractors is therefore high, while the economic gains of engaging in the process are evident.

2. The procurement regulations must clarify in which cases this method is not to be used. Since the dialogue normally involves complex and time-consuming procedures, the method should not be used for simple items that are usually procured through procurement methods not involving interaction with suppliers or contractors. The procurement method is, for example, not intended to apply to cases where negotiations are required because of urgency or because there is an insufficient competitive base (in such cases, the use of competitive negotiations or single-source procurement is authorized under the Model Law). It does not address the type of negotiations that seek only price reductions as in request for proposals with consecutive negotiations. Nor it is intended to apply in situations when the procuring entity needs to refine its procurement needs and envisages formulating a single set of terms and conditions (including specifications) of the procurement, against which tenders can be presented, in which two-stage tendering proceedings should be used.

3. In view of many similarities in conditions for use and features of two-stage tendering and request for proposals with dialogue, the procurement regulations should pay particular attention to clarifying the purpose of the use of this method as opposed to two-stage tendering. One of the main distinct features of this procurement method — the absence of any complete single set of terms and conditions of the procurement beyond the minimum requirements against which final submissions are evaluated. In order to use request-for-proposals-with-dialogue proceedings, the procuring entity would have to conclude therefore that formulating a complete single set of terms and conditions of the procurement would not be

possible or would not be appropriate, and therefore dialogue with suppliers or contractors is necessary for the procurement to succeed.

4. While it is not intended that the procedure will involve the procuring entity in setting out a full technical description of the subject matter of the procurement, the method is not to be used as an alternative to appropriate preparation for the procurement. The procurement regulations must therefore list issues to be addressed at the procurement planning stage for the method to be successfully used, such as identifying minimum technical and other requirements for the project and parameters of the project that cannot be varied during the dialogue.

5. The procurement regulations should explain the purpose for and nature of the dialogue held in this procurement method, in particular that the dialogue may concern any aspect of proposals, including price. While the primary focus of dialogue typically may be on technical, quality and performance aspects or legal or other supporting issues, the subject matter of the procurement and market conditions may allow and even encourage the procuring entity to use price as an aspect of dialogue. In addition, in some cases, it is not possible to separate price and non-price criteria.

6. The procurement regulations are also to explain that the dialogue is not intended to involve binding negotiations or bargaining from any party to the dialogue. The procurement regulations should list requirements for a concurrent dialogue, such as that all suppliers and contractors identified for dialogue by the procuring entity in accordance with the terms and conditions of the solicitation are entitled to an equal opportunity to participate in the dialogue, there are no consecutive discussions, and the dialogue is to be conducted at different times with different suppliers or contractors, by the same procurement officials or negotiating committees composed of the same procurement officials.

7. If the provisions calling for an ex ante approval mechanism for the use of this procurement method are enacted,²⁸ the procurement regulations must regulate prerogatives in the procurement proceedings of an approving authority designated by the enacting State in the law, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled. In addressing these issues, the procurement regulations should pay special attention to the need to avoid conflict of interest at this and subsequent stages in the procurement proceedings if for example the same entity grants the approval for the use of the method and subsequently approves the entry into force of the procurement contract or is engaged in reviewing claims arising from the procurement proceedings.

8. Considerations raised in connection with methods of solicitation in section IV above and particular aspects of direct solicitation raised in section VI above in the context of restricted tendering and request for proposals are relevant to request-for-proposals-with-dialogue proceedings. The procurement regulations should therefore address them in the context of this procurement method as well.

²⁸ As to which see para. 5 of the commentary to Conditions for use of request for proposals with dialogue (article 30 (2)) in the Guide.

9. The procurement regulations should recommend the minimum three suppliers or contractors with whom to hold the dialogue and where the maximum number of suppliers or contractors from which proposals will be requested is established, that maximum number should be higher than the maximum to be admitted to the dialogue stage, in order to allow the procuring entity to select from a bigger pool the most suitable candidates for the dialogue stage.

10. At the same time, the procurement regulations should address situations when only one or two responsive proposals are presented: the procuring entity should not be precluded from continuing with the procurement proceedings in such cases because the procuring entity in any event has no means of ensuring that the competitive base remains until the end of the dialogue stage: suppliers or contractors are not prevented from withdrawing at any time from the dialogue.

11. The procurement regulations should list or cross-refer to all grounds under the law of the enacting State under which suppliers or contractors may be excluded from further dialogue by the procuring entity, taking into account that the Model Law does not give an unconditional right to the procuring entity to terminate competitive dialogue with a supplier or contractor, for example, only because in the view of the procuring entity that supplier or contractor would not have a realistic chance of being awarded the contract. On the other hand, they must be excluded on the basis of article 21 [\[**hyperlink**\]](#) (inducement, unfair competitive advantage or conflicts of interest), or if they are no longer qualified (for example in the case of bankruptcy), or if they materially deviate during the dialogue stage from the essential requirements of the procurement (such as the subject matter of the procurement, the minimum requirements or the requirements identified as not being the subject of dialogue at the outset of the procurement).

12. The procurement regulations may require in all those cases the procuring entity to notify promptly suppliers or contractors of the procuring entity's decision to terminate the dialogue and to provide reasons for that decision. They may also require the procuring entity to provide suppliers or contractors at the outset of the procurement proceedings with information about the grounds on which the procuring entity will be required under law to exclude them from the procurement.

13. The procurement regulations should encourage better procurement planning that would make the process more predictable, in particular by requiring the procuring entity to specify in the request for proposals an estimated timetable envisaged for the procedure to give both sides a better idea as regards the timing of various stages and which resources (personnel, experts, documents, designs and so forth) would be relevant, and should be made available, at which stage. The procurement regulations may also require the procuring entity specifying the maximum period of time during which suppliers or contractors should be expected to commit their time and resources.

14. The procurement regulations should explain limits on the extent of modification of the terms and conditions of the procurement as set out at the outset of the procurement proceedings during the dialogue, taking into account that flexibility in making modifications is an inherent feature of this method and imposing excessive restrictions will defeat the purpose of the procedure. The need for modifications may be justified in the light of dialogue but also in the light of circumstances not related to dialogue (such as administrative measures).

15. The procurement regulations must illustrate with practical examples which modifications would be acceptable and which will not in the light of the requirements of article 49 (9). In general terms, any modifications should be permitted unless they are made to such essential terms and conditions of the procurement whose modification would have to lead to the new procurement (the subject matter of the procurement, qualification and evaluation criteria, the minimum requirements and any elements that the procuring entity explicitly excludes from the dialogue at the outset of the procurement).

16. The procurement regulations must list practical measures aimed at achieving fair, equal and equitable treatment of all participants during the dialogue. In addition to those identified in the Model Law itself (e.g. that the dialogue is to be held on a concurrent basis by the same representatives of the procuring entity and those related to circulation of pertinent documents and information to participating suppliers or contractors), the procurement regulations should identify other measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, and the rules for establishing the sequence of meetings held with different participants.

17. The procurement regulations should explain that the prohibition to negotiate after the best and final offers (BAFOs) are presented does not cover the possibility to seek clarifications under article 16 [\[**hyperlink**\]](#) subject to limitations imposed by that article, such as prohibition to alter price or other significant information as part of the clarification process.

18. The procurement regulations must require the procuring entity to record and preserve in writing details of dialogue with each supplier or contractor.

Request for proposals with consecutive negotiations

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that necessitate the use of this procurement method. They could usefully provide examples of its successful use, such as in procurement of more complex subject matter where the examination and evaluation of technical, quality and performance characteristics of the proposals separately from consideration of financial aspects of proposals is possible and needed and where holding negotiations on commercial or financial aspects of proposals is indispensable — there may be so many variables in these aspects of proposals that they cannot be all foreseen and specified at the outset of the procurement and must be refined and agreed upon during negotiations. When the need exists to negotiate on other aspects of proposals, this procurement method may not be used. Examples of the use of this method in practice include consulting (e.g. advisory) services.

2. Considerations raised in connection with methods of solicitation in section IV above and particular aspects of direct solicitation raised in section VI above in the context of restricted tendering and request for proposals are relevant to request-for-proposals-with-consecutive-negotiations proceedings. The procurement regulations should therefore address them in the context of this procurement method as well.

3. All stages in this procurement method preceding the stage of negotiations are the same as in request for proposals without negotiation. The procurement

regulations should therefore address issues raised in the relevant context in section VI above in the context of this procurement method as well.

4. The procurement regulations should explain the purpose for and nature of the negotiations held in this procurement method, in particular that they may concern only commercial or financial aspects of proposals and that they are held consecutively as opposed to concurrently as for example in competitive negotiations. As is the case with request for proposals without negotiation, the procurement regulations should delineate clearly the scope of “technical, quality and performance” characteristics of the proposals from their “financial aspects”. Practical examples of elements of proposals that might fall into one or other category are provided in the commentary to request for proposals without negotiation and to this procurement method in the Guide.²⁹

5. The procurement regulations must emphasize the requirement of the law that no procurement contract can be awarded to the supplier(s) or contractor(s) with which the negotiations have been terminated. The commentary to this procurement method in the Guide sets out considerations that the procuring entity should take into consideration while deciding to terminate negotiations with the best, or a better-ranked, supplier or contractor.³⁰

6. The procurement regulations may need to provide for practical measures that encourage discipline on both suppliers or contractors and procuring entities to negotiate in good faith. The procurement regulations may also include measures aimed at increasing the bargaining position of the procuring entity. Such measures may include requiring the procuring entity to fix a period for the negotiations in the solicitation documents.

Competitive negotiations

1. The procurement regulations must emphasize the exceptional nature of this procurement method, which could be considered in preference to single-source procurement whenever possible in the case of urgency, catastrophic events and the protection of essential security interests of the enacting State. It cannot be considered as an alternative to any other method of procurement available under the Model Law.

2. The procurement regulations must require the procuring entity even in cases of urgency, catastrophic events and the protection of essential security interests of the enacting State first to consider the use of open tendering or any other competitive method of procurement. Where the procuring entity concludes that the use of other competitive methods is impractical, it must always consider the use of competitive negotiations in preference to single-source procurement unless it concludes that there is extreme urgency or another distinct ground justifying the use of single-source procurement under paragraph (5) of article 30 of the Model Law

²⁹ Para. 2 of the commentary in the Guide to General description and main policy issues of request for proposals without negotiation and para. 3 of the commentary to Procedures for request for proposals with consecutive negotiations (article 50).

³⁰ Paras. 4 to 7 of the commentary to Procedures for request for proposals with consecutive negotiations (article 50).

[**hyperlink**] (for example, the absence of a competitive base or exclusive rights involved).

3. The procurement regulations should illustrate examples that would necessitate the use of this procurement method, such as the need for urgent medical or other supplies after a natural disaster or the need to replace an item of equipment in regular use that has malfunctioned. They should explain that the method is not available if the urgency is due to a lack of procurement planning or other (in)action on the part of the procuring entity. The procurement regulations must elaborate that the extent of the procurement through this method must be directly derived from the urgency itself. In other words, if there is an urgent need for one item of equipment and an anticipated need for several more of the same type, competitive negotiations can be used only for the item needed immediately.

4. The procurement regulations may impose additional requirements for the use of competitive negotiations. They may require that the procuring entity take steps such as: establishing basic rules and procedures for the conduct of the negotiations in order to help ensure that they proceed in an efficient manner; preparing various documents to serve as the basis for the negotiations, including documents setting out the description of the subject matter to be procured, and the desired contractual terms and conditions; and requesting the suppliers or contractors with which it negotiates to itemize their prices so as to assist the procuring entity in comparing offers.

5. Direct solicitation is an inherent feature of this procurement method since the solicitation in this procurement method is addressed to a limited number of suppliers or contractors identified by the procuring entity. It raises identical issues to those discussed in section VI above in the context of restricted tendering and request for proposals, such as consequences of the publication of an advance notice of the procurement, notably the emergence of unknown suppliers or contractors requesting participation in competitive negotiations, and mechanisms for ensuring a non-discriminatory manner of selecting the suppliers or contractors. Those issues must be addressed in the procurement regulations in the context of this procurement method as well.

6. The procurement regulations must in particular discuss exceptions to the requirement to publish an advance notice of the procurement in the case of direct solicitation since they are pertinent to the conditions of use of competitive negotiations. The procuring entity will not be required to publish such a notice, but may still choose to do so, when competitive negotiations are used in situations of urgency. When competitive negotiations are used in procurement for the protection of essential security interests of the State, the advance notice of the procurement is required subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized or required (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. The procurement regulations must set out such authority or requirement or cross-refer to other provisions of law of the enacting State where such authority or requirement is set out.

7. The procurement regulations may recommend engaging in negotiations with at least three suppliers or contractors to ensure effective competition.
8. The procurement regulations should explain the purpose for and nature of the negotiations held in this procurement method, in particular that they may concern any aspects of proposals and that they involve bargaining and are to be held concurrently, not consecutively as in request for proposals with consecutive negotiations.
9. The procurement regulations could usefully cross-refer to all safeguards in the Model Law aimed at ensuring transparency and the fair, equal and equitable treatment of participants in procurement by means of this procurement method. In addition to those identified in the Model Law itself specifically in the context of this procurement method (e.g. those related to circulation of pertinent documents and information to participating suppliers or contractors), they include the requirement to maintain a detailed record of the procurement proceedings, including details of negotiations with each participating supplier or contractor, and to provide access by suppliers or contractors to the record, as provided for in article 25 [\[**hyperlink**\]](#). The procurement regulations should identify other safeguards, such as providing equal opportunity to participate in negotiations to all invited to competitive negotiations. They could also provide for practical measures, such as ensuring that the same topic is considered with the participants concurrently for the same amount of time, and that the rules for establishing the sequence of meetings held with different participants, the maximum duration of the negotiations stage, and the time frame for negotiations with each supplier or contractor, are made known in the solicitation documents. The procurement regulations could also require oversight measures such as the presence during negotiations of persons outside the procuring entity's structure to oversee the process. They could also require the establishment of a negotiating committee and define rules for its composition and operation.
10. The procurement regulations must contain measures aimed at ensuring that all participating suppliers or contractors are treated by the procuring entity on an equal footing. Such measures include the requirement on the procuring entity to issue the request for BAFOs in writing and communicate it simultaneously to all participating suppliers or contractors so that all of them could receive information about termination of negotiations and available time to prepare their BAFO.
11. As with other procurement methods involving the BAFO stage, the procurement regulations must address differences between the prohibition of post-BAFO negotiations and the possibility to request clarifications and explanations as regards the terms and conditions of BAFOs under article 16 of the Model Law [\[**hyperlink**\]](#).

Single-source procurement

1. The procurement regulations must include measures that would prevent the procuring entity from using single-source procurement where other methods of procurement are available.
2. The procurement regulations should address different situations that lead to the use of single-source procurement, such as: (a) where no alternatives to single-source

procurement may objectively exist, such as where there is only one supplier or contractor capable of providing the subject matter, either because that supplier or contractor has exclusive rights with respect to the subject matter of the procurement or for other reasons that confirm the exclusivity; and (b) where the use of single-source procurement is authorized or required by law of the enacting State on other grounds, for example for implementing its socioeconomic policies or protecting essential security interests of the State. Apart from those objective and authorized reasons for the use of single-source procurement, the absence of the proper procurement planning or the capacity on the side of the procuring entity to consider and use alternative methods or tools may be the reason for the use of single-source procurement.

3. Where single-source procurement is used because of the absence of any alternative, the procurement regulations must establish or elaborate on measures of verifying whether the reason invoked by the procuring entity for the use of single-source procurement is indeed objectively justifiable. Among them is the requirement of giving a timely advance public notice of single-source procurement as an essential safeguard: it tests the procuring entity's assumption that there is an exclusive supplier or contractor and so enhances transparency and accountability in this aspect of procurement practice. The procurement regulations may establish a minimum period for the publication of such notice before the procurement proceedings may begin and call for the widest dissemination of the notice. The procurement regulations must require holding another procurement using another method of procurement where additional suppliers or contractors emerge, since the justification for single-source procurement in such case falls away. Other measures include verifying practices of formulating descriptions of the subject matter of the procurement (they could be formulated in such a narrow way so as to artificially limit the market concerned to a single source; this may encourage monopolies and corruption, whether inadvertently or intentionally). For this reason, the procurement regulations could encourage the use of functional descriptions (performance/output specifications).

4. Where the use of single-source procurement is authorized or required by law of the enacting State on other grounds, the procurement regulations should explain the application of the relevant condition for use and its limits, such as:

(a) In the context of the condition for use set out in article 30 (5) (b) of the Model Law, extreme urgency, the procurement regulations may explain that the urgency must be so extreme that holding negotiations with more than one supplier or contractor and thus the use of competitive negotiations would be impractical. As is the case in competitive negotiations, the need to link the extent of the procurement with the extreme urgency will limit the amount that can be procured using this method: the amount procured using emergency procedures should be strictly limited to the needs arising from that emergency situation. For example, following a catastrophic event, there may be immediate needs for clean water and medical supplies; a need for semi-permanent shelter may arise out of the same catastrophe but is perhaps not so urgent and could be procured by other methods;

(b) In the context of the condition for use set out in article 30 (5) (c), the need for standardization or compatibility with existing goods, equipment, technology or services, the procurement regulations must provide for the rule that procurement in such situations should be limited both in size and in time. They

should also emphasize that this reason must be truly exceptional: otherwise needs may be cited that are in reality due to poor procurement planning on the part of the procuring entity;

(c) In the context of the condition for use set out in article 30 (5) (d), the use of single-source procurement for the protection of essential security interests of the State, the procurement regulations must explain that the use of single-source procurement instead of another method of procurement, would be appropriate only if the procurement involves classified information and the procuring entity concludes that the information concerned will be insufficiently protected if any other method of procurement, including another exceptional method of procurement such as competitive negotiations, is used. As stated in section II.B above, the authority granted to procuring entities to take special measures and impose special requirements for the protection of classified information applies only to the extent permitted by the procurement regulations or by other provisions of law of the enacting State;

(d) In the context of the condition for use set out in article 30 (5) (e), the use of single-source procurement to implement socioeconomic policies of the enacting State, the procurement regulations must address in detail the stage of seeking and receiving comments, to make the opportunity to comment meaningful. They should provide for the minimum content of the notice, in particular to encourage on the question of whether there is only one available supplier or contractor, so as to avoid the abuse of this type of single-source procurement to favour a particular supplier or contractor. They should also regulate further aspects of these provisions: in particular, whose comments should specifically be sought (for example, of local communities), the purpose or the effect of comments, especially negative, if received. They should require the procuring entity to allow sufficient time to elapse between the public notice of the procurement and the start of the procurement proceedings, to analyse and record comments from any member of the public and to provide explanations upon request. If the provisions calling for an ex ante approval mechanism for the use of single-source procurement on this ground are enacted,³¹ the procurement regulations must regulate prerogatives of an approving authority, in particular whether these prerogatives will end with granting to the procuring entity the approval to use this procurement method or also extend to some form of supervision of the way proceedings are handled. In addressing these issues, the procurement regulations should pay special attention to the need to avoid conflict of interest at this and subsequent stages in the procurement proceedings if for example the same entity grants the approval for the use of the method and subsequently approves the entry into force of the procurement contract or is engaged in reviewing claims arising from the procurement proceedings.

5. Where the absence of the proper procurement planning or the capacity on the side of the procuring entity to consider and use alternative methods or tools is the reason for the use of single-source procurement, the procurement regulations must address those reasons by establishing measures towards the proper procurement planning and building the required capacity to consider and use alternatives to single-source procurement. For example, a closed framework agreement without

³¹ As to which see para. 8 of the commentary to Conditions for use of single-source procurement (article 30 (5)) in the Guide.

second-stage competition may effectively address situations of extreme urgency, where it has been concluded in advance against a background of an identified and probable need occurring on a periodic basis or within a given time frame. Open framework agreements could be established for the simple standardized items while closed framework agreements for more complex items, in anticipation of urgent needs or additional supplies from the same source for reasons of standardization and compatibility. Request for quotations and ERAs could be used instead of single-source procurement where the need for off-the-shelf items arose in situations of urgency, emergency and the protection of essential security interests of the enacting State. Where negotiations are necessary but the use of other more structured and transparent methods of procurement is not possible, the competitive negotiations are to be used. This is because competitive negotiations are inherently more competitive than single-source procurement and more safeguards are built in the provisions of the Model Law regulating procedures in competitive negotiations, making the latter more structured and transparent than single-source procurement.

6. Direct solicitation is an inherent feature of this procurement method since the solicitation in this procurement method is addressed to a single supplier or contractor identified by the procuring entity. It raises identical issues to those discussed in section VI above in the context of restricted tendering and request for proposals, such as consequences of the publication of an advance notice of the procurement, notably the emergence of suppliers or contractors challenging the use of single-source procurement, discussed also in paragraph 3 above. Those issues must be addressed in the procurement regulations in the context of this procurement method as well.

7. The procurement regulations must in particular discuss exceptions to the requirement to publish an advance notice of the procurement in the case of direct solicitation since they are pertinent to some conditions for use of single-source procurement. The procuring entity will not be required to publish such a notice, but may still choose to do so, when single-source procurement is used in situations of extreme urgency. When single-source procurement is used in procurement for the protection of essential security interests of the State, the advance notice of the procurement is required subject to any exemptions on the basis of confidentiality that may apply under the provisions of law of the enacting State. For example, procurement involving the protection of essential security interests of the State may also involve classified information; in such cases, the procuring entity may be authorized or required (by the procurement regulations or by other provisions of law of the enacting State) not to publish any public notice related to the procurement. The procurement regulations must set out such authority or requirement or cross-refer to other provisions of law of the enacting State where such authority or requirement is set out.

8. The procurement regulations could usefully cross-refer to all safeguards in the Model Law aimed at ensuring transparency in procurement by means of this procurement method, such as the requirements for an advance notice of the procurement, on publication of notices of procurement contract awards and on keeping the comprehensive record of the procurement proceedings, including justifications for the use of single-source procurement.

VIII. Subjects to be addressed in procurement regulations in the context of ERAs (article 31 and Chapter VI of the Model Law (Electronic reverse auctions) [\[hyperlinks**\]](#))**

General

1. The procurement regulations must explain the main features of ERAs and highlight their main differences from traditional auctions (such as that they are online auctions with automatic evaluation, where the anonymity of the bidders and the confidentiality and traceability of the proceedings can be preserved, and they are always to be used as the final stage in the procurement proceeding before the award of the procurement contract). In this respect they should draw on the definition of the ERA in article 2 of the Model Law and the general commentary to Chapter VI in the Guide [\[**hyperlinks**\]](#). To avoid confusion and undesirable interpretations, the procurement regulations should explain in particular the meaning of the term “successively lowered bids” used in the definition of the ERA as referring to successive reductions in the price or improvements in overall offers to the procuring entity.

2. The issues of authenticity, integrity of data, security and related topics in the use of e-procurement highlighted in the context of articles 7 and 40 above and in the Guide are in particular relevant in the context of ERAs since they are by default held online under the Model Law. The procurement regulations should therefore address technical issues, such as ensuring adequate infrastructure, that the relevant Internet sites are available and supported by adequate bandwidth, and appropriate security measures to avoid the elevated risk of bidders’ gaining unauthorized access to competitors’ commercially sensitive information.

3. The procurement regulations must address the technical aspects of the auction that must be provided in the solicitation documents to accommodate its online features and to ensure transparency and predictability in the process (such as specifications for connection, the equipment being used, the website, any particular software, technical features and, if relevant, capacity). The procurement regulations must require the procuring entity to prepare for each ERA rules for conducting the auction. The procurement regulations may provide for or call for formulating standard rules for conducting auctions that may be used by the procuring entities for adapting to the requirements of any given procurement. The rules for conducting the auction must specify at a minimum:

(a) The type of information that is to be disclosed to the bidders during the auction and how and when it will be made available to the bidders (at a minimum, and to ensure fair, equal and equitable treatment, the same information should be provided simultaneously to all bidders);

(b) The criteria and procedures for any extension of the deadline for submission of bids;

(c) Circumstances that would require suspension or termination of the auction;

(d) Procedural safeguards to protect the interests of bidders in case of the suspension or termination of the auction, such as immediate and simultaneous

notification of all bidders about suspension or termination and in the case of suspension, the time for the reopening of the auction and the new deadline for its closure. Where a stand-alone ERA is terminated, the rules should specify whether the termination necessarily cancels the ERA, or whether the contract can be awarded based on the results at the time of termination;

(e) Permissible criteria governing the closing of the auction, such as: (i) when the date and time specified for the closing of the auction has passed; (ii) when the procuring entity, within a specified period of time, receives no further new and valid prices or values that improve on the top-ranked bid; or (iii) when the number of stages in the auction, fixed in the notice of the ERA, has been completed. The procurement regulations should also make it clear that each of these criteria may entail the prior provision of additional specific information; guidance should expand on the types of information concerned. Examples include that item (ii) above would require the specification of the time that will be allowed to elapse after receiving the last bid before the auction closes. Item (iii) above would require the prior provision of information on whether there will be only a single stage of the auction, or multiple stages (in the latter case, the information provided should cover the number of stages and the duration of each stage, and what the end of each stage entails, such as whether the exclusion of bidders at the end of each stage is envisaged);

(f) The procedures to be followed in the case of any failure, malfunction, or breakdown of the system used during the auction process;

(g) As regards the conditions under which the bidders will be able to bid, any minimum improvements in price or other values in any new bid during the auction or limits on such improvements. In the latter case, the information must explain the limits (which may be inherent in the technical characteristics of the items to be procured).

4. The procurement regulations must call for more detailed planning than in other procurement methods, in view of the need to establish a mathematical formula to select the winner and prepare detailed rules for conducting the auction.

5. The procurement regulations should put in place or call for mechanisms in the procuring entity for monitoring competition in markets where techniques such as ERAs are used. The procurement regulations should require the procuring entity to possess good intelligence on past similar transactions, the relevant marketplace and market structure. The procurement regulations should call for modifications of procurement procedures in repeated procurement where the same small group of bidders take part in ERAs and if there is any evidence of manipulation of results of ERAs by bidders.

Article 31. Conditions for use of the electronic reverse auctions [\[hyperlink**\]](#)**

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that would make the use of an ERA desirable and appropriate. They should guide the procuring entity in considering the market concerned before a procurement procedure commences, to identify the relative risks and benefits of an ERA, and should encourage the use of a common procurement vocabulary to identify the subject matter of the procurement by codes or by reference to general market-defined standards. They must highlight that ERAs are

most suitable for commonly used goods and services which generally involve a highly competitive, wide market, where the procuring entity can issue a detailed description or one referring to industry standards, and where the offers from bidders offer the same quality and technical characteristics. Those include office supplies, commodities, standard communication technology equipment, primary building products and simple services. A complicated evaluation process is not required; no (or limited) impact from post-acquisition costs is expected; and no services or added benefits after the initial contract is completed are anticipated. Types of procurement where non-quantifiable factors prevail over price and quantity considerations including the procurement of construction or consulting services (e.g. advisory services) and other quality-based procurement are not suitable for ERAs.

2. The procurement regulations may restrict — perhaps on a temporary basis and to the extent allowed by the procurement law — the use of ERAs to markets that are known to be competitive (e.g. where there is a sufficient number of bidders to ensure competition and to preserve the anonymity of bidders) or through qualitative restrictions such as limiting their use to the procurement of goods only, where costs structures may be easier to discern. They may include illustrative lists of items suitable for acquisition through ERAs or, alternatively, to list generic characteristics that render a particular item suitable or not suitable for acquisition through this procurement technique.

3. The procurement regulations may establish additional conditions for the use of ERAs permissible under the law, such as consolidating purchases to amortize the costs of setting up the system for holding ERAs, including those of third-party IT and service providers, and guidance on the concept of “price” criteria drawing on the provisions of article 11 and the commentary thereto [\[**hyperlinks**\]](#). In the latter context, the procurement regulations should explain that when non-price criteria are involved in the determination of the successful submission, such criteria must be quantifiable and capable of expression in monetary terms (e.g. figures, percentages): this provision overrides the caveat in article 11 that the expression in monetary terms should be made “where practicable”. While all criteria can in theory be expressed in such terms, as noted in the Introduction to Chapter I in the Guide, an optimal result will arise where the evaluation criteria are objectively and demonstrably capable of expression in such terms.

Article 53. Electronic reverse auction as a stand-alone method of procurement [\[hyperlink**\]](#)**

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that would necessitate the pre-auction ascertainment of qualifications of bidders or examination and/or evaluation of initial bids. For example, for the procurement of off-the-shelf subject matter, there is almost no risk that bids will turn out to be unresponsive and little risk of bidders being unqualified. Hence the need for pre-auction checks is correspondingly low. In such cases, a simple declaration from suppliers or contractors before the auction may be sufficient (for example, that they possess the required qualifications and they understand the nature of, and can provide, the subject matter of the procurement). In other cases, assessing responsiveness before the auction may be necessary (for example, when only those suppliers or contractors capable of delivering cars with a pre-determined maximum level of emissions are to be

admitted to the auction), and initial bids will therefore be required. In some such cases, the procuring entity may wish to rank suppliers or contractors submitting responsive initial bids before the auction (in the given example, suppliers or contractors whose initial bids pass the established threshold will be ranked on the basis of the emissions levels), so as to indicate their relative position and the extent of improvement that their bids may need during the auction in order to increase a chance to win the auction. In such cases, the auction must be preceded by an evaluation of the initial bids.

2. The procurement regulations should establish any requirements that must be included in the solicitation documents in addition to those listed in the article. Where those requirements are found in other provisions of law of the enacting State, the procurement regulations should refer to them.

3. As was highlighted in section IV above, the procurement regulations must specify the media and means of publication of the invitation to the auction, including internationally that will ensure effective access by suppliers and contractors located overseas.

4. With reference to article 53 (4), the procurement regulations should list for ease of reference all grounds for the rejection of initial bids, such as those under article 9 setting reasons for disqualification, article 10 that sets out responsiveness criteria, article 20 on the rejection of abnormally low submissions, and article 21 on the exclusion of a supplier or contractor on the ground of inducements, an unfair competitive advantage or conflicts of interest [\[**hyperlinks**\]](#).

Article 54. Electronic reverse auction as a phase preceding the award of the procurement contract [\[hyperlink**\]](#)**

The procurement regulations should list all instances when the ERA announced as the method of selecting the successful supplier or contractor at the outset of the procurement proceedings may be cancelled, such as when the number of suppliers or contractors participating in proceedings is insufficient to ensure effective competition (article 55 (2)) or when there is a risk of collusion, for example if the anonymity of bidders has been compromised at an earlier stage of the procurement proceedings (article 19 [\[**hyperlink**\]](#) allows the procuring entity to cancel the procurement proceedings and the risk of collusion could be invoked as a reason for cancelling the ERA and the entire procurement proceedings).

Article 55. Registration for the electronic reverse auction and the timing of the holding of the auction [\[hyperlink**\]](#)**

1. The procurement regulations are to provide an exhaustive list of circumstances that would justify the ERA to proceed if the number of suppliers or contractors registered for the auction is insufficient to ensure effective competition. The provisions of the article are not prescriptive in this respect: they give discretion to the procuring entity to decide on whether the auction in such circumstances should be cancelled. Since the decision not to cancel may be inconsistent with the general thrust of competition and avoiding collusion, it should be justified only in the truly exceptional cases where the procurement must continue despite the lack of effective competition.

2. With respect to ERAs used as a phase in other procurement methods or technique, the procurement regulations may provide for an option for the procuring entity to stipulate in the solicitation documents that the award the procurement contract may take place on the basis of the initial bids. This option may be considered as an alternative to cancellation of the procurement where the number of remaining participants in the procurement proceedings is insufficient to ensure effective competition in the ERA or where collusion may occur.

Article 56. Requirements during the electronic reverse auction [\[hyperlink**\]](#)**

1. The procurement regulations must prohibit disclosure of identity of bidders during and after the auction, including where the auction is terminated or suspended. Both the explicit and indirect disclosure in whatever form must be prohibited, and the procurement regulations must illustrate ways of indirect disclosure intended to be covered by this prohibition.

2. The procurement regulations must require that any operators of the auction system on behalf of the procuring entity must be bound by the rules for conducting the auction, in particular as regards non-disclosure by any means of the identity of bidders before, during and after the auction.

Article 57. Requirements after the electronic reverse auction [\[hyperlink**\]](#)**

1. The procurement regulations must guide the procuring entity as regards the options available under the article if the winner turns out to be unqualified or its bid unresponsive or rejected as abnormally low: either to cancel the procurement proceedings or award the procurement contract to the next winning bidder. The procuring entity should be required to assess the consequences of cancelling the ERA, in particular whether holding a second auction in the same procurement proceedings would be possible and the costs of an alternative procurement method. In particular, the anonymity of the bidders may have been compromised and any re-opening of competition may also be jeopardized. This risk, however, should not encourage the procuring entity always to opt for the next winning bid. The cancellation of the auction may be required for example where collusion between the winning bidder and the next winning bidder is suspected since this may lead to the acceptance of the bid with the abnormally high price.

2. The procurement regulations must require prompt action after the auction, in strict compliance with the applicable provisions of the Model Law, so as to ensure that the final outcome should be determined as soon as reasonably practicable. The steps described in the article should not be treated as an opportunity to undermine the automatic identification of the winning bid. The procurement regulations must therefore require the procuring entity to put on the record details of the procedures envisaged in the article if they have taken place and the decisions taken and reasons therefor.

IX. Subjects to be addressed in procurement regulations in the context of framework agreement procedures (article 32 and Chapter VII of the Model Law (Framework agreement procedures) **[hyperlinks**]**)**

General

1. The procurement regulations must clarify the nature of the framework agreement in the enacting State. Under the Model Law, it is not a procurement contract as defined in the Model Law, but the framework agreement may be an enforceable contract in the enacting State. The procurement regulations or other provisions of law of the enacting States will therefore need to address such issues as the enforceability of the agreement in terms of contract law. The procurement regulations must in particular clarify whether the Government is to be bound to use the framework agreement, and the extent to which suppliers' or contractors' submissions at the first stage may be binding under the law of the enacting State. In the case of an open framework agreement, the procurement regulations must make it clear that suppliers or contractors that join the agreement after its initial conclusion will need to be bound by its terms upon joining.
2. The procurement regulations must explain the link between the circumstances of the procurement and various decisions to be taken in connection with the use of framework agreement procedures, in particular whether such use is appropriate, the type of framework agreement to be concluded, the scope of the framework agreement, the number of suppliers or contractors parties, the role of a centralized purchasing body, if any, and so forth.
3. As regards the type of framework agreement to be concluded, the procurement regulations must explain how to choose among the three types of framework agreements identified above, given the different ways in which competition operates in each type. How narrowly the procurement need can and should be defined at the first stage will dictate the extent of competition that is possible and appropriate at the second stage. If precise specification of the procurement needs is possible and if they will not vary during the life of the framework agreement, a framework agreement without second-stage competition, in which the winning supplier(s) or contractor(s) for all or some items is or are identified at the first stage, will maximize competition at the first stage and should produce the best offers. However, this approach is inflexible and requires precise planning: rigid standardization may be difficult or inappropriate, especially in the context of centralized purchasing where the needs of individual purchasing entities may vary, where refinement of the requirements may be appropriate so needs are expressed with lesser precision at the first stage, and in uncertain markets (such as future emergency procurement). If the procuring entity's needs may not vary, but the market is dynamic or volatile, second-stage competition will be appropriate unless the volatility is addressed in the framework agreement (such as through a price adjustment mechanism). The greater the extent of second-stage competition, the more administratively complex and lengthy the second-stage competition will be, and the less predictable the first-stage offers will be of the final result; this can make effective budgeting more difficult. Where there will be extensive second-stage

competition, there may also be little benefit of engaging in rigorous competition at the first stage; assessing qualifications and responsiveness may be sufficient.

4. A related issue that the procurement regulations must address is the selection between a single-supplier or multi-supplier framework agreement. The administrative efficiencies of framework agreements tend to indicate that multiple-supplier framework agreements are more commonly appropriate, but the nature of the market concerned may indicate that a single-supplier framework agreement is beneficial (for example, where confidentiality or security of supply is an important consideration, or where there is only one supplier or contractor in the market). In addition, a single-supplier closed framework agreement has the potential to maximize aggregated purchase discounts given the likely extent of potential business for a supplier or contractor, particularly where the procuring entity's needs constitute a significant proportion of the entire market, and provided that there is sufficient certainty as to future purchase quantities (through binding commitments from the procuring entity, for example). This type of agreement can also enhance security of supply to the extent that the supplier or contractor concerned is likely to be able to fulfil the total need. Multi-supplier framework agreements, which are more common, are appropriate where it is not known at outset who will be the best supplier or contractor at the second stage, especially where the needs are expected to vary or to be refined at the second stage during the life of the framework agreement, and for volatile and dynamic markets. They also allow for centralized purchasing, and can also enhance security of supply where there are doubts about the capacity of a single supplier to meet all needs.

5. The procurement regulations should emphasize that good procurement planning is vital to set up an effective framework agreement: framework agreements are not alternatives to procurement planning. Effective planning is required for both stages of a framework agreement procedure. Without it, no correct type of the framework agreement can be selected, not effective framework agreement may be concluded and its effective operation ensured. The procurement regulations should emphasize that the agreement itself should be complete in recording all terms and conditions, the description of the subject matter of the procurement (including specifications), and the evaluation criteria, both to enhance participation and transparency, and because of the restrictions on changing the terms and conditions during the operation of the framework agreement.

6. The procurement regulations may call for measures to ensure that appropriate capacity-building is in place in order to allow for optimal decision-making, taking into account that the capacity required to operate framework agreements effectively can be higher than for some procurement methods and techniques envisaged in the Model Law, and training and other capacity-building measures will be key to ensuring successful and appropriate use.

7. The procurement regulations should also address such issues as monitoring the operation of framework agreements to assess their effectiveness in the context of each procurement as well as the procurement market as a whole (whether the anticipated benefits in terms of administrative efficiency and value for money in fact materialize), the effect of the framework agreement on competition in the market concerned, particularly where there is a risk of a monopolistic or oligopolistic market, and compliance with safeguards built in the Model Law to ensure transparency, competition and objectivity in their operation. The

performance of individual procuring entities using the framework agreement and the performance of the framework agreement in terms of prices as compared with market prices for single procurements are also to be monitored. Increased prices or reductions in the quality of offers may arise from inappropriate or poor use of the framework agreement by one or two procuring entities.

8. Where the enacting State requires or encourages (or intends to encourage) that all framework agreements be operated electronically, the procurement regulations may require that all of them be maintained in a central location, which further increases transparency and efficiency in their operation and facilitates monitoring.

Article 32. Conditions for use of a framework agreement procedure

[hyperlink**]**

1. The procurement regulations should assist the procuring entity in the assessment of the circumstances that would make the use of a framework agreement procedure desirable and appropriate. They should set out measures that will enhance objectivity in taking decisions on the use of a framework agreement procedure and its type, and so facilitate the monitoring of whether decisions are reasonable in the circumstances of a given framework agreement.

2. The first circumstance that would make the use of a framework agreement procedure appropriate arises where the procuring entity's need is "expected" to arise on an "indefinite or repeated basis". The procurement regulations should explain that these latter conditions need not be cumulative, though in practice they will commonly overlap. The second circumstance arises where the need for the subject matter of the procurement "may arise on an urgent basis". The reference to an indefinite need, meaning that the time, quantity or even the need for the subject matter itself is or are not certain, can allow the framework agreement to be used to ensure security of supply, and in anticipation of repeat procurements. The regulations should also address the term "expectation", and how to assess in an objective manner the extent of likelihood of the anticipated need. The administrative costs of the two-stage procedure will be amortized over a greater number of purchases; i.e. the more the framework agreement is used in the case of repeat procedures. For indefinite purchases, those costs must be set against the likelihood of the need arising and the security that the framework agreement offers (for example, setting prices and other conditions in advance).

3. The procurement regulations may illustrate examples of products for which the use of framework agreement procedures could be considered: commodity-type purchases, such as stationery, spare parts, information technology supplies and maintenance, where the market may be highly competitive and where there will normally be regular or repeat purchases for which quantities may vary. They are also suitable for the purchase of items from more than one source, such as electricity, and for that of items for which the need is expected to arise in the future on an urgent or emergency basis, such as medicines (where a significant objective is to avoid the excessively high prices and poor quality that may result from the use of single-source procurement in urgent and emergency situations). These types of procurement may require security of supply, as may also be the case for specialized items requiring a dedicated production line, for which framework agreements are also suitable tools.

4. The procurement regulations may illustrate examples of procurement for which the use of framework agreement procedures should not be considered: complex procurement for which the terms and conditions (including specifications) vary for each purchase or may be expected to change before the procurement contract is awarded, such as procurement involving large investment or capital contracts, highly technical or specialized items, and more complex services, would not generally be appropriate for procurement through a framework agreement procedure.

Award of and requirements for a closed framework agreement (articles 58 and 59 [hyperlinks**])**

Award of the framework agreement

1. The procurement regulations are to provide guidance to the procuring entity in selection of a method of procurement for the award of a closed framework agreement taking into account the provisions of article 28 of the Model Law [**hyperlink**]. The importance of rigorous competition at the first stage of closed framework agreements means that the procurement regulations must refer to open tendering as default method for the award of a closed framework agreement. They should provide clear guidance as regards the application of exceptions to open tendering and provide for a mechanism to carefully scrutinize the application of those exceptions, particularly in the light of the competition risks in framework agreements procedures and types of purchases for which framework agreements are appropriate. The procurement regulations should provide examples of when procurement methods alternative to open tendering may be appropriate: for example, in the use of framework agreements for the swift and cost-effective procurement of low-cost, repeated and urgent items, such as maintenance or cleaning services (for which open tendering procurements may not be cost-effective), and specialized items such as drugs, energy supplies and textbooks, for which the procedure can protect sources of supply in limited markets. The use of competitive negotiations or single-source procurement may be appropriate for the award of a closed framework agreement in situations of urgency. There are examples in practice of effective procurement of complex subject matter using framework agreements combined with dialogue-based request-for-proposals methods, such as for the procurement of satellite equipment and specialized communications devices for law enforcement agencies.

2. The procurement regulations may need to explain the possible derogations from the procedures for the procurement method chosen for the award of a framework agreement to reflect specifics of a framework agreement procedure. The extent of the derogations will vary from case to case depending on the type of a closed framework agreement to be concluded (e.g. a closed framework agreement with and without second-stage competition and with one or more supplier or contractor parties). The procurement regulations may therefore provide for an illustrative rather than exhaustive list of expected derogations.

3. In the context of a multi-supplier closed framework agreement, the procurement regulations must guide the procuring entity on whether setting either a minimum or a maximum number of suppliers or contractors parties to a framework agreement or both would be appropriate and, if so, what to consider in doing so. For example, a minimum number may be required to ensure security of supply; where

second-stage competition is envisaged, there need to be sufficient suppliers or contractors to ensure effective competition, and the terms of solicitation may require a minimum number, or a sufficient number to ensure such effective competition. A maximum number may be appropriate, for example, where the procuring entity envisages that there will be more qualified suppliers or contractors presenting responsive submissions than can be accommodated. This situation may reflect the administrative capacity of the procuring entity, notably in that more participants may defeat the administrative efficiency of the procedure. An alternative reason for limiting the number of participants is to ensure that each has a realistic chance of being awarded a contract under the framework agreement, and to encourage it to price its offer and to offer the best possible quality accordingly. The procurement regulations must address situations where the stated minimum may not be achieved by requiring the procuring entity to specify in the solicitation documents the steps that it will then take, which might involve the cancellation of the procurement or the conclusion of the framework agreement with a lower number of suppliers or contractors.

4. The award of the closed framework agreement may be made subject to external approval; where framework agreements are being used across government ministries and agencies, ex ante approval mechanisms of this type may be considered appropriate. If so, the procurement regulations must require such approval and provide a mechanism for it. Alternatively, the enacting State may include the requirement for an ex ante approval in the procurement law itself and call for the procurement regulations to elaborate on the mechanism of its operation.

5. The procurement regulations must guide the procuring entity as regards the need in some cases to conclude separate agreements with individual suppliers or contractors that are parties to the framework agreement. The procurement regulations must set out the default rule that each supplier or contractor should be subject to the same terms and conditions of the framework agreement. Exceptions to this rule may allow only minor variations that concern only those provisions that justify the conclusion of separate agreements. The procurement regulations should illustrate possible justifications for concluding separate agreements. An example may be the need to execute separate agreements to protect intangible or intellectual property rights or where different licensing terms need to be accommodated or where suppliers or contractors have presented submissions for only part of the procurement. The procurement regulations must require putting on the record reasons for concluding separate agreements and variations made in each of the agreements concluded separately.

Duration of the agreement

6. The procurement regulations are to set out the maximum duration of a closed framework agreement. Practical experience in those jurisdictions that operate closed framework agreements indicates that the potential benefits of the technique are generally likely to arise where they are sufficiently long-lasting to enable a series of procurements to be made, such as a period of 3-5 years. Thereafter, greater anti-competitive potential may arise, and the terms and conditions of the closed framework agreement may no longer reflect current market conditions.

7. The procurement regulations must explain that different duration of framework agreement within the established maximum might be appropriate depending on the

circumstances of the procurement, in particular items covered, the market involved and needs of the procuring entity. As some procurement markets may change more rapidly, especially where technological developments are likely, for example in IT and telecommunications procurement, or the procuring entity's needs may not remain the same for a sustained period, the appropriate period for each procurement may be significantly shorter than the maximum established in the procurement regulations. For some highly changeable items, the appropriate period may be measured in months. For more stable items, markets and needs, a framework agreement may be long-lasting to enable a series of procurements to be made to derive most benefits of the technique.

8. The procurement regulations should therefore guide the procuring entity in selecting the maximum duration of a particular framework agreement within the maximum established in the procurement regulations or alternatively they may themselves establish different maximums for different types of procurement. The guidance provided in the procurement regulations should also address any external limitations on the duration of framework agreements (such as State budgeting requirements).

9. They should also explain that the maximum duration set out by the procuring entity for a particular framework agreement within the maximum established in the procurement regulations includes all possible extensions to the initially established duration for the framework agreement concerned. Any suspension of the operation of a framework agreement resulting from challenge proceedings would extend the framework agreement for the period of suspension, but the overall duration of the framework agreement remains unchanged.

10. If enacting States wish to provide for extensions of the duration of the framework agreement in exceptional circumstances, the procurement regulations must allow for that, specify such limited circumstances and ensure that any extensions are of short duration and limited scope. For example, new procurements may not be justified in cases of a natural disaster or restricted sources of supply, when the public may be able to benefit from the terms and conditions of the existing framework agreement.

11. The procurement regulations must establish internal controls in order to avoid abuse in extensions and exceptions to the initially established duration, in particular as regards the award of a lengthy or sizeable procurement contract towards the end of the validity of the framework agreement.

Estimates

12. The procurement regulations should guide the procuring entity when the contract price should or should not be established at the first stage. For example, where the subject matter is subject to price or currency fluctuations, or the combination of service-providers may vary, it may be counter-productive to try to set a contract price at the outset. A common criticism of closed framework agreements is that there is a tendency towards contract prices at hourly rates that are generally relatively expensive. The procurement regulations should encourage instead task-based or project-based pricing, where appropriate.

13. The terms of the framework agreement may limit commercial flexibility if guaranteed minimum quantities are set out as one of its terms, or if the framework

agreement operates as an exclusive purchasing agreement, though this flexibility should be set against the better pricing from suppliers or contractors. The procurement regulations should call therefore for: (a) using estimated (non-binding) quantities in the solicitation documents so that the framework agreement can facilitate realistic offers based on a clear understanding of the extent of the procuring entity's needs, and so that the procuring entity will be able to purchase outside the framework agreement if market conditions change; and (b) using binding quantities, which could be expressed as minima or maxima. There may be markets in which one solution appears to be better than the other; the monitoring mechanism can inform appropriate guidance, or can use examples from practice where the choice needs to be made by the procuring entity.

14. The procurement regulations must explain that maximum or minimum aggregate values for the framework agreement may be known; if so, they should be disclosed in the agreement itself, failing which an estimate should be set out. An alternative approach is, where there are multiple procuring entities that will use the framework agreement, to allow each procuring entity to set different maxima depending on the nature and potential obsolescence of the items to be procured; in such cases, the relevant values for each procuring entity should be included. The maximum values or annual values may be limited by budgetary procedures in individual States; if so, the procurement regulations should set out other sources of regulation in detail.

15. The procurement regulations must require setting out in the framework agreement all estimates to the extent they are known, recording the limitations on estimates, or a statement that accurate estimates are not possible (for example, where emergency procurement is concerned); providing the best available estimates, where firm commitments are not possible, will encourage participation.

Permissible variations to the framework agreement during its operation

16. In the context of articles 59 (1)(d)(iii) and 63 [\[**hyperlinks**\]](#), the procurement regulations must prohibit setting out in the framework agreement the range of permissible variation to evaluation criteria and their relative weight so wide as to make the safeguards contained in article 63 of the Model Law meaningless in practice. Those safeguards establish limits to the permissible range of changes to terms and conditions of the procurement during the operation of a framework agreement so that to ensure that no change to the description of the subject matter of the procurement occur and other changes are made in a transparent and predictable manner.

17. The procurement regulations should establish mechanisms for oversight of the application of those safeguards. Flexibility in varying evaluation criteria and their relative weight within the parameters and range set out in the framework agreement should not become a substitute for adequate procurement planning, distort purchasing decisions in favour of administrative ease, encourage the use of broad terms of reference that are not based on a careful identification of needs, and facilitate the abusive direction of procurement contracts to favoured suppliers or contractors. These latter points may be of increased significance where procurement is outsourced to a fee-earning centralized purchasing agency, which may use framework agreements to generate income. Oversight processes may assist in avoiding the use of relatively flexible evaluation criteria in framework agreements

to hide the use of inappropriate criteria based on agreements or connections between procuring entities and suppliers or contractors, and to detect abuse in pre-determining the second-stage results that would negate first-stage competition, the risks of which are elevated with recurrent purchases. Transparency in the application of the flexibility, and the use of a pre-determined and pre-disclosed range both facilitates such oversight.

Operation and monitoring of the closed framework agreement

18. The procurement regulations should explain that the basis for the award of procurement contracts under the framework agreement (the lowest-priced or most advantageous submission) will normally, but need not necessarily, be the same as that for the first stage; for example, the procuring entity may decide that among the highest-ranked suppliers or contractors at the first stage (chosen using the most advantageous submission), the lowest-priced responsive submission to the precise terms of the second-stage invitation to participate will be appropriate. Where variations and different options are envisaged, the procurement regulations must call for setting them all out in the framework agreement.

19. Where the procuring entity is not required to operate a closed framework agreement online, the procurement regulations should emphasize the advantages of an online procedure in terms of increased efficiency and transparency (for example, the terms and conditions can be publicized using a hyperlink; a paper-based invitation to the second-stage competition could be unwieldy and user-unfriendly). The procurement regulations should require the procuring entity to set out in the framework agreement all information specific to the online operation of the framework agreement, such as the requirements for connection to a website, particular software, technical features and, if relevant, capacity.

20. The procurement regulations should explain how to derive the major benefit and avoid the pitfalls of framework agreements. They should in particular address practical realities with the use of framework agreements reported in many jurisdictions that prices tend to remain fixed rather than varying with the market and procuring entities tend to procure through an existing framework agreement even though its terms and conditions do not quite meet their needs or reflect the current market conditions, to avoid having to commence new procurement proceedings. As a result, procuring entities may fail to assess price and quality sufficiently when placing a particular purchase order. They may overemphasize specifications over price.

21. To address these pitfalls, the procurement regulations should require procuring entities to assess on a periodic basis during the currency of a closed framework agreement whether a framework agreement continues to offer value for money and continues to allow access to the best that the market can offer at that time (e.g. whether its prices, and terms and conditions remain current and competitive). They should also consider the totality of the purchases under the framework agreement to assess whether their benefits exceed their costs. Ways of assessing whether the technical solution or product proposed remains the best that the market offers may include market research, publicizing the scope of the framework agreement and so forth. Where the framework agreement no longer offers good commercial terms to the procuring entity, the procurement regulations should require holding a new procurement procedure (classical or a new framework

agreement procedure). The procurement regulations should specifically discourage the award of a lengthy or sizeable procurement contract towards the end of the validity of the framework agreement, which increases risks of purchasing outdated or excessively priced items.

22. In multi-supplier framework agreements, each supplier or contractor party will wish to know the extent of its commitment both at the outset and periodically during operation of the framework agreement (such as after a purchase is made under the framework agreement). The procurement regulations should therefore require the procuring entities to inform periodically or upon request the suppliers or contractors about the extent of their commitments.

**Establishment of and requirements for an open framework agreement
(articles 60 and 61 [\[**hyperlinks**\]](#))**

1. The procurement regulations may recommend that the invitation to become a party to the open framework agreement should be made permanently available on the website at which the framework agreement will be maintained. They could also require that all information related to the operation of the open framework agreement must continuously be made available on the website. The procurement regulations may list information that should at a minimum appear there, such as:

(a) The names and addresses of all procuring entities that can use the framework agreement (where the framework agreement allows for several potential purchasers at the second stage);

(b) The agency responsible for establishing and maintaining the framework agreement where more than one purchaser are involved;

(c) Prerogatives of the central purchasing agency if any (e.g. whether it is authorized to undertake the procurements concerned in its own name (as a principal), without therefore needing to publish details of its own client entities; if the agency operates as an agent, however, these details must then be published);

(d) A maximum number of suppliers or contractors parties to the framework agreement, if any, and the procedure and criteria for the selection of that maximum. The procurement regulations must emphasize that establishing the maximum may be justified because of capacity limitations in its communications system, not on any other ground. They must specify techniques that can be used by the procuring entity to achieve the selection of the maximum number in a non-discriminatory manner, such as “first-come, first-served”, the drawing of lots, rotation or other random choice in a commodity-type market, and alert suppliers or contractors about the possibility of a challenge;

(e) The duration of the framework agreement. The procurement regulations may require in this context that the duration of an open framework agreement should not be excessive, and should be assessed by reference to the type of subject matter being procured, in order to allow for new technologies and solutions, and to avoid obsolescence. In addition, suppliers or contractors may be reluctant to participate in an agreement of unlimited duration;

(f) Requirements that must be fulfilled by suppliers or contractors in order to join the agreement;

- (g) All other main terms and conditions of the framework agreement;
- (h) The list of suppliers or contractors parties to the framework agreement (the procurement regulations may explain that posting the list in such a way could be effective implementation of the requirement on the public notice of the award of the framework agreement, contained in article 23 (1) of the Model Law);
- (i) The names of suppliers or contractors to whom procurement contracts were awarded under the framework agreement and prices of the awarded contracts (the procurement regulations may explain that posting this information could be effective implementation of the requirement on the public notice of the award of procurement contracts awarded under the framework agreement, contained in article 23 of the Model Law [\[**hyperlink**\]](#));
- (j) Announcements and all terms and conditions of second-stage competitions;
- (k) A copy of an invitation to the second-stage competition.

2. In the context of paragraph (5) of article 60, the procurement regulations must emphasize the importance of swift examination of applications to join the open framework agreement. The interaction between final submission deadlines, the time needed to assess indicative submissions and the frequency and size of second-stage competitions should be carefully assessed when operating the open framework agreement. The procurement regulations may emphasize the utility of relatively frequent and reasonable-sized second-stage competitions to take advantage of a competitive and dynamic market.

Article 62. Second stage of a framework agreement procedure [\[hyperlink**\]](#)**

1. The procurement regulations must explain how the option to issue an invitation to the second-stage competition to only those parties of the framework agreement then capable of meeting the needs of the procuring entity in the subject matter of the procurement will operate in practice without jeopardizing the principles of transparency and fair and equal treatment of suppliers and contractors. They need to emphasize that the purpose of the provision is to enhance efficiency, not to limit competition. The procurement regulations must set out the default rule that all suppliers or contractors parties to the agreement must be presumed to be capable of meeting the needs of the procuring entity in the subject matter of the procurement unless the framework agreement or initial or indicative submissions of some suppliers or contractors provide to the contrary. The procurement regulations should therefore require the procuring entity to interpret the term “then capable of meeting the needs” in a very narrow sense, in the light of the terms and conditions of the framework agreement and of the initial or indicative submissions. They may provide examples when issuing an invitation to a limited group of suppliers or contractors then capable of meeting the needs of the procuring entity in the subject matter of the procurement will be justified. For example, the framework agreement may permit suppliers or contractors to supply up to certain quantities (at each second-stage competition or generally) or initial or indicative submissions may state that certain suppliers or contractors cannot fulfil particular combinations or certain quality requirements.

2. The important safeguard against the abuse or misuse of this option, for example using it for the award of contracts to favoured suppliers or contractors, is the requirement on the procuring entity to give a notice of the second-stage competition to all parties to the framework agreement at the same time when the invitation to the second-stage competition is issued. Giving such notice in this manner will allow any excluded supplier or contractor to challenge the procuring entity's decision not to invite that supplier or contractor to the second-stage competition. The procurement regulations may provide for the minimum period of the notice before the second-stage competition may commence.
3. The procurement regulations must emphasize the negative impact of possible challenges on the efficiency that the framework agreement procedures try to achieve: exceptions to the default rule to invite all suppliers or contractors to the second-stage competition must be carefully considered and used when truly justified for the procuring entity to avoid being confronted by many aggrieved suppliers or contractors that challenge the procuring entity's assessment of their capability to meet the procuring entity's needs at a particular time. The procurement regulations must require the procuring entity to include in the record of the procurement an explanation of the exclusion of any suppliers or contractors parties to the agreement from the second-stage competition.
4. The procurement regulations should regulate the manner of issuing an invitation and notice of second-stage competition: e.g. that they must be in writing, issued simultaneously and automatically by the system to each supplier or contractor concerned. Although there is no requirement to issue a general notice of the second-stage competition, placing a notice on the publicly accessible page of the website where the framework agreement is maintained would bring such result and the procurement regulations may require the procuring entities to do so.
5. Paragraph (4) (b) regulates the content of the invitation to the second-stage competition. The procurement regulations must specify any other requirements relating to the preparation and presentation of submissions and to other aspects of the second-stage competition not listed in paragraph (4) (b) of the article that the procuring entity must specify in the invitation to present submissions at the second-stage competition. Where such requirements are found in other provisions of law of the enacting State, the procurement regulations should refer to them. The procurement regulations must also clarify whether suppliers or contractors may vary their first-stage (initial) submissions at the second stage with a result less favourable to the procuring entity (e.g. by increasing prices if market conditions change).
6. As noted in the context of the closed framework agreements above, the procurement regulations are to explain the operation of the permissible range of refinements to the terms and conditions of the procurement, including the relative weights of the evaluation criteria and subcriteria, through second-stage competition. The flexibility to engage in such refinement is limited by application of article 63 [\[**hyperlink**\]](#) which provides that there may be no change to the description of the subject matter of the procurement, and that other changes may be made only to the extent permitted in the framework agreement. Where modifications to the products, or technical substitutions, may be necessary, they should be foreshadowed in the framework agreement itself, which should also express needs on a sufficiently flexible and functional basis (within the parameters of article 10 [\[**hyperlink**\]](#)) to allow for such modifications. Other terms and conditions that may be refined

include combinations of components (within the overall description), warranties, delivery times and so forth. The balance of allowing sufficient flexibility to permit the maximization of value for money and the need for sufficient transparency and limitations to avoid abuse should form the basis of guidance to procuring entities in this aspect of the use of framework agreements.

7. With reference to paragraph (4) (b) (iv), the procurement regulations must emphasize the importance of setting out a suitable deadline for presenting submissions, in order to preserve the efficiency without jeopardizing legitimate interests of suppliers or contractors parties to the framework agreement: in the context of open framework agreements, for example, the deadline may be expressed in hours or a day or so. Otherwise, the administrative efficiency of the procedure will be compromised, and procuring entities will not avail themselves of the technique. The period of time between the issue of the invitation to present second-stage submissions and the deadline for presenting them should be determined by reference to what sufficient time to prepare second-stage submissions will be in the circumstances (the simpler the subject matter being procured, the shorter the possible duration). Other considerations include how to provide a minimum period that will allow a challenge to the terms of solicitation. The procurement regulations may explain that the time requirement will be in any event qualified by the reasonable needs of the procuring entity, as explicitly stipulated in article 14 (2) of the Model Law, which may in limited circumstances prevail over the other considerations, for example, in cases of extreme urgency following catastrophic events.

8. The procurement regulations must explain the operation of a standstill period in the context of various types of framework agreements, noting that shorter duration of a standstill period will be justified in the context of open framework agreement in the light of simple standardized items intended to be procured through such systems. The procurement regulations should explain reasons for not requiring a standstill period in the context of award of procurement contract under closed framework agreements without second-stage competition.

Article 63. Changes during the operation of a framework agreement [**hyperlink**]

As noted in the context of closed framework agreements and article 62 above, the procurement regulations are to explain limits on changes to the terms and conditions of the procurement during the operation of a framework agreement. The procurement regulations would also need to explain when framing the description of the subject matter of the procurement in a functional or output-based way, with minimum technical requirements where appropriate, would be appropriate so as to allow for subject-matter modifications or technical substitutions. Whether this approach is appropriate will depend on the nature of the procurement itself. There is a risk of abuse in both allowing broad and generic specifications, and in permitting changes; the framework agreement may be used for administrative convenience beyond its intended scope, allowing non-transparent and non-competitive awards of procurement contracts. Furthermore, this lack of transparency and competition will also have the potential significantly to compromise value for money in those awards. The procurement regulations should therefore address in some detail these risks and appropriate measures to mitigate them.

X. Subjects to be addressed in procurement regulations in the context of Chapter VIII of the Model Law (Challenge proceedings) [\[hyperlink**\]](#), in the order of the articles**

General

1. The provisions of the Chapter are intended to be supplemented by regulations and detailed rules of procedure to ensure that the challenge mechanisms operate effectively, expeditiously and in a cost-effective manner. Depending on legal traditions of the enacting State, such supplementing provisions will be included in the procurement regulations or regulations in other branches of law.
2. In addition, other branches of law and other bodies in the enacting State may have an impact on the challenge mechanism envisaged under Chapter VIII if for example a challenge is triggered by allegations of fraud or corruption, or breaches of competition law. In such cases, the procurement or other applicable regulations should require that the information about such allegations be made publicly available, to ensure that relevant authorities are alerted and so that appropriate action is taken.
3. The procurement or other applicable regulations should elaborate on all issues having implications on achieving the appropriate balance between the interests of suppliers or contractors and the needs of the procuring entity, such as the group of persons entitled to challenge the acts or decisions of the procuring entity (as discussed in the context of article 64 below) and on considerations relating to when suspension may or may not be appropriate and when the prohibition of article 65 should be lifted, such as in case of natural disasters, emergencies, and situations where disproportionate harm might otherwise be caused to the procuring entity or other interested parties. In this context, the procurement regulations must explain in detail the interaction of all relevant time limits in connection with challenge proceedings (such as duration of a standstill period, submission deadlines, the period in the end of which the prohibition covered by article 65 would lapse, the duration of suspension and deadlines for taking decisions on applications and for serving notices).
4. The procurement or other applicable regulations may discourage commencing parallel proceedings and establish a clear sequencing of applications to administrative and judicial review bodies existing in the enacting State. They may contain provisions addressing the sequence of applications, if desired. Sequencing may be different depending on legal traditions of enacting States. Some States are more flexible by not requiring the supplier or contractor to exhaust the challenge mechanism at the procuring entity before filing an application before the independent body or the court. Equally they may allow the aggrieved supplier or contractor not satisfied with the decision taken by the procuring entity in the challenge proceedings to appeal that decision in the independent body or the court. Where the application was filed directly to the independent body, the appeal of the decision of the independent body may be filed to any appeal authority within that body, if such option exists, or to the court. Some States may however require exhausting some or all measures before filing application to the court. The procurement or other applicable regulations may require the aggrieved supplier or

contractor to file an application for reconsideration first before the procuring entity and appeal any decision it wishes to appeal from that challenge proceedings within the independent body structure before applying to the court. Alternatively, they may allow to bypass the procuring entity but require to exhaust all remedies within the independent body structure before applying to the court. In this respect, the procurement regulations must be compliant with the international obligations of the enacting State, including under the United Nations Convention against Corruption (New York, 31 October 2003)³² and the WTO GPA, which may require them to ensure effective appeal to an independent body and that decisions of any review body that is not a court be open to judicial review.

Article 64. Right to challenge and appeal [\[hyperlink**\]](#)**

1. The procurement or other applicable regulations must provide or call for issuance of detailed guidance on operation of the provisions of article 64 consistent with the legal and administrative structure of the enacting State. In particular, they must specify the group of persons having the right to challenge decisions and actions taken by the procuring entity in the procurement proceedings. Unlike other systems, the Model Law gives this right only to suppliers and contractors (the term includes potential suppliers or contractors covered by the definition of article 2 [\[**hyperlink**\]](#), such as those excluded through pre-qualification or pre-selection), and not to members of the general public or subcontractors. This is because the right is based on a supplier's or contractor's claim that it has sustained loss or injury from non-compliance by the procuring entity with the procurement law. These limitations are designed to ensure that challenges relate to the decisions or actions of the procuring entity in a particular procurement procedure, and to avoid an excessive degree of disruption to the procurement process through challenges that are based on policy or speculative issues, or based on nominal breaches, and also reflecting that the challenge mechanism is not the only oversight mechanism available.
2. The procurement or other applicable regulations must in addition address the ability of a supplier or contractor to present a challenge and of various State bodies to pursue challenge applications, with reference to other provisions of law of the enacting State, such as those setting out the requirements under domestic law that a supplier or contractor must satisfy in order to be able to proceed with a challenge or obtain a remedy.
3. A challenge filed with the court — often termed a judicial review — is outside the scope of regulation by the procurement legal framework but has implications on it. It would be appropriate therefore for the procurement or other applicable regulations to refer to other provisions of law of the enacting State that set out the relevant authority and court procedures, so that both the procuring entities and suppliers and contractor has the complete picture as regards available remedies. In particular, this applies to the appeal mechanism, which under the Model Law is envisaged only through court proceedings and following the court procedures concerned. The procurement or other applicable regulations should provide for the

³² United Nations, *Treaty Series*, vol. 2349. The Convention was adopted by the United Nations General Assembly by its resolution 58/4. In accordance with article 68 (1) of the Convention, the Convention entered into force on 14 December 2005. The text of the Convention is also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (accessed January 2011).

guidance to users of the procurement system on whether the appeal exists in courts or elsewhere in the enacting States and how it operates.

Article 65. Effect of a challenge [\[hyperlink**\]](#)**

1. The procurement or other applicable regulations should explain to procuring entities the operation of the prohibition covered by the article, in particular differences between the prohibition covered by article 65 and suspension that may be applied by the procuring entity or ordered by an independent body, court or other competent authority. Although article 65 prohibits the entry into force of the procurement contract until the challenge or appeal has been disposed of, a suspension of the procurement proceedings may also be necessary. Suspension of the procurement proceedings is a broader notion than the prohibition under article 65: it stops all actions in those proceedings.

2. The procurement or other applicable regulations should explain what is intended to be covered by the term “any step to bring a procurement contract (or framework agreement) into force” and that the prohibition is not absolute (urgent public interest considerations may be invoked as the ground for lifting it). “Any step to bring a procurement contract (or framework agreement) into force” would encompass for example the dispatch of the notice of acceptance to successful supplier or contractor, or where this is envisaged, any steps towards signing a written procurement contract or receiving approval of another body for entry into force of the procurement contract (or framework agreement).

3. The procurement or other applicable regulations must explain the term the “participants in the challenge proceedings” as compared to “participants in the procurement proceedings”. The former term covers first the procuring entity and the supplier(s) or contractor(s) presenting the challenge (and, where relevant, any governmental authority whose interests are or could be affected by the application, such as an approving authority). They are generally a narrower group than the participants in the procurement proceedings, but under the right conferred by article 68 [\[**hyperlink**\]](#) more suppliers or contractors may seek to join the challenge proceedings, or to launch their own challenge, where they assert loss or damage arising from the same circumstances. In this context, the “participants in challenge proceedings” can include a varying pool of participants, depending on the timing of the challenge proceedings and subject of the challenge. Any supplier or contractor participating in the procurement proceedings to which the application relates can join the challenge proceedings. The “participants in challenge proceedings” can include other governmental authorities. In this regard, the term “governmental authority” means any entity that may fall within the definition of the procuring entity under article 2 [\[**hyperlink**\]](#), including entities that are entitled to operate and/or use a framework agreement, subject to the requirement in article 68 (1) for those entities to have an interest in the challenge proceedings at the relevant time. In this regard, it should be noted that a party to a framework agreement whose interests would or could be affected by the challenge proceedings is most probably the lead purchasing entity rather than other entities that became parties to the framework agreement at the outset of the procurement proceedings. The term would also include any approving authority in the context of the procurement concerned (see for example articles 22 (7) and 30 (2) and (5) (e) [\[**hyperlinks**\]](#) where the role of the approving authority is envisaged).

4. The procurement or other applicable regulations must clarify whether an independent body may take a decision on lifting the prohibition without a request from a procuring entity. This option may be appropriate in systems that operate on an inquisitorial, rather than an adversarial, basis, but in other States, it may be less so.

Article 66. Application for reconsideration before the procuring entity
[**hyperlink**]

1. The procurement or other applicable regulations may contain measures aimed at promoting the early resolution of disputes by encouraging the use of the optional challenge mechanism envisaged by this article. The procurement or other applicable regulations may also call for the wide dissemination and explanation to the public of the benefits of the reconsideration mechanism before the procuring entity and its manner of operation, so that effective use can be made of it. In addition, they should establish monitoring and oversight mechanisms to oversee the response to applications submitted, so as to ensure that they are treated seriously and the potential benefits are obtained.

2. The procurement or other applicable regulations are to elaborate on differences between the debriefing discussed in the context of article 22 above and a formal request for reconsideration before the procuring entity. In order to avoid confusion, they should highlight the key differences in terms of the objectives, procedures and possible outcomes of both procedures.

3. The procurement or other applicable regulations are to emphasize that filing the application for reconsideration to the procuring entity is not available where the procurement contract has entered into force; after the contract formation period, the challenge will fall instead within the purview of independent or judicial review bodies — that is, the independent body or the court. They should also explain that, where proceedings before an independent body or court are commenced, the competence of the procuring entity to entertain the application ceases. The procuring entity may nevertheless be able to continue with corrective action in the procurement proceedings concerned, provided that such action does not contravene any order of the independent body or court or other provisions of domestic law. Where such an application to an independent body or court is limited in scope, the precise implications of that application for the pre-existing application before the procuring entity will be a matter of domestic law and the procurement regulations must contain appropriate cross-references in this regard.

4. In connection with the deadlines for submitting applications for reconsideration, the procurement or other applicable regulations should explain:

(a) The meaning of the “terms of solicitation, pre-qualification or pre-selection” as encompassing all issues arising from the procurement proceedings before the deadline for presenting applications to pre-qualify or applications for pre-selection or submissions, such as the selection of a method of procurement or a method of solicitation where the choice between open and direct solicitation exists, and the limitation of participation in the procurement proceedings in accordance with article 8 [**hyperlink**]. It thus excludes issues arising from pre-qualification or pre-selection, which are covered by the second part of paragraph (2) (a) of the

article, or from examination and evaluation of submissions, which are covered by paragraph (2) (b) of the article;

(b) The term “prior to” the submission deadline in the context of paragraph (2) (a) and may establish the absolute maximum when the applications may be filed to prevent highly disruptive (and perhaps vexatious) challenges being filed immediately before the submission deadline. The aim should be to encourage filing any challenges to the terms of solicitation, pre-qualification or pre-selection and to the decisions taken by the procuring entity in the pre-qualification or pre-selection proceedings as early as is practicable;

(c) Which applications would be considered as filed out of time and must be dismissed by the procuring entity. For example, where a standstill period has been applied and approval of another authority is required for the entry into force of the procurement contract (or framework agreement), a challenge initiated after the expiry of the standstill period but before approval is granted is out of time; and

(d) That the alternative deadline provided for in paragraph (2) (b) is intended for all situations when the standstill period was not applied (e.g. because the legitimate exception was invoked or for illegal grounds).

5. The procurement or other applicable regulations may provide or call for issuance of procedural rules that would be applicable to the applications for reconsideration proceedings. Those rules may, inter alia, address the following issues:

(a) Supporting evidence to be presented by the applicant to demonstrate why a reconsideration or corrective action is the appropriate course. How that may be done will vary from case to case and preserving flexibility in this regard is necessary. The default rule should however be that the application for reconsideration should be accompanied by all available evidence; filing any supporting evidence later may defeat the aim of requiring prompt action on the application by the procuring entity;

(b) Time limits for serving prompt notices to all concerned and manner and means of doing so. The aim is to ensure that all interested persons, including participants in the procurement proceedings (whose contact details may or may not be known to the procuring entity), are timely informed that the application has been filed. In the electronic environment, for example, the most effective manner, means and place for serving notices is the website where the initial notice of the procurement was published, and the procurement regulations should encourage or require the procuring entity to do so;

(c) Sequence of issues to be considered and decisions to be taken by the procuring entity (whether the application has been filed within the prescribed time limits; whether or not the applicant has standing to file its application, whether the application is based on an obviously erroneous understanding of the facts or applicable law and regulations; or whether the application is frivolous or vexatious, whether the nature of the challenge and its timing, as well as the facts and circumstances of the procurement at issue justify suspending the proceedings and if so, for how long; which corrective measures are to take and so forth);

(d) The form, manner and place of recording all decisions by the procuring entity taken in the application-for-reconsideration proceedings and their minimum

content (e.g. that the decision must be in writing, state action(s) taken and include reasons, both to enhance understanding and thereby assist in the prevention of further disputes, and to facilitate any further challenge or appeal, and must become part of the documentary record of the procurement proceedings). In this context it should be noted that, although in some systems the silence can be deemed to be a rejection of an application, the Model Law provisions require a written decision on rejection. The procurement or other applicable regulations must therefore clarify the effect of silence by the procuring entity to an application within the periods allocated by law for taking actions and decisions on the application (including on serving notices under paragraph (3) of the article), in particular that the silence or absence of actions may trigger the application for review, to a court or to another competent authority of the enacting State;

(e) In the context of article 67 (8), means and manner of providing by the procuring entity of effective access by the independent body to all documents in the procuring entity's possession relevant to the procurement proceedings under review. Such means and manner must satisfy the requirement of law for prompt access upon receipt of a notice of the application. IT tools may facilitate that;

(f) The rights of persons joining the reconsideration proceedings, including the right to submit a request to lift a suspension that has been applied;

(g) Treatment of confidential information, including in the context of issuing decisions and notices and granting access to records by participants in challenge proceedings and by the independent body. In this context, the procurement or other applicable regulations may in particular explain the aim of provisions requiring servicing a notice of the substance of the application: it permits the procuring entity to avoid the disclosure of potentially confidential information without the need to redact confidential information from the application.

6. The procurement or other applicable regulations must explain the legal effects of a decision on dismissal, in particular that the dismissal constitutes a decision on the application and can thus be challenged and if it is not challenged, it lifts the prohibition against entry into force of the procurement contract or framework agreement after the time period allocated under article 65 for possible challenge or appeal has lapsed.

7. The procurement or other applicable regulations should guide procuring entities as regards corrective actions that they may take: for example, rectifying the procurement proceedings so as to be in conformity with the procurement law, the procurement regulations or other applicable rules; if a decision has been made to accept a particular submission and it is shown that another should be accepted, refraining from issuing the notice of acceptance to the initially chosen supplier or contractor, but instead to accept that other submission; or cancelling the procurement proceedings and commencing new proceedings.

8. To minimize the risks of abuse of the discretion on the side of the procuring entity as regards imposition of suspension, the procurement or other applicable regulations may provide examples when the suspension would be needed. An alternative approach would be to regulate the exercise of the procuring entity's discretion in deciding whether or not to suspend the procurement proceedings. Such approach may be particularly appropriate where the procuring entity might lack experience in challenge proceedings, where decisions in the procurement

proceedings concerned have been taken by another body, or where it is desired to promote the early resolution of disputes by strongly encouraging any challenge to be presented to the procuring entity in the first instance. If such an approach is preferred, more prescriptive regulation should be included in the procurement or other applicable regulations, taking into account the need to strike a balance between the right of the supplier or contractor to have a challenge or appeal properly reviewed and the need of the procuring entity to conclude a procurement contract (or a framework agreement) in an economic and efficient way, without undue disruption and delay of the procurement process.

Article 67. Application for review before an independent body [\[hyperlink**\]](#)**

1. In an enacting State that wishes to set up a mechanism for independent review, the procurement or other applicable regulations would need to identify the appropriate body in which to vest the review function, whether in an existing body or in a new body created by the enacting State. The body may, for example, be one that exercises overall supervision and control over procurement in the State, a relevant body whose competence is not restricted to procurement matters (e.g. the body that exercises financial control and oversight over the operations of the Government and of the public administration (the scope of the review should not, however, be restricted to financial control and oversight)), or a special administrative body whose competence is exclusively to resolve disputes in procurement matters.

2. The procurement or other applicable regulations should regulate the composition and operation of this body; the importance of independence and specialist expertise of individuals that will hear challenges in that body should be emphasized. They should attach particular importance to the question of evidence, confidentiality and hearings, so as to ensure that all parties to the proceedings are fully aware of their rights and obligations in this regard, to ensure that there is consistency in all proceedings, and to allow an effective and efficient appeal from a decision of an independent body. The regulations could allow civil society representatives or others to observe challenge proceedings, and provide for the required facility, in accordance with the legal tradition in the enacting State concerned.

3. There will be a need for robust procedural rules in order to ensure that the proceedings examine the issues in each case in the appropriate level of detail and in a timely fashion. The procurement or other applicable regulations must provide or call for issuance of rules of procedure and guidance for the operation of the independent body, including:

(a) The manner in which applications are to be filed, including applications to permit the procurement to continue on the ground of urgent public interest considerations (e.g. whether the application is to be made by the procuring entity *ex parte*, or *inter parts*);

(b) Questions of evidence and its examination, including clear rules and procedures as regards the elements and supporting evidence that a procuring entity would need to adduce as regards urgent public interest considerations;

(c) The conduct of review proceedings (such as whether public hearings are to take place);

(d) Issues of observers;

(e) Means of serving prompt notices by the independent body to all concerned, and means, manner and place of publication of such notices where required by law;

(f) Authority to make enquiry of the procuring entity if its decision on suspension must be taken before the independent body has a chance to review documents relating to the procurement proceedings, such as the full record of the procurement proceedings;

(g) Rights of entities whose interests might be affected by the application (such as other government entities), including intervention in the challenge proceedings or a request to lift a suspension that has been applied;

(h) Corrective actions that the independent body may order immediately in cases that trigger automatic suspension of the procurement proceedings under paragraph (4) of the article, such as ordering the procuring entity to extend the deadline for presenting submissions, or correcting the terms of solicitation, pre-qualification or pre-selection;

(i) Competence as regards applications submitted to the independent body out of time (the discretionary element of paragraph (2) (c) of the article allows the independent body to dismiss the application even where it was established that the application involves significant public interest considerations; it also does not bar the independent body from considering late applications where no significant public interest considerations are involved). The rules may illustrate the type of issues that should permit entertaining applications after the standstill period, such as the discovery of fraudulent irregularities or instances of corruption;

(j) The manner of access to all documents relating to the procurement proceedings in the possession of the procuring entity (e.g. physical or virtual), envisaging for example the provision of the relevant documents in steps (for example, a list of all documents could be provided to the independent body first so that the independent body could identify those documents relevant to the proceedings before it). The goal should be to avoid excessive disruption of both procurement and review proceedings by providing secure and efficient means of transfer of such documents, noting that the use of IT tools may facilitate this task. The rules must address in this context procedures of lifting any restrictions on the disclosure of confidential information covered by articles 24 and 25 (4) [\[**hyperlinks**\]](#) of the Model Law, in particular whether the independent body is the competent organ of the enacting State to lift such restriction or it has to apply to a court or another relevant organ of the enacting State for the order to lift such restriction;

(k) Rules for access by participants in the challenge proceedings to the record of the challenge proceedings (which will, under the provisions of article 67 (8), include the record of the procurement proceedings), including for example the requirement that participants in the challenge proceedings will need to demonstrate their interest in the documents to which access is sought: this measure is intended to allow the independent body to keep effective control of the proceedings and to avoid suppliers or contractors conducting exhaustive searches of the documents in case they may discover issues of relevance;

(l) Treatment of confidential information, including in the context of issuing decisions and notices and granting access to records by participants in challenge proceedings.

4. In the context of paragraph (9) (i), the procurement or other applicable regulations of the enacting State should address issues of quantification of losses specific to the procurement context. In addressing these issues, the regulations should consider how purely economic loss is addressed in the domestic legal system, so as to ensure consistency in the measure of financial compensation throughout the jurisdiction concerned (including the extent to which financial compensation is contingent on the applicant proving that it would have won the procurement contract concerned but for the non-compliance of the procuring entity with the provisions of the law). The possibility of receiving financial compensation can raise the risk of encouraging speculative applications and disrupting the procurement process. It may also increase the risk of abuse if the power to award financial compensation lies in a small entity or the hands of a few individuals. The applicable regulations may therefore call for oversight of the operation of the mechanism of financial compensation in challenge proceedings, especially where a quasi-judicial system is in its infancy. This should be coupled with a regular review of the entire challenge mechanism to ensure that it is operating effectively in allowing, and encouraging where appropriate, suppliers or contractors to bring applications.

Article 68. Rights of participants in challenge proceedings [\[hyperlink**\]](#)**

1. The procurement or other applicable regulations should explain that paragraph (1) aims to permit all suppliers or contractors “participating in the procurement proceedings” to join the challenge proceedings as long as they remain in the proceedings concerned at the time of the challenge. Thus the provisions intend to exclude those that have been eliminated through pre-qualification or a similar step earlier in the proceedings, unless that step is the action or decision of the procuring entity to which the challenge relates. This is predicated, as noted in the context of article 64 above, on the notion that participation is granted to the extent that the supplier or contractor, or other potential participant, can demonstrate that its interests may be affected by the challenge proceedings. The possibility of broader participation in the challenge proceedings should be provided for since it is in the interest of the procuring entity to have complaints aired and information brought to its attention as early as possible. The procurement or other applicable regulations may provide for suitable nomenclature to identify the various participants more accurately.

2. The rules of the conduct of challenge proceedings applicable to the procuring entity and the independent body, respectively, discussed in the context of articles 66 and 67 above, should provide for due process during the challenge proceedings and set out the rights of all participants in the challenge proceedings, differentiating the broader rights of the applicant and the procuring entity from the rights of other interested persons and the rights of those two groups from the rights of anyone else that may be present during public hearings (such as members of the press). The goal is to ensure that the proceedings can continue with appropriate dispatch and that suppliers or contractors can participate effectively.

Article 69. Confidentiality in challenge proceedings [\[hyperlink**\]](#)**

The issues for applicable regulations are those touched upon in the context of articles 24, 25 (4), 66 and 67 above.

**B. Note by the Secretariat on a glossary of procurement-related terms
used in the UNCITRAL Model Law on Public Procurement**

(A/CN.9/771)

[Original: English]

1. During the preparation of a guide to enactment of the 2011 UNCITRAL Model Law on Public Procurement,¹ it was decided to issue separately and publish on the UNCITRAL website a glossary of procurement-related terms used in the Model Law.² The Guide to Enactment adopted by the Commission at its forty-fifth session, in 2012,³ notes in this context the following:

“This glossary will include descriptions of terms that have not been defined in the Model Law, but are commonly used as procurement terms by suppliers, contractors, procuring officials and their advisers; it will also discuss terms that may carry a different meaning under the Model Law from those in other international or regional instruments regulating public procurement.”⁴

By this note, the Secretariat submits a draft text of the glossary for consideration by the Commission.

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, annex I.

² *Ibid.*, *Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 18, and paras. 19 (l) and 36 of A/CN.9/745.

³ *Ibid.*, para. 46.

⁴ Para. 8 of the Introduction to Chapter I of the Model Law. The text of the Guide as adopted by the Commission is available on the date of this document at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html.

Glossary of procurement-related terms used in the 2011 UNCITRAL Model Law on Public Procurement (the “Model Law”)¹

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|----|--|---|--|
| 1. | Abnormally low submission (article 20 [**hyperlink**]) | Submission which price in combination with other constituent elements of the submission is so abnormally low in relation to the subject matter of the procurement that it raises concerns with the procuring entity as to the ability of the supplier or contractor that presented it to perform the procurement contract. For the explanation of the terms “submission”, “constituent elements of the submission”, “subject matter of the procurement”, “procuring entity”, “supplier or contractor” and “procurement contract”, see ## 83, 14, 82, 62, 85 and 59 below [**hyperlinks**]. | <ul style="list-style-type: none"> • a tender abnormally lower than other tenders submitted (the plurilateral Agreement on Government Procurement (GPA) of the World Trade Organization (WTO)² (the 1994 WTO GPA), article XIII(4)(a)) • a tender with a price that is abnormally lower than the prices in other tenders submitted (the revised text of the 1994 WTO GPA³ (the 2012 WTO GPA), article XV(6)) • abnormally low tender (directive 2004/17/EC of the European Parliament and of the Council,⁴ article 57; directive 2004/18/EC of the European Parliament and of the Council,⁵ article 55) |

¹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17), annex I.*

² The plurilateral Agreement on Government Procurement (GPA) of the World Trade Organization (WTO), negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996 (see Annex 4(b) to the Final Act embodying the results of the Uruguay round of multilateral trade negotiations available at the date of this glossary at www.wto.org/english/docs_e/legal_e/gpr-94_e.pdf).

³ On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). The revised text is available at the date of this glossary at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

⁴ Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of the procurement procedures of entities operating in the water, energy, transport and postal services sectors (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 1. Available at the date of this glossary at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

⁵ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (*Official Journal of the European Union*, No. L 134, 30 April 2004, p. 114. Available at the date of this glossary at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm).

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|----|--|--|---|
| 2. | Appeal (article 64 [**hyperlink**]) | An application to a competent authority against a decision taken in the challenge proceedings. For the explanation of the term “challenge proceedings”, see # 8 below [**hyperlink**]. | <ul style="list-style-type: none"> • administrative or judicial review (the 2012 WTO GPA, article XVIII:1) • non-judicial and judicial review (directive 2007/66/EC of the European Parliament and of the Council,⁶ article 2 (9)) |
| 3. | Application for reconsideration before the procuring entity (article 66 [**hyperlink**]) | A challenge proceedings initiated by a supplier or contractor that claims to have suffered or claims that it may suffer loss or injury because of the alleged non-compliance of a decision or action of the procuring entity with the provisions of the procurement law of the enacting State (an “aggrieved supplier or contractor”) by filing an application to the procuring entity for reconsideration of its decision or an action taken in the procurement proceedings. For the explanation of the terms “challenge proceedings”, “supplier or contractor” and “procuring entity”, see ## 8, 85 and 62 below [**hyperlinks**]. | <ul style="list-style-type: none"> • initial review of a challenge by a body other than an authority referred to in paragraph 4 [administrative or judicial authority] (the 2012 WTO GPA, article XVIII:5) • review with the contracting authority (directive 2007/66/EC, article 1 (5)) • review by procuring entity (the 1994 UNCITRAL Model Law on Procurement of Goods Construction and Services⁷ (the “1994 Model Law”), article 53) |
| 4. | Application for review before an independent body (article 67 [**hyperlink**]) | A challenge proceedings initiated by an aggrieved supplier or contractor by filing an application to the independent body for review of a decision or an action taken by the procuring entity in the procurement proceedings, or of the failure of the procuring entity to issue a decision under article 66 of the Model Law within the time limits prescribed in that article. For the explanation of the term “aggrieved supplier or contractor”, see # 4 above [**hyperlink**]. For the explanation of the terms “independent body”, “challenge proceedings” and “procuring entity”, see ## 37, 8 and 62 below [**hyperlinks**]. | <ul style="list-style-type: none"> • administrative review with a review body that is not a court (the 2012 WTO GPA, article XVIII:6) • non-judicial review with the independent body (directive 2007/66/EC, article 2(9)) • administrative review (the 1994 Model Law, article 54) |

⁶ Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (*Official Journal of the European Union*, No. L 335, 20 December 2007, p. 31. Available at the date of this glossary at http://ec.europa.eu/internal_market/publicprocurement/remedies/remedies_en.htm).

⁷ The text of the 1994 Model Law is found in annex I to the report of UNCITRAL on the work of its twenty-seventh session (*Official Records of the General Assembly, Forty-ninth Session, Supplement No. 17 (A/49/17)*), and is also available at www.uncitral.org.

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
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| 5. | Award of a procurement contract or framework agreement (articles 22 and 23 [**hyperlinks**]) | A final stage of the procurement proceedings regulated by the Model Law, resulting in the conclusion and entry into force of a procurement contract or framework agreement between the procuring entity and selected supplier(s) or contractor(s). For the explanation of the terms “procurement contract”, “framework agreement”, “procuring entity” and “supplier or contractor”, see ## 59, 31, 62 and 85 below [**hyperlinks**]. | <ul style="list-style-type: none"> contract award and conclusion of a framework agreement (directive 2004/17/EC, article 43, and directive 2004/18/EC, article 35(4)) procurement contract award (the 1994 Model Law, article 14) |
| 6. | Best and final offers (BAFOs) (articles 49 (11) and 51 (3) [**hyperlinks**]) | Final submissions presented by suppliers or contractors remaining in the procurement proceedings following completion of the dialogue phase in the request-for-proposals-with-dialogue proceedings, or the negotiation phase in the competitive negotiations proceedings. For the explanation of the terms “submission”, “supplier or contractor” and “competitive negotiations”, see ## 83, 85 and 12 below [**hyperlinks**]. | final tenders (the 1994 WTO GPA, article XIV; directive 2004/18/EC, article 29) |
| 7. | Cancellation of the procurement (article 19 [**hyperlink**]) | The decision taken by the procuring entity during any procurement proceedings not to proceed with the procurement proceedings. For the explanation of the term “procuring entity”, see # 62 below [**hyperlink**]. | rejection of all tenders, proposals, offers or quotations (the Guidelines for selection and employment of consultants by World Bank borrowers, the 2010 version ⁸ (the “World Bank procurement guidelines (consultants)”); the 1994 Model Law, article 12) |
| 8. | Challenge proceedings (Chapter VIII [**hyperlink**]) | Proceedings initiated by an aggrieved supplier or contractor in the procuring entity, an independent body or a court against a decision or action of the procuring entity and any subsequent challenge or appeal to a competent body of the State against any decision taken in the challenge proceedings. For the explanation of the term “aggrieved supplier or contractor”, see # 4 above [**hyperlink**]. For the explanation of the terms “procuring entity” and “independent body”, see ## 62 and 37 below [**hyperlinks**]. | <ul style="list-style-type: none"> review procedures (the 2012 WTO GPA, article XVIII and directive 2007/66/EC, recital 17) review (the 1994 Model Law, chapter VI) |

⁸ Available at the date of this glossary at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060656~menuPK:93977~pagePK:84269~piPK:60001558~theSitePK:84266,00.html>.

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
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| 9. | Clarifications and modifications of the solicitation documents (article 15 [**hyperlink**]) | Clarifications: any explanation provided by the procuring entity to suppliers or contractors as regards the solicitation documents. Modifications: any corrections or other amendments made by the procuring entity to the solicitation documents. For the explanation of the terms “procuring entity”, “supplier or contractor” and “solicitation document”, see ## 62, 85 and 80 below [**hyperlinks**] . | <ul style="list-style-type: none"> • reply to request for explanations relating to tender documents and to requests for other information (the 1994 WTO GPA, article 12) • procedure of clarification (the World Bank procurement guidelines (consultants)) |
| 10. | Closed framework agreement (article 2 [**hyperlink**] , definition (e)(ii)) | Defined in the Model Law as: “Framework agreement to which no supplier or contractor that is not initially a party to the framework agreement may subsequently become a party.” For the explanation of the terms “supplier or contractor” and “framework agreement”, see ## 85 and 31 below [**hyperlinks**] . | |
| 11. | Classified information (articles 2 [**hyperlink**] , definition (l), 7 and 24 [**hyperlinks**]) | Information designated as classified by an enacting State under national law access to which is restricted by law or regulation to particular classes of persons. | |
| 12. | Competitive negotiations (articles 30 (4), 34 (3) and 51 [**hyperlinks**]) | A procurement method available in very limited circumstances (in cases of urgency, emergency and for the protection of essential security interests of the State where the use of other methods of procurement is not appropriate) and involving: (a) a public advance notice of procurement; (b) concurrent negotiations of terms and conditions of the procurement contract by the procuring entity with a sufficient number of suppliers or contractors to ensure effective competition; (c) submission by participating suppliers or contractors of BAFOs with respect to all aspects of their proposals being negotiated with the procuring entity; (d) examination and evaluation of BAFOs by the procuring entity; and (e) the selection of the winner. For the explanation of the term “BAFOs”, see # 6, above [**hyperlink**] . For the explanation of the terms “procurement”, “procuring entity”, “supplier or contractor”, “examination” and “evaluation”, see ## 58, 62, 85, 29 and 27 below [**hyperlinks**] . | |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
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| 13. | Conditions for use (Chapter II, section I [**hyperlink**]) | A set of minimum requirements that must be met to make it possible for the procuring entity to use a method of procurement alternative to open tendering. For the explanation of the terms “procuring entity” and “open tendering”, see ## 62 and 49, below [**hyperlinks**]. | cases justifying the use (directives 2004/17/EC and 2004/18/EC; the 2012 WTO GPA) |
| 14. | Constituent elements of the submission (articles 10, 11, 20 and 39 (h) [**hyperlinks**]) | (a) Price (the cost of the subject matter of the procurement, which may also cover transportation and insurance charges, customs duties and taxes; if not those elements may be construed as separate constitute elements of the submission, see in this regard article 39 (h) [**hyperlink**]); (b) The cost of operating, maintaining and repairing goods or construction; the time for delivery of goods, completion of construction or provision of services; the characteristics of the subject matter of the procurement, such as the functional characteristics of goods or construction and the environmental characteristics of the subject matter; and the terms of payment and of guarantees in respect of the subject matter of the procurement; (c) Where relevant in procurement conducted in accordance with articles 47, 49 and 50 of the Model Law [**hyperlinks**], the experience, reliability and professional and managerial competence of the supplier or contractor and of the personnel to be involved in providing the subject matter of the procurement; (d) Any other elements of the submission examined or evaluated in accordance with the criteria and procedures stipulated by the procuring entity in the solicitation documents under articles 10 and 11 of the Model Law [**hyperlinks**]. For the explanation of the terms “subject matter of the procurement”, “submission”, “goods”, “construction”, “services”, “procurement”, “supplier or contractor”, “examination”, “evaluation” and “solicitation document”, see ## 82, 83, 35, 15, 76, 58, 85, 29, 27 and 80 below [**hyperlinks**]. | constituent elements of the tender may include the following: (a) the economics of the manufacturing process, of the services provided and of the construction method; (b) the technical solutions chosen and/or any exceptionally favourable conditions available to the tenderer for the supply of the goods or services or for the execution of the work; (c) the originality of the supplies, services or work proposed by the tenderer; (d) compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed; (e) the possibility of the tenderer obtaining State aid. (directive 2004/17/EC, article 57, and directive 2004/18/EC, article 55) |

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| 15. | Construction (article 39 [**hyperlink**]) | All work associated with the construction, reconstruction, demolition, repair or renovation of a building, structure or works, such as site preparation, excavation, erection, building, installation of equipment or materials, decoration and finishing, as well as services incidental to construction such as drilling, mapping, satellite photography, seismic investigations and similar services provided pursuant to the procurement contract, if the value of those services does not exceed that of the construction itself (see article 2, definition (d) of the 1994 Model Law). For the explanation of the term “procurement contract”, see # 59 below [**hyperlink**] . | <ul style="list-style-type: none"> • construction service, civil or building works (2012 WTO GPA, article I(c)) • building or civil engineering works (directive 2004/18/EC, article 1(2)b) • works (the Guidelines for Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants, the January 2011 version⁹ (the “World Bank procurement guidelines”)) |
| 16. | Currency (article 39 [**hyperlink**]) | Defined in article 2 of the Model Law [**hyperlink**] as including “the monetary unit of account”. | local currency or fully convertible foreign currency (e.g. the World Bank procurement guidelines (consultants)) |
| 17. | Deadline for presenting applications/submissions (article 14 [**hyperlink**]) | A specific date and time after which no applications to pre-qualify or applications for pre-selection or submissions may be accepted by the procuring entity for examination and evaluation. For the explanation of the terms “submission”, “procuring entity”, “examination” and “evaluation”, see ## 83, 62, 29 and 27 below [**hyperlinks**] . | time limits (directive 2004/17/EC, article 45, and directive 2004/18/EC, article 38) |
| 18. | Description of the subject matter of the procurement (article 10 [**hyperlink**]) | Technical, quality and performance characteristics of the subject matter of the procurement and any other requirements that the submission must meet in order to be considered responsive, identified by the procuring entity in the solicitation documents in accordance with article 10 of the Model Law [**hyperlink**] . For the explanation of the terms “subject matter of the procurement”, “submission”, “procuring entity” and “solicitation document”, see ## 82, 83, 62 and 80 below [**hyperlinks**] . | |

⁹ Available at the date of this glossary at http://siteresources.worldbank.org/INTPROCUREMENT/Resources/278019-1308067833011/Procurement_GLS_English_Final_Jan2011.pdf.

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
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| 19. | Direct solicitation (articles 2 [**hyperlink**] , definition (b), 34 and 35 [**hyperlinks**]) | Defined in the Model Law as: “Solicitation addressed directly to one supplier or contractor or a restricted number of suppliers or contractors. This excludes solicitation addressed to a limited number of suppliers or contractors following pre-qualification or pre-selection proceedings.” For the explanation of the terms “solicitation”, “supplier or contractor”, “pre-qualification” and “pre-selection”, see ## 79, 85, 53 and 55 below [**hyperlinks**] . | direct invitation without open advertisement (the World Bank procurement guidelines, provision 3.2) |
| 20. | Documentary record of procurement proceedings (article 25 [**hyperlink**]) | An exhaustive written file on a given procurement that includes decisions, description of actions and all other information related to the procurement with supporting documentation. For the explanation of the term “procurement”, see # 58 below [**hyperlinks**] . | <ul style="list-style-type: none"> • documentation and reports of tendering procedures and contract awards relating to covered procurement, including the reports required under Article XIII (on contracts awarded through limited tendering, including the name of the procuring entity, the value and kind of goods or services procured and a statement indicating the circumstances and conditions that justified the use of limited tendering) as well as data that ensure the appropriate traceability of the conduct of covered procurement by electronic means (the 2012 WTO GPA, article XVI(3)) • information to be stored concerning awards (directive 2004/17/EC, article 50) • documentary records for post review (the World Bank procurement guidelines) • record of procurement proceedings (the 1994 Model Law, article 11) • agreed exclusions from national treatment and non-discrimination (the 2012 WTO GPA, article V:4) • national competitive bidding (the World Bank procurement guidelines, provision 3.3) |
| 21. | Domestic procurement (article 2 [**hyperlink**] , definition (c)) | Defined in article 2 of the Model Law as “procurement limited to domestic suppliers or contractors pursuant to article 8 of this Law”. For the explanation of the terms “procurement” and “supplier or contractor”, see ## 58 and 85 below [**hyperlinks**] . | <ul style="list-style-type: none"> • agreed exclusions from national treatment and non-discrimination (the 2012 WTO GPA, article V:4) • national competitive bidding (the World Bank procurement guidelines, provision 3.3) |
| 22. | Domestic suppliers or contractors (articles 2, 11 and 33 [**hyperlinks**]) | In the context of a particular State, suppliers or contractors registered as legal entities in that State. For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**] . | |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
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| 23. | Domestically produced goods (article 11 [**hyperlink**]) | In the context of a particular State, goods manufactured locally (legislation usually indicates the minimum percentage of required local content (labour, raw material, and components) for goods to qualify as such). For the explanation of the term “goods”, see # 35 below [**hyperlink**] . | <ul style="list-style-type: none"> domestic products (the 1994 WTO GPA, para. 2 of the preamble and articles III(1)(a) and XIII(4)(b)) goods manufactured in the country of the Borrower (the World Bank procurement guidelines) |
| 24. | Electronic reverse auction (article 2 [**hyperlink**] , definition (d), article 31 and Chapter VI [**hyperlink**]) | Defined in the Model Law as: “an online real-time purchasing technique utilized by the procuring entity to select the successful submission, which involves the presentation by suppliers or contractors of successively lowered bids during a scheduled period of time and the automatic evaluation of bids.” For the explanation of the terms “procuring entity”, “successful submission”, “supplier or contractor” and “evaluation”, see ## 62, 84, 85 and 27 below [**hyperlinks**] . | electronic auction (the 2012 WTO GPA, article XIV; directive 2004/18/EC, article 54) |
| 25. | Electronic reverse auction as a stand-alone method of procurement (articles 31 (1) and 53 [**hyperlinks**]) | An electronic reverse auction used as a separate method of procurement. For the explanation of the terms “electronic reverse auction” and “method of procurement”, see # 24 above and # 44 below [**hyperlinks**] . | electronic auction (the 2012 WTO GPA, article XIV; directive 2004/18/EC, articles 1 (7) and 54) |
| 26. | Electronic reverse auction as a phase (articles 31 (2) and 54 [**hyperlinks**]) | An electronic reverse auction used as a phase preceding the award of the procurement contract in another method of procurement or in a framework agreement procedure with second-stage competition. For the explanation of the terms “electronic reverse auction”, “method of procurement” and “framework agreement procedure with second-stage competition”, see # 24 above and ## 44 and 33 below [**hyperlinks**] . | electronic auction (directive 2004/18/EC, article 54) |
| 27. | Evaluation (articles 11, 16, 22, 25 and 43 [**hyperlinks**]) | Comparative analysis of submissions in accordance with the criteria and procedures set out in the solicitation documents for the purpose of the ascertainment of the successful submission. For the explanation of the terms “submission”, “solicitation document” and “successful submission”, see ## 83, 80 and 84 below [**hyperlinks**] . | assessment (directive 2004/18/EC, recital 46) |

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| 28. | Evaluation criteria (article 11 [**hyperlink**]) | Criteria used in evaluation as identified in the solicitation documents for ascertainment of the successful submission. For the explanation of the terms “evaluation”, “solicitation document” and “successful submission”, see # 27 above and ## 80 and 84 below [**hyperlinks**] . | <ul style="list-style-type: none"> • the criteria for awarding the contract (the 1994 WTO GPA, article XII(2)(h)) • contract award criteria or award criteria (directives 2004/17/EC and 2004/18/EC, preamble paras. 1 and 51) • selection criteria (the World Bank procurement guidelines (consultants)) • the criteria to be used by the procuring entity in determining the successful tender; criteria for the evaluation of proposals (the 1994 Model Law, articles 27 (e) and 39) |
| 29. | Examination (articles 11, 16, 25 and 43 [**hyperlinks**]) | Ascertainment of qualifications of suppliers or contractors and responsiveness of their submissions against the criteria specified in the solicitation documents. The process is on a “pass/fail” basis and does not involve comparison of submissions as in evaluation. For the explanation of the terms “supplier or contractor”, “submission”, “solicitation document” and “evaluation”, see # 27 above and ## 85, 83 and 80 below [**hyperlinks**] . | |
| 30. | Forthcoming procurement (article 6 [**hyperlink**]) | Planned procurement activities for forthcoming months or years. | <ul style="list-style-type: none"> • planned procurement (the 1994 WTO GPA, article IX(7) (cf. “proposed procurement”) and the 2012 WTO GPA, article VII (cf. “intended procurement”)) • future procurement (the 2012 WTO GPA, article VII) • “buyer profile” indicating the kind and value of contracts they intend to award (directive 2004/17/EC, article 41, and directive 2004/18/EC, article 35) |
| 31. | Framework agreement (article 2 [**hyperlink**] , definition (e) (i)) | Agreement between the procuring entity and the selected supplier (or suppliers) or contractor (or contractors) concluded upon completion of the first stage of the framework agreement procedure. For the explanation of the terms “procuring entity”, “supplier or contractor”, and “framework agreement procedure”, see ## 62, 85 and 32 below [**hyperlinks**] . | |

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| 32. | Framework agreement procedure (article 2 [**hyperlink**] , definition (e)) | Defined in the Model Law as: “Procedure conducted in two stages: a first stage to select a supplier (or suppliers) or a contractor (or contractors) to be a party (or parties) to a framework agreement with a procuring entity, and a second stage to award a procurement contract under the framework agreement to a supplier or contractor party to the framework agreement.” For the explanation of the terms “supplier or contractor”, “procuring entity” and “framework agreement”, see # 31 above and ## 85 and 62 below [**hyperlinks**] . | |
| 33. | Framework agreement procedure with second-stage competition (article 2 [**hyperlink**] , definition (e) (iv)) | Defined in the Model Law as: “Procedure under an open framework agreement or a closed framework agreement with more than one supplier or contractor in which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are to be established or refined through a second-stage competition.” For the explanation of the terms “closed framework agreement” and “framework agreement”, see ## 10 and 31 above [**hyperlinks**] . For the explanation of the terms “open framework agreement”, “supplier or contractor”, “procurement” and “second-stage competition”, see ## 48, 85, 58 and 74 below [**hyperlinks**] . | |
| 34. | Framework agreement procedure without second-stage competition (article 2 [**hyperlink**] , definition (e) (v)) | Defined in the Model Law as: “Procedure under a closed framework agreement in which all terms and conditions of the procurement are established when the framework agreement is concluded.” For the explanation of the terms “closed framework agreement” and “framework agreement”, see ## 10 and 31 above [**hyperlinks**] . For the explanation of the term “procurement”, see # 58 below [**hyperlinks**] . | |
| 35. | Goods (article 2 [**hyperlink**] , definition (j), and articles 11 and 39 [**hyperlinks**]) | Objects of every kind and description including raw materials, products and equipment and objects in solid, liquid or gaseous form, and electricity, as well as services incidental to the supply of the goods if the value of those incidental services does not exceed that of the goods themselves (the enacting State may include additional categories of goods) (see article 2, definition (c), of the 1994 Model Law). | products (directive 2004/18/EC) |

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| 36. | Indefinite or repeated basis (article 32 [**hyperlink**] , paragraph (1)(a)) | One of the conditions for use of a framework agreement procedure under the Model Law that presupposes that quantity and/or timing of delivery of the subject matter of the procurement that will be required during any given period is/are not known in advance. For the explanation of the term “framework agreement procedure”, see # 32 above [**hyperlink**] . For the explanation of the term “subject matter of the procurement”, see # 82 below [**hyperlink**] . | |
| 37. | Independent body (Chapter VIII [**hyperlink**]) | A competent body of the enacting State, which is independent of the procuring entity and entrusted by the State with the consideration of applications for review and taking actions as regards those applications and the procurement proceedings to which the applications relate, in accordance with article 67 of the Model Law. For the explanation of the term “applications for review”, see # 4 above [**hyperlink**] . For the explanation of the term “procuring entity”, see # 62 below [**hyperlink**] . | <ul style="list-style-type: none"> • independent authority (the 2012 WTO GPA, article XVIII:4) • a body of first instance, which is independent of the contracting authority (directive 2007/66/EC, article 2(3)) • administrative body (the 1994 Model Law, article 54) |
| 38. | Indicative submissions (article 60 [**hyperlink**]) | Submissions presented by suppliers or contractors to become a party to the open framework agreement. For the explanation of the terms “submission”, “supplier or contractor” and “open framework agreement”, see ## 83, 85 and 48 below [**hyperlinks**] . | |
| 39. | Initial bids (article 53 [**hyperlink**]) | Bids submitted for examination or evaluation before the electronic reverse auction as a stand-alone method of procurement is held. For the explanation of the terms “examination”, “evaluation” and “electronic reverse auction as a stand-alone method of procurement”, see ## 29, 27 and 25 above [**hyperlinks**] . | |
| 40. | Initial tenders (article 48 [**hyperlink**]) | Tenders containing proposals without a tender price, presented by suppliers or contractors in the first stage of two-stage-tendering proceedings for the examination by the procuring entity and the discussion between the procuring entity and suppliers or contractor in order to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under article 10 of the Model Law. For the explanation of the terms “examination” and “description of the subject matter of the procurement”, see ## 29 and 18 above [**hyperlinks**] . | |

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| 41. | Invitation to tender, present submissions or participate in request-for-proposals proceedings or an electronic reverse auction (article 2 [**hyperlink**] , definition (p)) | <p>For the explanation of the terms “tender price”, “supplier or contractor”, “two-stage-tendering” and “procuring entity”, see ## 86, 85, 88 and 62 below [**hyperlinks**].</p> <p>Minimum information about any given procurement published or provided to suppliers or contractors to allow them to assess their interest in participating in the procurement proceedings and to apply according to the requirements specified in the invitation.</p> <p>For the explanation of the terms “procurement” and “supplier or contractor”, see ## 58 and 85 below [**hyperlinks**].</p> | <ul style="list-style-type: none"> • invitation to participate in the procurement (the 1994 WTO GPA, article IX) • notice of intended procurement (the 2012 WTO GPA, article I-k) • an invitation to submit a tender, to take part in a restricted or negotiated procedure, to negotiate or to participate or to take part in the dialogue (directive 2004/17/EC, articles 1(2)(7) and 47, and directive 2004/18/EC, articles 1(2)(8), 33 and 40) • letter of invitation (the World Bank procurement guidelines (consultants)) |
| 42. | Irresponsible or dilatory conduct on the part of the procuring entity (article 19 [**hyperlink**]) | <p>The term is used in the Model Law in the context of cancellation of the procurement (article 19 [**hyperlink**]): the procuring entity may be liable for cancelling the procurement if the cancellation is the consequence of irresponsible or dilatory conduct on its part, for example when the procuring entity cancels the procurement after the opening of tenders with the knowledge that a favoured supplier or contractor would not win, or when the procuring entity cancels open tendering intentionally with the purpose of using a method of procurement alternative to open tendering in the newly announced procurement as allowed by the Model Law under article 30 (1) (b) and (2) (d) [**hyperlink**], or when the procuring entity started the procurement without proper procurement planning.</p> <p>For the explanation of the term “cancellation of the procurement”, see # 7 above [**hyperlink**].</p> <p>For the explanation of the terms “procurement”, “procuring entity”, “supplier or contractor”, “open tendering” and “method of procurement”, see ## 58, 62, 85 and 44 below [**hyperlinks**].</p> | |
| 43. | Margin of preference (article 11 [**hyperlink**]) | <p>A technique applied in the evaluation of submissions that permits the procuring entity to accord a more favourable treatment to some suppliers or contractors or goods (usually domestic suppliers or contractors or domestically produced goods) in comparison with others. When the difference in price (or price combined with quality scores) between the submissions from a favoured group (or with</p> | |

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| | | <p>respect to favoured goods) and the overall lowest-priced or most advantageous submission falls within the range of the margin of preference, a submission from the favoured group (or with respect to favoured goods) is ascertained as successful in accordance with the rules concerning the calculation and application of a margin of preference that are to be set out in the legislation of the enacting State.</p> <p>For the explanation of the terms “evaluation”, “goods”, “domestic suppliers or contractors” and “domestically produced goods”, see ## 27, 35, 22 and 23 above [**hyperlinks**].</p> <p>For the explanation of the terms “submission”, “procuring entity” and “supplier or contractor”, see ## 83, 62 and 85 below [**hyperlinks**].</p> | |
| 44. | Method of procurement (article 27 [**hyperlink**]) | <p>A way of conducting procurement, subject to a set of conditions for use and rules and procedures for solicitation and ascertainment of the successful submission.</p> <p>For the explanation of the term “conditions for use”, see # 13 above [**hyperlink**].</p> <p>For the explanation of the terms “procurement”, “solicitation” and “successful submission”, see ## 58, 79 and 84 below [**hyperlinks**].</p> | <ul style="list-style-type: none"> • procurement methods (the 2012 WTO GPA, article VII(2)) • procedures (directive 2004/18/EC, chapter V) |
| 45. | Misrepresentation (article 9 [**hyperlink**]) | <p>An assertion or manifestation by words or conduct that is not in accord with the facts (e.g. factually incorrect statements because of conscious ignorance or a reckless disregard for the truth, nondisclosure of material or important facts). The term does not intend to encompass intentionally false statements referred to in the Model Law separately.</p> | <p>false declarations, professional misconduct or acts or omissions that adversely reflect on the commercial integrity of the supplier (the 1994 and 2012 WTO GPA)</p> |
| 46. | Most advantageous tender (article 43 [**hyperlink**]) | <p>The successful tender ascertained on the basis of evaluation of price and other evaluation criteria and in accordance with the procedures for evaluating tenders specified in the solicitation documents in accordance with article 11 of the Model Law [**hyperlink**].</p> <p>For the explanation of the terms “evaluation” and “evaluation criteria”, see ## 27 and 28 above [**hyperlinks**].</p> <p>For the explanation of the term “solicitation document”, see # 80 below [**hyperlinks**].</p> | <ul style="list-style-type: none"> • tender most economically advantageous (directive 2004/18/EC, article 53(1)(a)) • the bid with the lowest evaluated cost; the lowest evaluated bid (the World Bank procurement guidelines, provisions 2.49 and 2.52) • the lowest evaluated tender (the 1994 Model Law, article 34 (4) (b) (ii)) |

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|-----|--|---|--|
| 47. | Notice of procurement (articles 34 and 35 [**hyperlinks**]) | <p>A notice published prior to the direct solicitation (except in cases of request for quotations and urgency) containing information about upcoming procurement (the most important of which are the name and address of the procuring entity, a summary of the principal terms and conditions of the procurement contract or framework agreement, a declaration on limitation imposed on participation by suppliers or contractors in the procurement proceedings, and the method of procurement to be used).</p> <p>For the explanation of the terms “direct solicitation”, “framework agreement” and “method of procurement”, see ## 19, 31 and 44 above [**hyperlinks**].</p> <p>For the explanation of the terms “request for quotations”, “procurement”, “procuring entity”, “procurement contract”, “participation by suppliers or contractors in the procurement proceedings” and “suppliers or contractors”, see ## 71, 58, 62, 59, 51 and 85 below [**hyperlinks**].</p> | <ul style="list-style-type: none"> • contract notice (directive 2004/18/EC, article 30(1)(a)) • general procurement notice and specific procurement notice (the World Bank procurement guidelines) |
| 48. | Open framework agreement (article 2 [**hyperlink**], definition (e) (iii)) | <p>Defined in the Model Law as:</p> <p>“Framework agreement to which a supplier (or suppliers) or a contractor (or contractors) in addition to the initial parties may subsequently become a party or parties.”</p> <p>For the explanation of the term “framework agreement”, see # 31 above [**hyperlink**].</p> <p>For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**].</p> | <p>dynamic purchasing system (directive 2004/18/EC, article 1(5))</p> |
| 49. | Open tendering (Chapter III [**hyperlink**]) | <p>The default method of procurement involving public and unrestricted solicitation, a comprehensive description and specification in the solicitation documents of what is to be procured, thus providing a common basis on which suppliers and contractors are to prepare their tenders; full disclosure to suppliers or contractors of the criteria to be used in evaluating tenders and in selecting the successful tender; the strict prohibition against negotiations between the procuring entity and suppliers or contractors as to the substance of their tenders; the public opening of tenders at the deadline for submission; and the disclosure of any formalities required for entry into force of the procurement contract.</p> <p>For the explanation of the terms “method of procurement”, “evaluation”, and “deadline for submission”, see ## 44, 27 and 17 above [**hyperlinks**].</p> | <ul style="list-style-type: none"> • open procedures (directive 2004/18/EC, article 1(11) (a)) • international competitive bidding (the World Bank procurement guidelines) |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|---|---|---|
| 50. | Opening of tenders (article 42 [**hyperlink**]) | For the explanation of the terms “solicitation”, “solicitation document”, “supplier or contractor”, “procuring entity”, “successful tender”, “opening of tenders” and “procurement contract”, see ## 79, 80, 85, 62, 84, 50 and 59 below [**hyperlinks**] . A stage in the tendering proceedings that involves public opening of tenders and the announcement of the name and address of each supplier or contractor whose tender is opened and the tender price to those present at the opening. For the explanation of the terms “supplier or contractor” and “tender price”, see ## 85 and 86 below [**hyperlinks**] . | bid opening (the World Bank procurement guidelines) |
| 51. | Participation by suppliers or contractors in the procurement proceedings (articles 7, 8, 10, 15, 25, 54, 58 and 60 [**hyperlinks**]) | Taking part by suppliers or contractors at any stage of the procurement proceedings starting from the moment of presentation of an application to pre-qualify, application for pre-selection or a submission. For the explanation of the terms “supplier or contractor”, “pre-qualification”, “pre-selection” and “submission”, see ## 85, 53, 55 and 83 below [**hyperlinks**] . | |
| 52. | Period of effectiveness of tenders (article 41 [**hyperlink**]) | The period during which suppliers or contractors are bound by the terms and conditions of their submissions. For the explanation of the terms “supplier or contractor” and “submission”, see ## 85 and 83 below [**hyperlinks**] . | |
| 53. | Pre-qualification (article 2 [**hyperlink**] , definition (f), and article 18 [**hyperlink**]) | Defined in the Model Law as: “Procedure set out in article 18 of this Law to identify, prior to solicitation, suppliers or contractors that are qualified.” For the explanation of the terms “solicitation” and “supplier or contractor”, see ## 79 and 85 below [**hyperlinks**] . | |
| 54. | Pre-qualification documents (article 2 [**hyperlink**] , definition (g), and article 18 [**hyperlink**]) | Defined in the Model Law as: “Documents issued by the procuring entity under article 18 of this Law that set out the terms and conditions of the pre-qualification proceedings.” For the explanation of the term “pre-qualification”, see # 53 above [**hyperlink**] . For the explanation of the term “procuring entity”, see # 62 below [**hyperlink**] . | |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|--|---|---|
| 55. | Pre-selection (article 2 [**hyperlink**] , definition (h), and article 49 [**hyperlink**] , paragraph 3) | Defined in the Model Law as: “Procedure set out in paragraph 3 of article 49 of this Law to identify, prior to solicitation, a limited number of suppliers or contractors that best meet the qualification criteria for the procurement concerned.” For the explanation of the terms “solicitation”, “supplier or contractor” and “procurement”, see ## 79, 85 and 58 below [**hyperlinks**] . | |
| 56. | Pre-selection documents (article 2 [**hyperlink**] , definition (i), and article 49 [**hyperlink**] , paragraph 3) | Defined in the Model Law as: “Documents issued by the procuring entity under paragraph 3 of article 49 of this Law that set out the terms and conditions of the pre-selection proceedings.” For the explanation of the term “pre-selection”, see # 55 above [**hyperlink**] . For the explanation of the term “procuring entity”, see # 62 below [**hyperlink**] . | |
| 57. | Presentation of tenders (article 40 [**hyperlink**]) | Submission of tenders by suppliers or contractors to the procuring entity in writing, signed and in a sealed envelope or its electronic equivalent that ensures the same level of security, integrity, confidentiality and authenticity, in the manner, at the place and by the deadline stipulated by the procuring entity in the solicitation documents. For the explanation of the terms “supplier or contractor”, “procuring entity” and “solicitation document”, see ## 85, 62 and 80 below [**hyperlinks**] . | <ul style="list-style-type: none"> • submission of tenders (directive 2004/18/EC, article 1(8); the 1994 Model Law, chapter III, section II) • submission of bids (the World Bank procurement guidelines) |
| 58. | Procurement (article 2 [**hyperlink**] , definition (j)) | Defined in the Model Law as: “Acquisition of goods, construction or services by a procuring entity.” For the explanation of the terms “goods” and “construction”, see ## 35 and 15 above [**hyperlinks**] . For the explanation of the terms “procuring entity” and “services”, see ## 62 and 76 below [**hyperlinks**] . | |
| 59. | Procurement contract (article 2 [**hyperlink**] , definition (k)) | Defined in the Model Law as: “Contract concluded between the procuring entity and a supplier (or suppliers) or a contractor (or contractors) at the end of the procurement proceedings.” For the explanation of the terms “procuring entity” and “supplier or contractor”, see ## 62 and 85 below [**hyperlinks**] . | public contracts (directive 2004/18/EC, article 1-2 (a)) |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|--|---|--|
| 60. | Procurement involving classified information (article 2 [**hyperlink**] , definition (l)) | Defined in the Model Law as: “Procurement in which the procuring entity may be authorized by the procurement regulations or by other provisions of law of this State to take measures and impose requirements for the protection of classified information.” For the explanation of the term “procurement”, see # 58 above [**hyperlink**] . For the explanation of the terms “procuring entity” and “procurement regulations”, see ## 62 and 61 below [**hyperlinks**] . | <ul style="list-style-type: none"> secret contracts and contracts requiring special security Measures (directive 2004/18/EC, article 14) contracts awarded in the field of defence and security (directive 2009/81/EC,¹⁰ article 2) |
| 61. | Procurement regulations (article 2 [**hyperlink**] , definition (m)) | Defined in the Model Law as: “Regulations enacted in accordance with article 4 of this Law.” | |
| 62. | Procuring entity (article 2 [**hyperlink**] , definition (n)) | Defined in the Model Law as: “ <i>Option I</i> (i) Any governmental department, agency, organ or other unit, or any subdivision or multiplicity thereof, that engages in procurement, except ...; [and] <i>Option II</i> (i) Any department, agency, organ or other unit, or any subdivision or multiplicity thereof, of the [Government] [<i>other term used to refer to the national Government of the enacting State</i>] that engages in procurement, except ...; [and] (ii) [<i>The enacting State may insert in this subparagraph and, if necessary, in subsequent subparagraphs other entities or enterprises, or categories thereof, to be included in the definition of ‘procuring entity’;</i> ” For the explanation of the term “procurement”, see # 58 above [**hyperlink**] . | contracting authorities (directive 2004/18/EC, article 1(9)) |

¹⁰ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (*Official Journal of the European Union*, No. L 216, 20 August 2009, p. 76. Available at the date of this glossary at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:216:0076:0136:en:PDF>.)

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|--|--|--|
| 63. | Public notice of the award (article 23 [**hyperlink**]) | Announcement to the public in general through publication in the media specified in the legislation of the enacting State to whom the procurement contract or the framework agreement was awarded and the price of the procurement contract. For the explanation of the terms “procurement contract” and “framework agreement”, see ## 59 and 31 above [**hyperlinks**] . | <ul style="list-style-type: none"> • contract award notice (directive 2004/17/EC, article 43 and annex XVI) • a notice of the results of the award procedure (directive 2004/18/EC, article 35(4) and annex VII A) • publication of the award (the World Bank procurement guidelines, appendix 1 [7]) |
| 64. | Public procurement | Should be understood as procurement (see # 58 above). | |
| 65. | Publication internationally (articles 18(2) and 33 (2) [**hyperlinks**]) | Publication in a media widely accessible to international suppliers or contractors. For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**] . | <ul style="list-style-type: none"> • e.g. publication by the Office for Official Publications of the European Communities (directive 2004/17/EC, article 42, and directive 2004/18/EC, articles 35 and 36 (2)) • e.g. a General Procurement Notice in the <i>United Nations Development Business</i> (UNDB online) (the World Bank procurement guidelines) |
| 66. | Qualification criteria (article 9 [**hyperlink**]) | Criteria used by the procuring entity in ascertainment of eligibility of suppliers or contractors to participate in the procurement proceedings, as specified in the pre-qualification or pre-selection documents where applicable and in the solicitation documents. For the explanation of the terms “pre-qualification documents” and “pre-selection documents”, see ## 54 and 56 above [**hyperlinks**] . For the explanation of the terms “supplier or contractor” and “solicitation document”, see ## 85 and 80 below [**hyperlinks**] . | substantives criteria to be taken into account to assert the contractor’s qualifications (directive 2004/17/EC, articles 52 to 54, and directive 2004/18/EC, articles 45 to 52) |
| 67. | Relative weights (article 11 [**hyperlink**]) | Weights assigned by the procuring entity in the solicitation documents to evaluation criteria in their relation to each other. For the explanation of the terms “procuring entity” and “evaluation criteria”, see ## 62 and 28 above [**hyperlinks**] . For the explanation of the term “solicitation document”, see # 80 below [**hyperlink**] . | <ul style="list-style-type: none"> • different weight, relative weighting of criteria (directive 2004/17/EC, preamble (55) and article 55(2), and directive 2004/18/EC, preamble (46) and article 53(2); • the weighting of evaluation criteria (the World Bank procurement guidelines) |
| 68. | Request for proposals with consecutive negotiations (articles 30 (3) and 50 [**hyperlinks**]) | A method of procurement which main distinct feature is negotiation of financial terms of submissions after completion of the evaluation of technical, quality and performance characteristics of submissions. For the explanation of the terms “method of procurement” and “evaluation”, see ## 44 and 27 above [**hyperlinks**] . For the explanation of the term “submission”, see # 83 below [**hyperlink**] . | |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|--|---|---|
| 69. | Request for proposals with dialogue (articles 30 (2) and 49 [**hyperlinks**]) | A method of procurement which main distinct feature is a dialogue with suppliers or contractors to obtain the most satisfactory solution to the procurement needs. For the explanation of the term “method of procurement”, see # 44 above [**hyperlink**]. For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**]. | competitive dialogue (directive 2004/18/EC, article 1(11) (c)) |
| 70. | Request for proposals without negotiation (articles 29 (3) and 47 [**hyperlinks**]) | A method of procurement which main distinct feature is evaluation of financial terms of submissions after completion of the evaluation of technical, quality and performance characteristics of submissions whereas submissions are presented to the procuring entity in two separate sealed envelopes. For the explanation of the terms “method of procurement”, “evaluation” and “procuring entity”, see ## 44, 27 and 62 above [**hyperlinks**]. For the explanation of the term “submission”, see # 83 below [**hyperlink**]. | |
| 71. | Request for quotations (articles 29 (2) and 46 [**hyperlinks**]) | A method of procurement which main distinct feature is submission of only one quotation by suppliers or contractors in response to request for quotations by the procuring entity; the quotation cannot be changed and be subject to negotiation (the method is available only for low-value simple off-the-shelf items). For the explanation of the terms “method of procurement” and “procuring entity”, see ## 44 and 62 above [**hyperlinks**]. For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**]. | shopping (the World Bank procurement guidelines) |
| 72. | Request-for-proposals proceedings (article 35 [**hyperlinks**]) | Methods of procurement encompassing request for proposals without negotiation, request for proposals with dialogue and request for proposals with consecutive negotiations (see ## 70, 69 and 68 above). For the explanation of the term “method of procurement”, see # 44 above [**hyperlink**]. | |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|---|--|---|
| 73. | Restricted tendering (articles 29 (1) and 45 [**hyperlinks**]) | A method of procurement and one of the forms of tendering, which main distinct feature is direct solicitation. For the explanation of the terms “method of procurement” and “direct solicitation”, see ## 44 and 19 above [**hyperlinks**]. | <ul style="list-style-type: none"> • selective tendering (the 2012 WTO GPA, articles I (q) and IX:4) • restricted procedures (EU directive 2004/18/EC, article 1(11) (b)) • limited international bidding (the World Bank procurement guidelines) reopening of competition (the EU Explanatory Note on Framework Agreements) ¹¹ |
| 74. | Second-stage competition (article 2 [**hyperlink**], definition (e) (iv), and Chapter VII [**hyperlink**]) | A stage in closed framework agreements with more than one supplier or contractor and in open framework agreements through which certain terms and conditions of the procurement that cannot be established with sufficient precision when the framework agreement is concluded are established or refined through a competition between or among suppliers or contractors parties to the framework agreement. For the explanation of the terms “closed framework agreement”, “open framework agreement”, “procurement” and “framework agreement”, see ## 10, 48, 58 and 31 above [**hyperlinks**]. For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**]. | |
| 75. | Security for the performance of the procurement contract (articles 2, definition (u), 17 and 39 [**hyperlinks**]) | Security against the breach of the procurement contract by the supplier or contractor concluding the procurement contract with the procuring entity, presented to the procuring entity by that supplier or contractor in the form and the amount and in accordance with other requirements (such as with respect to the nature of the security and the issuer) specified by the procuring entity in the solicitation documents. For the explanation of the terms “procurement contract” and “procuring entity”, see ## 59 and 62 above [**hyperlinks**]. For the explanation of the terms “supplier or contractor” and “solicitation document”, see ## 85 and 80 below [**hyperlinks**]. | performance security (the World Bank procurement guidelines) |
| 76. | Services (article 39 [**hyperlink**]) | Services of intellectual and consulting nature and any other services not covered by the terms “goods” and “construction” above (see ## 35 and 15 [**hyperlinks**]). | |

¹¹ Document CC/2005/03_rev 1 of 14.7.2005. Available at the date of this glossary at http://ec.europa.eu/internal_market/publicprocurement/docs/explan-notes/classic-dir-framework_en.pdf.

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|---|---|---|
| 77. | Single-source procurement (articles 30 (5) and 52 [**hyperlinks**]) | A method of procurement of last resort which main distinct feature is the absence of competition since the invitation to present a quotation or proposal is addressed only to one supplier or contractor. For the explanation of the term “method of procurement”, see # 44 above [**hyperlink**]. For the explanation of the term “supplier or contractor”, see # 85 below [**hyperlink**]. | direct contracting (the World Bank procurement guidelines) |
| 78. | Socioeconomic policies (article 2 [**hyperlink**], definition (o), and article 25 [**hyperlink**]) | Defined in the Model Law as: “Environmental, social, economic and other policies of this State authorized or required by the procurement regulations or other provisions of law of this State to be taken into account by the procuring entity in the procurement proceedings.” For the explanation of the terms “procurement regulations” and “procuring entity”, see ## 61 and 62 above [**hyperlinks**]. | <ul style="list-style-type: none"> • special and differential treatment for developing countries (the 1994 WTO GPA, article V:1) • offset (the 2012 WTO GPA, article I:l) • obligations relating to taxes, environmental protection, employment protection provisions and working conditions; environmental management standards (directive 2004/18/EC, articles 27 and 50) • project sustainability; social objectives of the project; preferences for domestically manufactured goods or domestic contractors (the Wold Bank procurement guidelines) • invitation to participate regarding intended procurement (the 1994 WTO GPA, article IX:1) • invitations to submit a tender, participate in the dialogue or negotiate (directive 2004/18/EC, article 40) • invitation to bid (the World Bank procurement guidelines) • tender documentation (the 2012 WTO GPA, article X:7) • specification and descriptive document (directive 2004/18/EC, article 40(2)) • standard bidding documents (the World Bank procurement guidelines) |
| 79. | Solicitation (article 2 [**hyperlink**], definition (p), articles 6, 7, 18, and chapter II, section II [**hyperlinks**]) | Defined in the Model Law as: “Invitation to tender, present submissions or participate in request-for-proposals proceedings or an electronic reverse auction.” (see # 41 above [**hyperlink**]) | |
| 80. | Solicitation document (article 2 [**hyperlink**], definition (q), and extensively throughout the Model Law) | Defined in the Model Law as: “Document issued by the procuring entity, including any amendments thereto, that sets out the terms and conditions of the given procurement.” For the explanation of the terms “procuring entity” and “procurement”, see ## 62 and 58 above [**hyperlinks**]. | |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
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| 81. | Standstill period (article 2 [**hyperlink**] , definition (r), articles 22, 25, 39, 47, 49, 53, 62, 66 and 67 [**hyperlinks**]) | Defined in the Model Law as: “Period starting from the dispatch of a notice as required by paragraph 2 of article 22 of this Law, during which the procuring entity cannot accept the successful submission and during which suppliers or contractors can challenge, under chapter VIII of this Law, the decision so notified.” For the explanation of the term “procuring entity”, see # 62 above [**hyperlink**] . For the explanation of the terms “successful submission” and “supplier or contractor”, see ## 84 and 85 below [**hyperlink**] . | subject-matter of the contract (the 1994 WTO GPA and directives 2004/17/EC and 2004/18/EC) |
| 82. | Subject matter of the procurement (article 10 [**hyperlink**] and extensively throughout the Model Law) | Procurement needs — goods, construction or services or any combination thereof acquired by the procuring entity in any given procurement — as described by the procuring entity in the solicitation documents in accordance with article 10 of the Model Law [**hyperlink**] . For the explanation of the terms “goods”, “construction” and “services”, see entries ## 15, 35 and 76 above [**hyperlinks**] . For the explanation of the terms “procuring entity”, “procurement” and “solicitation document”, see ## 62, 58 and 80 above [**hyperlinks**] . | |
| 83. | Submission (article 2 [**hyperlink**] , definition (s), and extensively throughout the Model Law) | Defined in the Model Law as: “Tender (or tenders), a proposal (or proposals), an offer (or offers), a quotation (or quotations) and a bid (or bids) referred to collectively or generically, including, where the context so requires, an initial or indicative submission (or submissions).” | <ul style="list-style-type: none"> • tender (directives 2004/17/EC and 2004/18/EC) • bid (the World Bank procurement guidelines) |
| 84. | Successful submission (articles 9, 11, 17, 19 22, 25, 31 and 62 [**hyperlinks**]) | The submission ascertained as such by the procuring entity during evaluation of submissions on the basis of the criteria and procedures for evaluating submissions specified in the solicitation documents: <ul style="list-style-type: none"> • in tendering proceedings, the successful submission is: <ul style="list-style-type: none"> (i) where price is the only award criterion, the tender with the lowest tender price; or (ii) where there are price and other award criteria, the most advantageous tender (article 43 (3) [**hyperlink**]); | the successful supplier’s tender (the 2012 WTO GPA) |

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|-----|---|---|---|
| 85. | Supplier or contractor (article 2 [**hyperlink**] , definition (t), and extensively throughout the Model Law) | <ul style="list-style-type: none"> • in request-for-quotations proceedings, the successful submission is the lowest-priced quotation meeting the needs of the procuring entity as set out in the request for quotations (article 46 (3) [**hyperlink**]); • in request-for-proposals-without-negotiation proceedings, the successful submission is the proposal with the best combined evaluation in terms of: (a) the criteria other than price specified in the request for proposals; and (b) the price (article 47 (10) [**hyperlink**]); • in request-for-proposals-with-dialogue proceedings, the successful submission is the offer that best meets the needs of the procuring entity as determined in accordance with the criteria and procedure for evaluating the proposals set out in the request for proposals (article 49 (13) [**hyperlink**]); • in competitive-negotiations proceedings, the successful submission is the offer that best meets the needs of the procuring entity (article 51 (5) [**hyperlink**]); and • in electronic reverse auctions, the successful submission is the lowest-priced bid or the most advantageous bid ascertained automatically by the system at the closure of the electronic reverse auction (article 2 [**hyperlink**], definition (d) and article 57 (1) [**hyperlink**]). <p>For the explanation of the terms “submission”, “procuring entity”, “evaluation”, “solicitation document” and “most advantageous tender”, see ## 83, 62, 27, 80 and 46 above [**hyperlinks**].</p> <p>For the methods of procurement referred to in this column in connection with this definition, see ## 49, 68-73, 12 and 24 above and # 88 below [**hyperlinks**].</p> <p>Defined in the Model Law as: “According to the context, any potential party or any party to the procurement proceedings with the procuring entity.” For the explanation of the term “procuring entity”, see # 62 above [**hyperlink**].</p> | <ul style="list-style-type: none"> • supplier (the 2012 WTO GPA, article I (t)) • contractor, supplier and service provider (directive 2004/18/EC, article 1(8)) • suppliers, service providers, and contractors (the World Bank procurement guidelines) |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|--|---|---|
| 86. | Tender price (articles 39, 42, 43 and 48 [**hyperlinks**]) | <p>The price as formulated and expressed by suppliers or contractors in their final tenders submitted to the procuring entity and read out by the procuring entity at the opening of tenders in accordance with article 42 of the Model Law [**hyperlink**]; covers as a rule the cost of the subject matter of the procurement itself plus the cost of other constituent elements essential to providing the subject matter of the procurement; the solicitation documents instruct suppliers or contractors on the manner in which the tender price is to be formulated and expressed, including whether the price is to cover elements other than the cost of the subject matter of the procurement itself, such as any applicable transportation and insurance charges, custom duties and taxes (see in this regards article 39 (h) [**hyperlink**]).</p> <p>For the explanation of the terms “supplier or contractor”, “procuring entity”, “opening of tenders”, “subject matter of the procurement”, “constituent elements” and “solicitation document”, see ## 85, 62, 50, 82, 14 and 80 above [**hyperlinks**].</p> | submitted price (the World Bank procurement guidelines) |
| 87. | Tender security (article 2 [**hyperlink**], definition (u)) | <p>Defined in the Model Law as:</p> <p>“Security required from suppliers or contractors by the procuring entity and provided to the procuring entity to secure the fulfilment of any obligation referred to in paragraph 1 (f) of article 17 of this Law and includes such arrangements as bank guarantees, surety bonds, standby letters of credit, cheques for which a bank is primarily liable, cash deposits, promissory notes and bills of exchange. For the avoidance of doubt, the term excludes any security for the performance of the contract.”</p> <p>For the explanation of the terms “supplier or contractor”, “procuring entity” and “security for the performance of the procurement contract”, see ## 85, 62 and 75 above [**hyperlinks**].</p> | bid security (the World Bank procurement guidelines) |

| # | <i>The term used in the Model Law (with illustrative references to the relevant provisions of the Model Law)</i> | <i>Its definition or description</i> | <i>Other terms in use in international instruments regulating procurement to convey the same or similar meaning</i> |
|-----|--|---|---|
| 88. | Two-stage tendering (articles 30 (1) and 48 [**hyperlinks**]) | <p>A method of procurement and one of the forms of tendering, which main distinct feature is two-stage process:</p> <ul style="list-style-type: none"> • the first stage involves the discussion between the procuring entity and suppliers or contractors of various aspects of their initial tenders excluding price, in order to refine aspects of the description of the subject matter of the procurement and to formulate them with the detail required under article 10 of the Model Law; and • the second stage involves submission of final tenders with price in response to the revised set of terms and conditions of the procurement, examination and evaluation of final tenders and award of the procurement contract. <p>For the explanation of the terms “method of procurement”, “procuring entity”, “supplier or contractor”, “initial tenders”, “description of the subject matter of the procurement”, “procurement”, “examination”, “evaluation” and “award of a procurement contract”, see ## 44, 62, 85, 40, 18, 58, 29, 27 and 5 above [**hyperlinks**].</p> | two-stage bidding procedure (the World Bank procurement guidelines) |

VII. FUTURE WORK

A. Planned and possible future work

(A/CN.9/774)

[Original: English]

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I. Introduction

A. Background

1. At its forty-fourth session in 2011, the Commission requested the Secretariat to prepare a note on strategic planning for its next session (A/66/17, para. 343).
2. A Note by the Secretariat in response to that request entitled "A strategic direction for UNCITRAL" (A/CN.9/752 and Add.1, referred to in this paper as the "Strategic Direction paper") was submitted to the Commission at its forty-fifth session. The Commission agreed to consider and provide further guidance on UNCITRAL's strategic direction at its forty-sixth session, and

requested the Secretariat to reserve sufficient time to allow for a detailed discussion at that time (A/67/17, para. 231).

3. In the Strategic Direction paper, certain factors were set out to assist the Commission when considering possible future work, particularly in choosing between topics where resources are insufficient to address all current and possible future topics (A/CN.9/752, paras. 20 and 21). The current paper sets out details of current and possible future work; since the Commission may consider that UNCITRAL has indeed reached a situation of insufficient resources (see, further, section IV below), the paper has been produced to assist the Commission both in its discussions on future work at this forty-sixth session, and in discussing the Strategic Direction paper (A/CN.9/752 and Add.1).

4. The scope of this paper encompasses all of UNCITRAL's main work areas: planned and possible future legislative texts, technical assistance to law reform, promotion of uniform interpretation and application of UNCITRAL texts, status and promotion of those texts, coordination and cooperation with other organizations active in its field of activity and promoting the rule of law. The aim is to enable the Commission to consider how any mandate given for work on any one activity and in any topic will impact UNCITRAL's other activities and topics.

5. The Commission may wish to take into account the following documents in considering these issues. Background documents presented to the Commission at its forty-fifth session (available at www.uncitral.org/uncitral/commission/sessions/45th.html) are:

A/CN.9/752 and Add.1 A strategic direction for UNCITRAL, Note by the Secretariat; and

A/67/17 Report of the Commission's forty-fifth session.

Documents for the current Commission session, (available at www.uncitral.org/uncitral/commission/sessions/46th.html) are:

A/CN.9/760 and A/CN.9/765 Reports of the fifty-seventh and fifty-eighth sessions of Working Group II;

A/CN.9/762 and A/CN.9/769 Reports of the twenty-sixth and twenty-seventh sessions of Working Group III;

A/CN.9/761 and A/CN.9/768 Reports of the forty-sixth and forty-seventh sessions of Working Group IV;

A/CN.9/763 and A/CN.9/766 Reports of the forty-second and forty-third sessions of Working Group V;

A/CN.9/764 and A/CN.9/767 Reports of the twenty-second and twenty-third sessions of Working Group VI;

A/CN.9/773 Status of the conventions and model laws, Note by the Secretariat;

A/CN.9/775 Technical assistance activities undertaken since the Commission's forty-fifth session and technical assistance resources, Note by the Secretariat, including UNCITRAL publications, the UNCITRAL website,

and a survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP) since the Commission's forty-fifth session;

A/CN.9/776 Brief survey of the activities undertaken by the Secretariat since the Commission's forty-fifth session to ensure coordination with the work of other organizations active in the field of international trade law, Note by the Secretariat;

A/CN.9/777 Status and progress of CLOUT, Note by the Secretariat (including updates on the current activities concerning digests);

A/CN.9/779 Report of a Colloquium on Public-Private Partnerships;

A/CN.9/780 Creating an enabling legal environment for microbusiness and small and medium-sized enterprises, Note by the Secretariat;

A/CN.9/785 Possible future work in the field of dispute settlement, Note by the Secretariat;

A/CN.9/788 Meeting on commercial fraud, Note by the Secretariat.

II. Summary of current activities

A. Legislative work

6. The table below sets out current and ongoing legislative activities, and their envisaged completion dates.

7. As the table indicates, draft texts on arbitration, insolvency and security interests will be presented for adoption at the forty-sixth session of the Commission. The Working Groups concerned (II, V and VI) will therefore be available for future work, some of which is already mandated by the Commission (as discussed in section III, paras. 10-14 below). Working Group I completed its work on developing the UNCITRAL Model Law on Public Procurement and Guide to Enactment in April 2012. It has not met since the forty-fifth Commission session in 2012 and is thus available for future work. Working Groups III and IV are engaged with ongoing work.

Table 1
Current and ongoing legislative activities

| <i>Topic</i> | <i>Report references</i> | <i>Envisaged completion date</i> |
|---|---------------------------|----------------------------------|
| <i>Arbitration (WG II)</i> | | |
| (i) Preparation of a legal standard on transparency in treaty-based investor arbitration | A/CN.9/760 and A/CN.9/765 | 2013 |
| (ii) Applicability of the UNCITRAL Rules on transparency to the settlement of disputes arising under existing investment treaties (draft text of a recommendation and convention) | | 2013 |

| <i>Topic</i> | <i>Report references</i> | <i>Envisaged completion date</i> |
|---|-------------------------------|--|
| Preparation of a Guide to the 1958 New York Convention | n/a – prepared by Secretariat | Extracts for consideration 2013; completion 2014 |
| <i>Online dispute resolution (WG III)</i> | | |
| Preparation of a legal standard on online dispute resolution for cross-border electronic transactions | A/CN.9/762 and A/CN.9/769 | Estimated 2014 or beyond |
| <i>Electronic commerce (WG IV)</i> | | |
| Electronic transferable records | A/CN.9/761 and A/CN.9/768 | Estimated 2015 or beyond |
| <i>Insolvency (WG V)</i> | | |
| (i) Revisions to Guide to Enactment of the Model Law on Cross-Border Insolvency | A/CN.9/763 and A/CN.9/766 | 2013 |
| (ii) Obligations of directors of an enterprise in the period approaching insolvency | | 2013 |
| (iii) Updating of The Model Law on Cross-Border Insolvency: the Judicial Perspective | | 2013 |
| <i>Security interests (WG VI)</i> | | |
| (i) Draft Technical Legislative Guide on the Implementation of a Security Rights Registry | A/CN.9/764 and A/CN.9/767 | 2013 |
| (ii) Draft Model Law on Secured Transactions ¹ | | Not yet known |

B. Other activities

8. UNCITRAL's main areas of activity other than legislative development are part of its mandate to support the adoption and use of UNCITRAL texts. The main activities concerned are technical cooperation and assistance, which covers both promotion of the adoption of a text and its application and interpretation, and coordination of work in the field of international trade law. As the Strategic Direction paper notes, harmonization in its true sense requires that, in addition to legislative activity, these areas be addressed for each text that UNCITRAL adopts (see, further, A/CN.9/752, para. 3).

9. Reports available to the forty-sixth session of the Commission describing UNCITRAL's current activities in these areas will be as follows:

A/CN.9/772 Bibliography of recent writings related to UNCITRAL's work;

¹ At its twenty-third session (2013), the Working Group had a general exchange of views with respect to the draft Model Law and, in particular, the scope of the Working Group's mandate in that regard.

A/CN.9/775 Technical assistance to law reform and technical assistance resources, including UNCITRAL publications, the UNCITRAL website and UNCITRAL regional presence: survey of the activities undertaken by the UNCITRAL Regional Centre for Asia and the Pacific (RCAP);

A/CN.9/773 Status and promotion of UNCITRAL legal texts (status of the conventions and model laws resulting from UNCITRAL's work as well as the status of the New York Convention);

A/CN.9/776 Coordination and cooperation: (i) Brief survey of the activities undertaken by the Secretariat; (ii) Reports of other international organizations;

A/CN.9/777 Promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts: (i) Case Law on UNCITRAL texts (CLOUT), (ii) Digests of case law relating to UNCITRAL legal texts;

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

III. Summary of planned and possible activities after July 2013

A. Legislative work

1. Planned future work

10. The Commission has previously considered proposals for future legislative work on the following topics and mandated a working group to commence such work at a future time:²

(a) *Arbitration*: See the Note by the Secretariat on possible future work in the field of dispute settlement (A/CN.9/785), which addresses (i) arbitrability: this topic has been maintained by Working Group II on its future work agenda since 2006 (A/62/17, para. 177);³ and (ii) revision of the 1996 UNCITRAL Notes on Organizing Arbitral Proceedings. The Commission has agreed to decide at a future session whether draft revised Notes should be examined by the Working Group before being considered by the Commission, or whether the work should be undertaken by the Secretariat (A/67/17, para. 70).

(b) *Insolvency*: The Working Group's current mandate extends, in addition to issuing guidance on the interpretation of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to the centre of main interests, to possibly developing a legislative text (such as a model law, convention, or provisions for a domestic insolvency law) addressing selected international issues, including jurisdiction, access and recognition. Working Group V has recommended that the Commission confirm its view that the scope of the Working Group's

² Items that the Commission has considered in outline, but agreed to revisit after discussion of further or revised proposals submitted to it, are discussed in the following sub-section as proposals for possible future work.

³ See, also, subsequent reports of the Commission A/63/17 and Corr.1, para. 316; A/64/17, para. 299; and A/66/17, para. 203.

mandate as originally approved included centre of main interests in the context of enterprise groups (A/CN.9/763, para. 13). Working Group V agreed that this topic be handled upon completion of the current revisions proposed for the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency relating to the centre of main interests of individual debtors (A/CN.9/763, para. 14). The Working Group has also agreed that directors' obligations in the context of the insolvency of enterprise groups should be considered (A/CN.9/763, para. 92 and A/CN.9/766, para. 104); and

(c) *Security interests*: The Commission provided a mandate for the preparation of a Model Law on Secured Transactions to Working Group VI to commence work on the preparation of a simple, short and concise model law on secured transactions (A/67/17, para. 105). The report of that Working Group includes an exchange of views on that mandate and the scope of a model law to be developed (A/CN.9/767, paras. 63-64).⁴

2. Possible future work

11. The Commission has before it proposals for possible future legislative work on the following subject areas (listed alphabetically):

(a) *Arbitration*: See the Note by the Secretariat on possible future work in the field of dispute settlement (A/CN.9/785), which addresses work identified in consultations held by the Secretariat: the question of concurrent proceedings in the field of investment arbitration was seen as increasingly important;

(b) *Commercial fraud*: UNCITRAL has considered the issue of international commercial fraud at several sessions commencing with its thirty-fifth session in 2002 (A/57/17, paras. 279-290; see also further discussions referred to in para. 75 of the Agenda for the forty-sixth Commission session). At this session, the Commission will have before it a note on commercial fraud (A/CN.9/788) outlining the conclusions of an informal meeting hosted by the Secretariat in Vienna on 29-30 April 2013;

(c) *Electronic commerce*: The Commission has previously agreed that work regarding electronic transferable records might include certain aspects of other topics such as identity management, use of mobile devices in electronic commerce and electronic single window facilities. However, there has been no mandate by the Commission for a working group to take up these subjects, other than as aspects of current work on electronic transferable records (A/66/17, paras. 235 and 239);

(d) *Insolvency*: In addition to the topics relating to the remainder of its current mandate, the following topics for possible future work were mentioned at the forty-third session of the Working Group (A/CN.9/766, para. 109), acknowledging that a further mandate for such topics would have to be sought from the Commission at some future time: private international law rules applicable in insolvency proceedings, especially as they relate to enterprise groups; the effectiveness of current instruments in the light of the global financial crisis, in particular, the provisions of the Legislative Guide on Insolvency Law relating to financial contracts; the relevance of the Model Law on Cross-Border Insolvency to

⁴ See footnote 1.

the resolution of financial institutions; and enforcement of substantive rights and claims in a cross-border insolvency context;

(e) *International contract law*: At its forty-fifth session, in 2012, the Commission considered the desirability of work in the area of international contract law on the basis of a proposal by Switzerland (A/CN.9/758). It was determined that there was a prevailing view in support of requesting the Secretariat to organize symposiums and other meetings, including at the regional level, maintaining close cooperation with Unidroit, with a view to compiling further information to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general contract law at a future session. At its forty-sixth session, the Secretariat will present an oral report on this topic to the Commission;

(f) *Microfinance/Creating an enabling legal environment for microbusiness and small and medium-sized enterprises (MSMEs)*: At its forty-fifth session, the Commission agreed that one or more colloquiums on microfinance and related matters would be held with a focus on topics related to creating an enabling legal environment for microfinance and micro, small and medium-sized business. At its forty-sixth session, the Commission will have before it a note (A/CN.9/780) outlining the key findings of the colloquium organized by the Secretariat in Vienna on 16-18 January 2013, as well as recommendations for consideration by the Commission. The Commission will also hear an oral report on State's replies to a questionnaire (circulated in 2011-2012) on their experience with the establishment of a legislative and regulatory framework for microfinance;

(g) *Online dispute resolution (ODR)*: Future work raised with the Commission at its forty-fourth session includes guidelines and minimum requirements for online dispute resolution providers and neutrals; substantive legal principles for resolving disputes; and a cross-border enforcement mechanism (A/66/17, paras. 213-214);

(h) *Public procurement and related areas, including public-private partnerships (PPPs)*: At its forty-fifth session, the Commission agreed that a glossary of terms used in the UNCITRAL Model Law on Public Procurement and suggested topics for procurement regulations should be produced to support the Model Law. Draft papers on these topics will be before the Commission for its consideration (A/CN.9/771 and A/CN.9/772, respectively).

The Commission also agreed to explore the possibility of issuing further guidance papers on several topics to support the implementation and use of the Model Law, and instructed the Secretariat to undertake a study of topics that might warrant such guidance papers. The Commission also instructed the Secretariat to explore options for publishing and publicizing the various resources and papers themselves (A/67/17, paras. 109, 110 and 114). As regards several of those topics (suspension, debarment and self-cleaning, codes of conduct, interaction between suppliers or contractors and procuring entities and internal controls), the consultations indicated that there may be a need for further legislative work on some or all of these issues. As regards the other topics, the consultations indicated that further legislative activity was not warranted, but that further materials would be provided to the Secretariat in due course.

As regards PPPs, the recommendations emanating from a Colloquium, held in Vienna from 2-3 May 2013 pursuant to the Commission's suggestion made at its

forty-fifth session (*supra*, para. 120), to consider possible future work in public-private partnerships (PPPs) will also be before the Commission for its consideration (A/CN.9/779);

(i) *Security interests*: The Commission has agreed that security interests in non-intermediated securities (in the sense of securities other than those credited in a securities account), the rights and obligations of the parties to a security agreement and specific issues arising in the context of intellectual property licensing practices should continue to be retained on the future work agenda of Working Group VI (A/67/17, paras. 105, 268 and 273), as previously recommended by the 2010 International Colloquium on Security Interests (www.uncitral.org/uncitral/en/commission/colloquia_security.html).

Table 2

Summary of planned and possible future legislative activity

| <i>Subject area</i> | <i>Proposal</i> | <i>Planned or possible future work</i> | <i>Other relevant subject areas</i> |
|---|--|--|---|
| Arbitration | - Arbitrability; Revision of the Notes on Organizing Arbitral Proceedings - Multiple, concurrent proceedings in the field of investment arbitration; Dispute boards | Planned Possible | — |
| Commercial Fraud | Conclusions of informal meeting to be considered | — | |
| Electronic commerce | Identity management; single Windows; mobile commerce | Possible | — |
| Insolvency | Centre of main interests in the enterprise group context (including international aspects such as jurisdiction, access and recognition); directors' obligations in the group context | Planned | |
| International contract law | Broad proposal on international contract law | Possible | — |
| Microfinance/creating an enabling legal environment for MSMEs | Legal aspects of an enabling environment for MSMEs, e.g. corporate structure, dispute resolution, electronic transfers, access to credit and insolvency | Possible | Arbitration/ conciliation, insolvency, security interests, E-commerce |
| ODR | Guidelines and related issues; substantive legal principles; cross-border enforcement mechanism | Possible | Arbitration/ conciliation, E-commerce |
| Public Procurement | Sanctions-related issues | Possible | Arbitration/conciliation |

| <i>Subject area</i> | <i>Proposal</i> | <i>Planned or possible future work</i> | <i>Other relevant subject areas</i> |
|---------------------------------|---|--|-------------------------------------|
| PPPs | Development of a Model Law or Legislative Guide ⁵ | Possible | Arbitration/conciliation |
| Security interests ⁶ | - Preparation of a Model Law on Secured Transactions | Planned | Insolvency |
| | - Non-intermediated securities; party rights; intellectual property | Possible | |

B. Activities to support the adoption and use of UNCITRAL texts

12. Reports of the activities supporting the adoption and use of UNCITRAL texts (including technical assistance; promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL texts; identifying the status of and work in promoting UNCITRAL texts; coordination and cooperation; and promoting the rule of law at the national and international levels) are included in documents A/CN.9/772, A/CN.9/773, A/CN.9/775, A/CN.9/776 and A/CN.9/777; other activities will be reported orally to the Commission.⁷ These activities are expected to continue in the coming year at approximately the same level as in the year to July 2013.

13. As noted at several places in those documents, however, the demand for such activities far exceeds the resources available in the Secretariat to meet it, even given the additional resources provided by the UNCITRAL regional office in Incheon.

14. The implications for planning of future work within UNCITRAL and its strategic direction are discussed below.

IV. Allocation of resources and prioritization

A. Level of activity and need for prioritization or alteration in working methods

15. At its forty-fifth session, the Commission stated that, "... as is clear from the above analysis, UNCITRAL cannot continue, with its existing resources, to generate legal texts at the current rate and work towards the implementation and use of all UNCITRAL texts to the extent necessary." (A/CN.9/752/Add.1, at para. 25).

16. At the legislative level, paragraph 7 and Table 1 indicate the ongoing activities of the Working Groups, including those to be concluded at the Commission's forty-sixth session and those that are ongoing; Working Group I does not have a

⁵ The Colloquium will take place after the date of this Report. The development of a legal text on PPPs is one of the issues for discussion at the Colloquium; it is therefore included here for completeness, and the Report of the Colloquium will need to be examined for its recommendations (A/CN.9/779).

⁶ See footnote 1.

⁷ With respect to coordination activities on security interests, see provisional agenda A/CN.9/759, para. 18.

current legislative mandate. The Commission therefore has significant flexibility in setting its future legislative work programme. Paragraphs 10 and 11, including Table 2, set out the existing proposals for future work; the final column of the table identifies areas in which a proposal may involve issues of another subject area. More details of some of the proposals are found in the oral reports to the Commission and in the following documents: A/CN.9/785 (arbitration and conciliation); A/CN.9/763, paragraphs 13 and 14 and A/CN.9/766, paragraphs 103 and 104 (insolvency); A/CN.9/780, paragraphs 49-55 (Microfinance/Creating an enabling legal environment for MSMEs); A/66/17, paragraphs 213-214 (ODR); A/CN.9/779 (PPPs); and A/CN.9/788 (commercial fraud).

17. Clearly, six working groups cannot work on all of these activities simultaneously if UNCITRAL's current working methods are to be preserved (these methods are set out in A/CN.9/752, para. 5 and Section B), unless some of the suggestions proposed in the Strategic Direction paper are adopted (A/CN.9/752, paras. 34 and 35, and 37-40), such as (a) allocation of more than one topic to each working group, and (b) placing of greater emphasis on informal negotiations than on formal negotiations when developing texts, so that one working group could handle more than one topic within its allocated two weeks of conference time per annum.

18. In other words, UNCITRAL's legislative activity has now reached a level at which prioritization of subject-areas and/or some alteration in working methods is a necessity, even before considering the allocation of resources between legislative and other activity (a question that is addressed in section D, paras. 38-42 below).

B. Prioritization of subject areas

19. Prioritization of subject areas was discussed at the first Commission session in 1968, which concluded it was the appropriate manner of selecting topics for its work (A/7216, para. 39). At that first session the Commission also had before it a report on the progressive development of the law of international trade, submitted by the Secretary-General to the General Assembly at its twenty-first session — the session at which UNCITRAL was established (A/6396).

20. The Secretary-General's Report stated that, "in considering topics suitable for harmonization and unification, three general observations should be made. First ... harmonization is more easily achieved in technical branches of the law than in subjects closely connected with national traditions and basic principles of domestic law" (A/6396, para. 203). Examples of technical branches of the law given included transportation, international banking and arbitration.

21. The second observation was that, "the unification process is desirable per se only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade" (A/6396, para. 204).

22. The third observation was that, "in addition to their direct impact, unifying measures tend to have what is called a 'radiation' effect. This occurs when, for example, a State which is not a party to an international convention decides to apply the principle on which the international convention is founded, or when a unifying technique used in one international instrument is subsequently made part of another." (A/6396, para. 205).

23. At its first session, the Commission decided that it would select certain substantive topics for inclusion in its future work programme and identify certain topics for priority (A/7216, para. 34). The Report of that session does not set out the debate on prioritization on specific topics in detail, but the conclusions reflect the matters and suggested topics set out in the Report of the Secretary-General (see, also, the Strategic Direction paper, A/CN.9/752, para. 6). The Commission also stated at its first session that it would focus on short-term topics, rather than committing to all proposed topics at that session, with indications as to priority (A/7216, para. 34).

24. While there have been many developments in private international trade law since that time, the Commission may consider that those observations should continue to guide its selection of subjects.

25. The first observation underpins why UNCITRAL has not engaged in matters such as the regulation of corporate and taxation law. Instead, it has focussed on the areas set out in paragraph 20 above and others such as international sale of goods, electronic commerce, insolvency and online dispute resolution as more fully described in the Strategic Direction paper (A/CN.9/752, paras. 6 and 7).

26. The second observation, among other things, explains why UNCITRAL has taken up some subjects that are more closely connected with national traditions — such as public procurement and insolvency law. This is because such subjects have a potential beneficial effect on the development of international trade, rather than a potential benefit in terms of development of the legal and regulatory framework in a particular country alone. (In the case of public procurement, the OECD estimates that the total market value approaches 13 per cent of GDP in OECD countries and more elsewhere, the European Union indicates that international trade even within its borders is under 5 per cent of contract value, and many systems were riddled with obstacles to foreign participation before texts to remove them were issued by the World Trade Organization, the European Union, the World Bank and regional development banks, and UNCITRAL.)

27. As the Commission will be aware, the third observation has been proved in practice. Some examples include the enactment by the six States members of the Commission de la Communauté Economique et Monétaire de l'Afrique Centrale (CEMAC) of the substance of the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) without ratification of the Convention; the use by the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as a regional law without ratification of the Convention; and, in the context of updating e-commerce laws, the inclusion by several States of provisions of the United Nations Convention on the Use of Electronic Communications in International Contracts (ECC), without ratification of the Convention, as well as the enactment of a regional model law based on the Convention.

28. In the Strategic Direction paper, it is noted that setting priorities in UNCITRAL's work programme requires a consideration of not only the current and likely future scope of that programme (in terms of the resources available for its activities), but also the role and relevance of UNCITRAL both within the United Nations and in the field of international trade and commerce (A/CN.9/752/Add.1,

para. 24). The Strategic Direction paper continues that “UNCITRAL’s role and relevance can be assessed by reference to the work and priorities of the United Nations, donor communities and priorities of national governments. Key developments, such as the Paris Declaration on Aid Effectiveness (2005), and major international issues of concern — anti-corruption agenda, 2008 global financial crisis, conflict/post-conflict situations — will shape the priorities of these bodies” (ibid.).

29. It is suggested that a further principle that the Commission may wish to apply when prioritizing subject areas is the extent to which work on any subject selected by the Commission would (a) accord with the priorities of these bodies and member States, and (b) enable a symbiotic approach with the activities of these bodies as set out in the notes by the Secretariat on technical assistance activities and activities to ensure coordination with the work of other organizations active in the field of international trade law undertaken since the Commission’s forty-fifth session (A/CN.9/775 and A/CN.9/776, respectively).

30. The Commission may therefore wish to apply the three observations and the matters in the preceding paragraph in selecting among the proposals in Table 2 for future legislative activity. The materials referred to in paragraph 16 above that describe the proposals in more detail may assist the Commission in assessing how they fit within its mandate and within the priorities of donor communities and national governments. Were the Commission to decide, for example, that a topic was of importance to development, but fell outside its mandate to address international trade law, the Commission might also consider recommending it to another body active in law reform for its own work programme.

31. In that regard, the Commission may also wish to balance the proposals of existing working groups for further work in their subject areas with the views of member States at a more strategic level.

32. As regards the time period over which it plans its future work, the Commission may wish to consult members of, and observers to, relevant working groups as well as the Secretariat on the likely time frame for planned and possible future legislative activity, so as to ensure that its planning accords with the life cycle of a text (see the Strategic Direction paper on that topic, paras. 6-62). In addition, the Commission may consider that some of the future work proposals, whether possible or planned, should be addressed sooner, and others later — in other words, that it addresses prioritization in terms both of importance and time frame.

33. The Commission may also wish to consider whether the priority it sets among subjects for legislative activity should apply also to activities supporting the adoption and use of UNCITRAL texts and its broader work programme, or whether other considerations should also apply in that context. Some considerations on the possible scope of activities to support the adoption and use of UNCITRAL texts are discussed in paragraphs 39 and 41 below.

C. Possible need for alteration of working methods

34. The Commission may wish to bear in mind the issues raised regarding working methods in the Strategic Direction paper, including the number of sessions of

working groups per year, documentation and ways of working (paras. 34-40). In summary, that section of the Strategic Direction paper notes the importance of the consensus-based methodology of the Commission's work in ensuring the acceptability of its texts, but that servicing six working groups was stretching the Secretariat's resources to the maximum; undertaking some work informally; and the question of reducing documentation.

35. One option noted above would be for each working group to take on more than one topic at a time: one meeting per annum could be reserved for one topic, and the second meeting for another (thus preserving the allotted conference time for working group sessions). This approach would facilitate legislative activity on more than six topics at a time. However, the Commission may consider that that approach would also stretch the Secretariat's resources beyond breaking point.

36. Another option would be to increase the proportion of informal to formal negotiations, with some texts being developed outside the working group structure and presented directly to the Commission (as has been done previously, as noted in the Strategic Direction paper, para. 33). Indeed, in its first session, the Commission stated that the balance between informal and formal negotiations should be assessed in the light of the nature of the topic concerned (A/7216, para. 43). However, as the Strategic Direction paper also notes, the risk is that the universal representation that also supports the acceptability of UNCITRAL texts might thereby be compromised (paras. 35 and 37-40).

37. The Commission may also wish to consider ways of streamlining documentation, as suggested in the Strategic Direction paper (A/CN.9/752, para. 36). Issues relating to the translation of UNCITRAL documents and texts are considered in paragraphs 45-47 below.

D. Prioritization within UNCITRAL's overall work programme

38. While the Strategic Direction paper notes that the comparative advantage of UNCITRAL (as compared with other organizations working in similar areas) lies in its legislative working methods as described (A/CN.9/752, paras. 35 and 37-40), the Commission indicated at its forty-fifth session that it would consider the suggestions in that paper to promote an integrated approach to UNCITRAL's range of activities, beginning with the development of a proposed legislative project and carrying through to technical assistance and monitoring of the use and adoption of the resulting text. Indeed, as the Strategic Direction paper points out, the activities supporting the enactment and use of UNCITRAL texts give UNCITRAL's legislative work meaning and relevance: "without those activities, the legislative texts remain little more than reference tools" (A/CN.9/752, para. 41).

39. With its current and anticipated level of resources and the existing balance between legislative activity and activity on other aspects of the mandate, the Secretariat is likely to be able to continue to adjust its current level of activity to support the adoption and use of UNCITRAL texts. Nonetheless, it is clear that the Secretariat cannot undertake further activities, such as those suggested as a possible basis for a work programme promoting the rule of law at the national and international levels, which the Commission indicated it wished to consider at this session (A/67/17, para. 230). These activities included, for example:

(a) Supporting the adoption and use of those existing texts not currently supported by an existing working group or other legislative work (for a complete list of texts as at 29 May 2012, see Annex to the Strategic Direction paper, A/CN.9/752/Add.1);

(b) Developing practice guidelines or training materials for judges working in cross-border areas of the law, beyond what was done by Working Group V (Insolvency Law) with regard to cross-border insolvency;

(c) Formalizing networking by creating a list of participants ("listserv") that would allow experts to "meet" and exchange information, as well as help States that needed assistance to identify experts in the field. The example was given of a similar mechanism that had been launched by the Hague Conference on Private International Law;

(d) Further developing the cooperation of UNCITRAL with the World Bank on elaborating the links between economic development and trade law, and the role of trade law in helping States attract foreign trade and investment, and enhancing the visibility and integration of trade law within the broader United Nations rule of law agenda, the benefits of which are described in the Strategic Direction paper (A/CN.9/752/Add.1, paras. 17-20);

(e) Monitoring experience in the adoption and use of UNCITRAL texts, which can be used both to indicate where revision or modernization may be necessary, and to improve the efficiency of future legislative work; and

(f) Identifying existing resources and publications of other bodies active in relevant law reform and development, which might be made available to support the implementation, interpretation and use of UNCITRAL texts, and establishing mechanisms for ongoing collaboration with such other bodies.

40. The Commission has not yet considered whether and how to mobilize additional and external resources for its activities, such as through joint activities and cooperation with other bodies, as raised in the Strategic Direction paper (A/CN.9/752/Add.1, para. 23). Despite its vastly increased workload and output, as that paper points out, the Secretariat currently operates with more or less the same level of human and other resources in real terms that it was allocated shortly after it was established (A/CN.9/752, para. 25); that is 14 professional posts and 7 general service posts, plus 1 professional post and 1 general service post to support the RCAP in Incheon. Indeed, a consequence for the Secretariat of budget cuts throughout the United Nations is that one of the general service posts has been identified for abolition as of 1 January 2014, with the consequence that ensuring the ongoing publication of the UNCITRAL Yearbook will prove difficult. It is also

assumed that the current financial backdrop is such that the availability of external resources will be limited.

41. Furthermore, experience with existing technical assistance and coordination projects indicates that external support provided, for example, by financing Secretariat travel to events organised by third parties to promote the adoption and use of UNCITRAL texts, may create additional pressure on the Secretariat to dedicate appropriate resources to the implementation of such projects.

42. The Commission may therefore wish to consider, when assessing the usefulness of the activities set out in paragraph 39 above, whether the current balance between them and legislative activities is optimal, given current resources. In that regard, the Commission may wish to assess whether the continuing servicing of six working groups is appropriate. Reducing the number of working groups involved on legislative activity to five, for example, would allow the Secretariat to devote more of its time to these other activities.

E. Related questions

1. Working group and Commission support for activities promoting the adoption and use of UNCITRAL texts

43. The Strategic Direction paper suggests that setting aside time at UNCITRAL meetings for the sharing of information by States on initiatives they were undertaking to promote UNCITRAL instruments would, inter alia, make States that might be seeking assistance aware of initiatives that they could access for their benefit. The Commission reserved that topic for possible discussion at its forty-sixth session (A/67/17, para. 230).

44. Including such a time at the end of a working group session before consideration of the report of that session, could both improve the efficiency of that session, and allow States to demonstrate their commitment to supporting the adoption and use of UNCITRAL texts. That type of discussion, which does not require negotiation or deliberation, would not need to be recorded in the report of the relevant session. A similar approach could be taken, as appropriate, for sessions of the Commission.

2. Issuing documents in all official UNCITRAL languages

45. The Commission may be aware of the increasing difficulties of ensuring documents are issued simultaneously in all official United Nations languages. UNCITRAL documents consume a significant portion of resources allocated for translation at the United Nations Office at Vienna. The increasing difficulties reflect, in part, the increase in volume of UNCITRAL documents noted in the Strategic Direction paper (A/CN.9/752, para. 36) and in part other pressures on the language sections concerned. Publications issued by UNCITRAL are particularly affected on the basis that they are not prepared for a specific meeting and thus do not have a firm deadline by which they must be issued. In one recent case, the final Spanish language version of a lengthy UNCITRAL text is unlikely to be published until some two years after its adoption by the Commission.

46. The Commission may also wish to note that the resources available for the translation of material for the website are increasingly limited.

47. The Commission may therefore wish to consider alternative mechanisms to ensure that the policy goal behind the issue of documents in all official languages — the wide understanding of UNCITRAL texts — can be fulfilled. Such mechanisms may include the use of external translators to provide unofficial translations of original texts and/or greater use of United Nations working languages only for some documents. The Commission may also wish to assist the Secretariat in identifying external sources and, as necessary, financial support for such purposes.

B. Possible future work in the area of public-private partnerships (PPPs) — Report of the UNCITRAL colloquium on PPPs (Vienna, 2-3 May 2013)

(A/CN.9/779)

[Original: English]

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I. Introduction

1. At its forty-fifth session, in 2012, the Commission noted that further consideration of desirability and feasibility of future work in the area of PPPs would require additional research and a detailed study by the Secretariat. It therefore agreed that holding a colloquium to identify the scope of possible work and primary issues to be addressed would be helpful. The Secretariat was requested, in preparation for a colloquium, to define the possible topics for discussion at the colloquium, using the provisions of the UNCITRAL instruments on privately financed infrastructure projects¹ (the UNCITRAL PFIPs instruments) and drawing on the resources of other bodies and the deliberations at the forty-fifth session of the Commission. It was expected that the results of the colloquium would be presented

¹ The UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects (2000) and the Model Legislative Provisions on Privately-Financed Infrastructure Projects (2003), available at www.uncitral.org/uncitral/uncitral_texts/procurement_infrastructure.html.

to the Commission for its consideration. In that regard, it was also agreed that it would be essential to define a clear mandate for any future work in that area.²

2. The colloquium was held in Vienna, from 2 to 3 May 2013. It brought together experts from government, intergovernmental and international non-governmental organizations, private sector and academia. The discussion at the colloquium focused on two main issues: (a) whether there was a need for UNCITRAL work in the area of PPPs; and (b) if so, the scope of such work.

3. Under the first issue the following aspects were discussed: (a) experience with the use and regulation of PPPs since 2003 when the Commission last worked in the related area of privately financed infrastructure projects (PFIPs); (b) experience with the use of the UNCITRAL PFIPs instruments; and (c) particular factors that justify UNCITRAL work in the area of PPPs.

4. Under the second issue the following aspects were discussed: (a) which type of PPPs should be addressed in UNCITRAL work; (b) approaches to regulating PPPs; (c) which form(s) UNCITRAL work should take; and (d) considerations to be taken into account in the organization of UNCITRAL work in the area of PPPs.

5. This note transmits for consideration by the Commission a summary of the discussion and main conclusions reached at the colloquium.

II. Summary of the discussion at the colloquium

A. The need for UNCITRAL work in the area of PPPs

1. Experience with the use and regulation of PPPs since 2003

(a) Use of PPPs

6. It was noted that during the recent decade, in particular since the beginning of the financial crisis, there has been a growing interest in PPPs as an efficient means of resource mobilization for the provision of public services. PPPs have gained popularity also in the context of preparation of major public events (e.g. the Olympic Games). PPPs have thus increasingly been used and new forms of PPPs have emerged.

7. A shift has occurred in many jurisdictions as regards policies that underlie the use of PPPs. Previously, a lack of or insufficient public resources for the delivery of public services was the main driving force for the use of PPPs. Currently, there is a widespread recognition that private sector finance is not the only factor that makes PPPs attractive, other factors being the ability of the private sector to offer innovative, creative and efficient solutions to public needs.

8. Whereas the concept of a “public-private partnership” was earlier considered to be a policy term found only in long-term development programmes or visions at the national level, since 2005 the concept has been defined and regulated in several jurisdictions.

² *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 120.

9. Experience with PPPs has been mixed: some PPPs have been very successful, others less so, while some others have failed completely. A number of studies have been launched by international financial institutions and other entities to analyse the causes of PPPs' failures. The conclusion seems to be that problems with the implementation of PPPs are very specific and depend on the context and experience of countries where PPPs have been implemented.

(b) Regulation of PPPs

10. Some jurisdictions would require specific legislation enabling PPPs; others would not. Recent studies into the extent of regulation of PPPs, such as one into European Bank for Reconstruction and Development (EBRD) countries of operation, showed a wide variety in both how PPPs were regulated and in the scope of legislation.

11. A trend in a number of countries is to regulate PPPs by statute, sometimes in the absence of any prior practical experience with using them. In a few jurisdictions, efforts to legislate on PPPs have been undertaken only at the local/municipal level and not on the national/federal level; in others, legislation at both levels may exist. Only in a few cases was it thought that legislative efforts have resulted in a coherent and comprehensive legislative framework that facilitates, rather than creates obstacles to, the conclusion and successful use of PPPs. The adoption of PPPs-specific legislation in some countries has led to inconsistencies in the legislative framework. In some countries, the adopted PPPs laws exist only on paper, and are not used in practice. In some jurisdictions, the adoption of a PPPs law resulted in the appearance of three and more legislative acts that regulate the same issues (e.g. a law regulating public procurement, law regulating concessions and a PPPs law) and that may conflict with each other.

12. The existing texts on PPPs at the international and regional levels were recalled.³ It was noted that not all States take them into account when drafting PPPs laws.

13. In some jurisdictions, PPPs are regulated through regulations or guidance rather than by statute. In other countries, PPPs are not specifically regulated at all. PPPs in these countries may be created and implemented under the existing legal framework, i.e. using a combination of other laws in the State, such as the public procurement or concessions law. It was observed that this approach does not always produce the desired results if, for example, the stringent requirements of a public procurement law or concessions law are transposed without any modification to suit PPPs. In particular, a focus on price as the dominant evaluation criterion common in public procurement law might be excessive and inappropriate in the context of PPPs. Limitations on negotiations usually embedded in a public procurement law, it was said, would also not allow for sufficient flexibility in the PPPs context.

14. In some jurisdictions, in the absence of a specific legal framework on PPPs, rules regulating PPPs have been adopted on a project-by-project basis; the creation of a PPP may then be subject to cumbersome approvals in legislative bodies or municipal authorities, and may require feasibility studies to be first approved by the Government.

³ See, further, A/CN.9/782, Section II.B.4.

15. The Commonwealth of Independent States (CIS) was cited as an example of a regional effort to prepare a model law on PPPs.

16. Laws regulating PPPs vary in scope and level of detail. Some laws contain a definition of the term “public-private partnership” while others leave the term undefined. An observed trend is to encompass in a PPP law a wide range of arrangements through which the private sector can engage in the provision of public services. Some PPPs laws are very detailed in regulating various aspects of PPPs (said to be at the risk of over-regulating them), while others are very general and may contain gaps in regulating important issues. Most regulate contractual relationships arising from PPPs and call for the establishment of a PPP unit with a variety of functions and roles. The accumulated experience in some jurisdictions with the implementation of PPPs and the role of creditors in the process have led to adjustments in the existing legislative framework with the view to making laws more workable and PPPs created under them “bankable”.⁴ The scope of the draft model law currently being discussed in the CIS Inter-Parliamentary Assembly covers production-sharing and revenue-sharing agreements.

17. Another trend observed has been to include PPPs among subjects of negotiation for accession to the Agreement on Government Procurement of the World Trade Organization (GPA).⁵ If PPPs are part of a country’s GPA commitments, the principles of national treatment and most-favoured-nation clauses will apply to them.

18. The link between the quality of PPP regulation and the quality of implementation was discussed at length. In some jurisdictions, it was observed, successful PPPs have been implemented without any specific legislative framework. In other jurisdictions, where PPPs failed, the lack of appropriate legal framework could have been a contributing factor. At the same time, PPPs have also failed in some cases in jurisdictions that have in place an adequate legal framework applicable for PPPs. The absence of practical experience with the implementation of PPPs could have been a contributing factor to the failures in such cases. It was recognized that there could be many contributing factors to successes or failures of PPPs, including the political will and interest of the host country in a project and capacity and quality of engagement of all parties to the project. While it was difficult to illustrate a direct causal link between the quality of legal framework applicable to PPPs and their failure or success, it was undisputed that an inadequate legal framework creates barriers to the creation and successful use of PPPs.

2. Experience with the use of the UNCITRAL PFIPs instruments

19. According to some speakers, no legal instrument existing at the national, regional or international level, including the UNCITRAL PFIPs instruments, can be

⁴ This term may be used to describe a project that is acceptable to institutional investors and hence one in which contractors are likely to participate.

⁵ The plurilateral Agreement on Government Procurement of the World Trade Organization (the GPA), negotiated in parallel with the Uruguay Round in 1994, and entered into force on 1 January 1996. On 15 December 2011, negotiators reached an agreement on the outcomes of the renegotiation of the GPA. This political decision was confirmed, on 30 March 2012, by the formal adoption of the Decision on the Outcomes of the Negotiations under Article XXIV:7 of the Agreement on Government Procurement (GPA/113). Both texts are available at www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm.

considered as a de facto standard or model available to States for PPPs legal reform. Other speakers considered that the UNCITRAL PFIPs instruments could be seen as such a model, and examples of laws on PPPs in CIS countries, Eastern Europe, North Africa, China and Mongolia, enacted on the basis of the UNCITRAL PFIPs instruments, were provided. EBRD reported that it used the UNCITRAL PFIPs instruments for assessing legislation on PPPs in thirty-four countries of its operation and consider them a useful benchmark tool. The utility of those instruments was highlighted in particular because they deal with issues beyond the selection of the project operator — a relatively straightforward stage where the main principles of sound public procurement apply. The point was made that not all States and not all institutions or individuals using the UNCITRAL PFIPs instruments acknowledge this fact.

20. Some speakers pointed out that, despite their use by some States and organizations as a benchmark for law reforms, there is no widespread awareness about the UNCITRAL PFIPs instruments. They have proved to be a useful source of information but mainly for experts and academia from countries and institutions that have extensive experience with PPPs. For others, especially in countries that do not have any or much experience with PPPs, they are excessively complex and do not reflect the immediate needs and realities on the ground, so they have proved to be of limited utility for legislators and regulators. They do not reflect regional particularities, particularities of PPPs in various sectors (water, health, roads, etc.) and do not allow countries to graduate from simple forms of PPPs to more complex ones. They tend to overwhelm readers with complex concepts, not taking into account that readers may not yet comprehend even simple concepts in the context of PPPs such as what would constitute State support measures, and what would be considered risks on the parties as opposed to their liabilities or obligations.

21. Some speakers raised a concern that while the UNCITRAL PFIPs instruments addressed the majority of PPPs — PFIPs — they failed to address some other forms of PPPs that became widespread since 2003 (such as partnering and alliancing). Others considered that the UNCITRAL PFIPs instruments might only seem to be outdated in that respect but were prepared intentionally with a limited scope and with a main focus on infrastructure development. Certain projects were excluded from coverage by choice (such as oil and gas concessions and institutional PPPs). It was also an informed choice to address only the core issues of PFIPs and guide enacting States as regards other branches of law where reforms would be necessary for the legal framework applicable to PFIPs to be coherent and comprehensive.

22. In response to the concerns about the complexity of the UNCITRAL PFIPs instruments, it was explained that the complexity of projects necessitated dealing with complex issues. The lack of capacity in some countries to implement PPPs should not mean that the quality of UNCITRAL texts should be jeopardized by taking a very simplistic approach to treating issues that are not simple; nor should the role of those instruments be downgraded to one of a simply educational nature. The UNCITRAL instruments need to reflect best practices in regulating PPPs. It was also pointed out that complaints about complexity may be valid as regards the UNCITRAL Legislative Guide on PFIPs, but not as regards the UNCITRAL Model Legislative Provisions on PFIPs. The former is indeed long and complex, but this is justified as the Guide is an analytical tool that explains various options and the implications of each. The latter, the UNCITRAL Model Legislative Provisions on

PFIPs, however, is a short and simple text providing guidance to States as regards the core provisions to be included in their laws on PFIPs.

3. Particular factors that justify UNCITRAL work in the area of PPPs

23. As the discussion summarized in section 1 above demonstrates, more States have started regulating PPPs and more definitions of this concept appear. Much confusion currently exists as regards terminology, the appropriate scope of a law on PPPs, its content and interaction with other areas of law, political aspects and policy considerations (trade, governance and employment). Poor laws enable poor projects, in particular leading to excessive transaction costs because of the need to prepare and negotiate complex contracts that would have to address the gaps and inconsistencies in the existing legal framework. This does not facilitate efficient use of public, private or development assistance resources. Institutional reforms that have accompanied legislative efforts have added even more complexity since they have led to the proliferation of State institutions dealing with issues of PPPs. This problem, it was noted, did not exist before 2003 when only a few national institutions entrusted with issues of PPPs, such as PPPs units (a common term for agencies handling policy and practical issues in PPPs), existed.

24. The view was that the international community, i.e. international, regional and subregional institutions, has not been effective in guiding States as regards legislative or institutional reforms in the area of PPPs. The situation is characterised by uncoordinated rule-making, technical assistance and capacity-building and inconsistent results and confusion. There was an urgent need therefore, according to the speakers that raised this issue, to achieve an integrated approach by all organizations that produce model laws on PPPs or guidelines on how to prepare and implement a national law on PPPs.

25. UNCITRAL was therefore urged to tackle all these difficulties faced by States in preparing a coherent law on PPPs. With its mandate to coordinate activities of various organizations preparing legal texts in the area of international trade law, UNCITRAL could ensure that the international community would start speaking in one language on the basis of an UNCITRAL model. The current situation is the reverse, and the UNCITRAL PFIPs instruments are not adequate to change it. Speakers considered that it is appropriate now to analyse why this is so and how to redress the situation.

26. PPPs have increasingly been used in various forms and various contexts and it is most likely that they will be used in an even wider array of contexts and forms. A survey of PFIPs and PPPs legislation worldwide indicated that PPPs laws contained some elements not found in PFIPs laws, including the UNCITRAL PFIPs instruments, arising from the distinct features of non-infrastructure-related PPPs. It was therefore argued that the scope of the UNCITRAL PFIPs instruments should be expanded by regulating some or all types of PPPs not currently covered.

27. As PPPs have proved to be an extremely effective tool under some circumstances and an undesirable tool under other circumstances, it was thought that an analysis of lessons learned from their implementation would assist in identifying factors that have contributed to the successes and failures. Safeguards against abuses and common mistakes would need to be provided accordingly. Some safeguards not found in the UNCITRAL PFIPs instruments would need to be added,

and some that are found in those instruments would need to be rephrased or revised in order to reflect practice.

28. It was noted in this regard that the UNCITRAL PFIPs instruments currently lack some important safeguards and provisions, such as on social clauses and other measures promoting social responsibility and pro-poor projects. As suggested at the UNCITRAL congress “Modern Law for Global Commerce” (Vienna, 9-12 July 2007),⁶ provisions aimed at anticipating and minimizing disputes between the contracting authority and a project operator should also be developed as a way of effectively handling continued relations between the core contracting parties to PPPs. Such preventive mechanisms may include regular meetings, alerts about possible changes in legislation and regulations and establishment of standing commissions in various sectors ready to intervene into disputes.

29. Some safeguards included in the UNCITRAL PFIPs instruments have not been sufficiently set out. For example, those aimed at transparency and accountability should be applicable not only at the stage of the selection of the project operator but throughout the project. The need for public disclosure of information about the movement of resources from the State to the project operator and vice versa was specifically highlighted. Anti-corruption measures should be strengthened, for example by discouraging one-to-one meetings and instead encouraging the use of public media and modern means of communication for better traceability of operations.

30. Another area to be developed in the UNCITRAL PFIPs instruments, it was added, is effective dispute resolution. The UNCITRAL PFIPs instruments do not address in detail the complexity of dispute resolution mechanisms that are usually involved in PPPs and crucial role that the choice of governing law and dispute resolution forum plays in effective dispute resolution. Different clusters of agreements may refer to various arbitration rules and governing laws and places for resolution of disputes. Their interaction with each other should be explained.

31. The view was also expressed that the UNCITRAL model legislative provisions and relevant provisions in the Guide addressing dispute resolution could be more balanced in treating various forums for dispute resolution — international arbitration as opposed to domestic dispute settlement. Dispute resolution through international arbitration has in many cases not led to effective outcomes, most importantly regarding the enforcement of international arbitral awards. This is despite the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, on 10 June 1958 (the New York Convention)⁷ that are binding on the prevailing majority of States. Proliferation of international arbitration forums, cases and rulings, coupled with proliferation of investment treaties, have complicated dispute settlement through international arbitration. A shift towards emphasizing the importance of effective domestic dispute settlement and the need to build local capacity for such purpose may be needed in the UNCITRAL PFIPs instruments.

⁶ See the Proceedings of the Congress, chapter V; available from www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

⁷ United Nations, *Treaty Series*, vol. 330, No. 4739. Also available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (accessed May 2013).

32. Such a shift, if it were to take place, was recommended without jeopardizing the enabling environment for international arbitration. In particular, the contracting authority should be allowed by law to agree to international arbitration under a PPP contract; in many legal systems, this approach is currently not possible although the legal framework may generally allow for international arbitration. UNCITRAL was urged in any future work on PPPs also to address other obstacles towards achieving effective settlement of disputes arising from PPPs: (a) the necessary experience, skills and expertise of the judiciary to address complex issues in PPPs; (b) inefficiencies in court systems; (c) lack of independence; (d) accessibility (procedures may discriminate against foreign investors as opposed to national entities); and (e) reluctance at the domestic level (for a variety of reasons) to enforce international arbitral awards despite international obligations on States to do so under the New York Convention and other multilateral and bilateral treaties. Issues of sovereign acts and sovereign immunities should also be addressed in more detail, it was noted, as there had been cases of abuse where sovereign immunity defences and exemptions had been invoked.

33. Unsolicited proposals were identified as another area where more specific guidance by UNCITRAL is needed. The UNCITRAL PFIPs instruments allow unsolicited proposals to be considered with caution and subject to some transparency safeguards, but in practice this area was assessed as flawed and abuses were considered common, especially in countries without institutional and transparency safeguards. It was suggested that the provisions on this subject could be considerably strengthened, using positive experience accumulated since 2003 in the regulation of unsolicited proposals worldwide. The main approach was to preserve competition while protecting intellectual property rights and encouraging creativity and innovation. Caution was, however, voiced against detailed regulation of this controversial subject. Any regulatory text on this subject would by necessity be accompanied with extensive explanatory notes. It was also noted that the notion of unsolicited proposals depends on the definition of PPPs: when the focus in this definition is on the delivery of public services, the likelihood and justification for unsolicited proposals are minimal since the private sector cannot define better than the public sector what public needs are. It was added that the concept of unsolicited proposals should, however, not be confused with other related concepts, such as private sector proposals.

34. Some speakers considered that some other provisions of the UNCITRAL PFIPs instruments, in particular on risk allocation, government guarantees and State support measures, should be further elaborated, as there is much confusion in practice on those issues. Some other provisions of the UNCITRAL PFIPs instruments were considered to convey incorrect messages or to give the wrong impression, and needed therefore to be rephrased.

35. Other factors that some speakers noted might affect any decision of UNCITRAL to undertake the work in this area, include developments in the international arena, such as the entry into force of the United Nations Convention against Corruption (New York, 31 October 2003).⁸ This text contains provisions relevant to PPPs. Developments in UNCITRAL itself, in particular new legislative

⁸ United Nations, *Treaty Series*, vol. 2349. Also available at www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf.

standards in the areas of public procurement, insolvency law and security interests, may necessitate the revision of some provisions of the UNCITRAL PFIPs instruments.

B. The scope of any possible work by UNCITRAL on PPPs

36. As further elaborated in the sections below, there was no disagreement among speakers that, in the light of the above-referred facts, guidance from UNCITRAL on issues of PPPs is needed urgently and should be provided. Views varied as regards the form that such guidance should take — a model law or expanded and revised legislative guide, legislative recommendations and model provisions. While there was strong support for a model law, some speakers were not convinced that the preparation of a model law was desirable or feasible. Various considerations, including the time that would be allotted by UNCITRAL to its work in the area of PPPs, if any, would influence the eventual decision by the Commission on the extent and the form of any contemplated work in that area.

1. Which type of PPPs should be addressed in UNCITRAL work?

37. There was consensus that achieving a common understanding of PPPs would be essential in order to define accurately the scope of the work. There was no disagreement that the concept of PPPs must be kept flexible to cover all possible forms of private sector involvement in the provision of public services. This approach would lead to an umbrella concept, which in turn could be divided into subcategories, rather than a strict defined term of PPPs.

38. For such purpose, UNCITRAL would need to identify similar features attributable to PPPs that UNCITRAL would regulate and that make them distinct from related forms of public-private engagements that would fall outside the scope of the intended exercise. The presence of physical infrastructure, it was said, should not be considered as an indispensable criterion attributable to PPPs that UNCITRAL would regulate. Views varied on whether possible future work by UNCITRAL in this area should encompass partnering and alliancing, institutional PPPs and long-term lease, leasing and management contracts as well as natural resources concessions.

39. The colloquium had a preliminary consideration of the distinct features of PPPs that UNCITRAL should regulate, in particular as compared to public procurement and natural resources concessions.

40. In a public procurement project, it was noted, the Government is expected to finance the project from the start. Regardless of whether the payment to the supplier or contractor is made in the beginning or in the end of the project or in instalments, there are consequences for the public budget; an increase in public debt would be visible. In the PPPs context, it is usually the private sector, not the Government, that is expected to finance the project from the start, although sources of financing of the project at later stages of the project implementation are varied. The impact of PPPs on the State budgeting processes was observed to be less clear; it has been identified by experts as an area where guidance by UNCITRAL should be provided, taking into account that short-term budgeting cycles in many jurisdictions do not accommodate the long-term nature of PPPs. Risk allocation was considered as

another feature that differentiates PPPs from public procurement: performance risks in public procurement are primarily borne by the public sector, unlike PPPs in which project risks were allocated between the private and public sectors. Doubt was, however, expressed that such a strict risk allocation scheme remains true in all cases of public procurement and PPPs.

41. Most natural resources concessions, it was explained, involve the exploitation of public wealth/goods, rather than the delivery of public services, with the result that concessions have less direct impact on the public than PPPs. It was argued that this feature of concessions should not justify their exemption from sound procurement principles of competition, transparency and accountability, especially since public wealth should be exploited for the benefit of all and there are examples of concessions (e.g. exploitation of hydro resources) involving or impacting delivery of public services. Another distinct feature of such concessions, at least those in the mining sector, it was said, is that they did not presuppose the continuous engagement of public authorities in the implementation of the project; public authorities usually participate in profit-sharing and other type of ancillary arrangements.

42. The following main distinct features of PPPs were identified by some speakers: (a) the long-term participation of the private sector in the delivery of public services; (b) the PPP arrangement is amenable to modifications and adjustments over time; (c) such life-cycle considerations of the project as sustainable and sustained performance matter most (in particular because the need to provide uninterrupted services to the population); (d) the primacy of the government authority that remains responsible to the public for delivery of services throughout the project and afterwards; (e) an opportunity for innovation and creativity on the part of the private sector; and (f) various schemes for project finance payment to the private sector for the services delivered.

43. The long-term participation of the private sector in the delivery of public services and the government's remaining responsible to the public for the delivery of public services were identified by some speakers as the key distinct features of PPPs. Those features, it was said, have short- and long-term implications on the structure, contract formation and clauses and implementation of the project. As individuals are the ultimate beneficiaries of PPPs, and the public interest has a higher stake in PPPs than in other public-private transactions, the law regulating PPPs should limit the freedom of parties to agree terms. For example, a contract should provide for necessary safeguards in the case of termination, in order to ensure continuity of public services. The law should also address such sensitive issues as non-discrimination in the provision of public services and fair profit-sharing. Some other speakers pointed out that some public procurement contracts also involved long-term delivery of public services by the private sector; public procurement should not be reduced to supplier purchasing as a consequence of the introduction of PPPs.

44. As regards mining concessions in particular, a strong view was expressed that UNCITRAL should not contemplate regulating such a heavily political and internationally sensitive sector, which remains largely self-regulating (mining codes apply to them and in some jurisdictions they may operate under special regimes approved by the legislative body). The point was also made that, unlike PPPs that

UNCITRAL should regulate, these natural resource concessions do not have a direct impact on the immediate needs of individuals.

45. UNCITRAL was invited to look into PPPs with the participation of State-owned enterprises and new forms of PPPs linked to availability payments or infrastructure projects as private equity. It was also pointed out that cross-border PPPs should receive closer attention by UNCITRAL in the light of their emergence in some subregions and the likelihood of their gaining more popularity, in particular in the context of subregional and regional economic integration. They may face particular issues: applicable law, conflicts of law, supra-national institution, extra-territorial application of standards and so forth.

2. Approaches to regulating PPPs

46. It was suggested that UNCITRAL should aim at formulating general principles that regulate the common elements of PPPs. No PPP model should be singled out for regulation but a broad spectrum of PPPs should be addressed. Restricting an UNCITRAL text in this way to a high-level general framework level, adaptable to local circumstances, was said to be essential to make UNCITRAL work on PPPs feasible and useful — otherwise, the project would be too lengthy and complex to meet the urgent need for a more general UNCITRAL standard on PPPs. It was added that regulating specific elements of all PPPs would be useless because they would in any event be defined by local culture and the needs of each project.

47. The goal of any regulation, it was said, should be to enable and facilitate a variety of forms of PPPs for the delivery of better public services and sustainable development.

48. It was agreed that the work must define its boundaries, noting that not all issues are susceptible to legal solution. UNCITRAL should for example not try to regulate policy matters that underlie the use of PPPs or issues that are embedded in constitutional law (e.g. the primacy of collective property over private property). UNCITRAL should focus on categories of issues that need a legislative solution, such as allocation of powers and risks, and legal obstacles (e.g. authority and capacity to enter into PPPs, and inconsistencies of PPPs policy and laws with other related branches of law (insolvency, taxation)), and on basic standards and safeguards at which investors will look to ensure that the project is bankable (e.g. step-in rights, transparency and other sound procurement principles, safeguards against expropriations).

49. In regulating PPPs, the focus should be on enabling appropriate projects and reducing transaction costs, some of which could be minimized or avoided through an adequate legal framework. For example, including core principles regarding tariffs in law or regulations could save the need to hold lengthy negotiation with local authorities.

50. A balance between academic rigour and a pragmatic approach was urged. Such practical aspects as how public sector remains responsible to the public and engaged throughout the project should be addressed, as should such trends as new ways of urbanization, combating fraud and managing identity. With respect to the latter, establishing a global transparency registry that would track each company record in implementing PPPs worldwide for the benefit of Governments that would be able to consult the registry was suggested for consideration by UNCITRAL. Concern was

voiced that the risk of commercial fraud in developing countries is real and tools must be provided by the international community to combat this economic crime internationally.

51. UNCITRAL was also encouraged to be clear as to which aspects should be addressed in primary legislation and which aspects in regulations or guidance notes, so as to ensure an adequate level of predictability and security of the legal framework applicable to PPPs. This approach would also ensure that the basic legal framework on PPPs would not depend on the government or one minister, and a change in government would not therefore have a direct impact on the formation and implementation of PPPs. Currently, these risks are present in some countries because fundamental issues affecting PPPs are delegated there to regulations or guidance. This approach, however, would not mean that all fundamental issues would need to be addressed in a single legislative act — laws addressing customs, taxation, investment protection, land rights, insolvency law, security interests and so forth were noted also to be relevant.

52. A legal framework on PPPs should therefore be capable of interacting with other laws applicable to the project. In particular, it was noted that some level of harmonization between public procurement and PPPs laws should be achieved, by cross-references where necessary, since certain provisions might be equally applicable in the public procurement and PPPs contexts. Examples given included challenges before an independent body and remedies available to aggrieved investors. An UNCITRAL text on PPPs would have an added value to the extent that it would regulate specific features of PPPs requiring flexibility beyond that normally allowed by public procurement legislation, and so as to avoid creating disincentives and obstacles to PPPs.

53. It was emphasized that UNCITRAL could not avoid dealing with issues of institutional reforms in order to address practice: institutions intended to support PPPs should be compatible and coherent; the tendency to create additional bureaucracy should be avoided, as it would add an unnecessary level of complexity. In this regard, it was noted that putting in place more flexible structures would be desirable (e.g. an advisory board on policy issues with its precise composition designed to reflect the sector in which a PPP is undertaken).

54. It was added that UNCITRAL should advocate a gradual approach to introducing PPPs in jurisdictions that do not have experience with them (from simple PPPs to complex ones), and should provide options for States at different capacity level. Even in the presence of a sound legal framework, it was noted, PPPs would not be used if the society and public authorities were not ready for them.

55. It was added that issues of terminology should be addressed, and that any future text should be drafted in plain language to assist the reader.

3. Which form(s) should UNCITRAL work take?

56. A model law as the form of an UNCITRAL text on PPPs was preferred by many speakers, especially in the light of all facts set out above. It was acknowledged, however, that the nature of the social contract in States is very different and needs in regulating PPPs are therefore also very different. As a result, not all countries would need or would want to enact a law on PPPs. Where such need and will exist, a UNCITRAL model law would provide States with an

internationally accepted model, readily available and easy to use for enactment of a national law on PPPs. Without such model, the risk of adoption by States of ill-considered legislation on PPPs was said to be high. With such a model, States would be able to focus on local particularities that necessitated adjustments to the model. An UNCITRAL model law would thus provide the necessary level of confidence to policymakers and legislators that their law enacted on the basis of the UNCITRAL model reflected best international practices. This in turn would send a positive signal to the private sector as regards the adequacy and stability of the local legal framework applicable to PPPs.

57. The following features of a model law were suggested: it should not be overly complicated; it should be flexible; it should include best practice on which international consensus existed, disputed or controversial issues should not be included in its provisions; it should cover all core provisions applicable to all types of PPPs regulated by the model law and should cross-refer to other branches of law where necessary; the law should define the main PPP-related terms used in the law; the law should address the obligations of the parties to the PPP, State support obligations and measures, monitoring mechanisms, including the participation of civil society, compensation in case of termination, international arbitration and step-in rights. It should also require the PPP contract to address these issues if the law itself does not prescribe a specific solution to them. The law should be clear which mandatory provisions must be crafted individually for each project and should identify any minimum requirements applicable to them. The UNCITRAL Model Legislative Provisions on PFIPs, which addresses many of the enumerated points, should become the basis for such a model law.

58. Other options considered for possible work of UNCITRAL in this area were to update, revise and expand the scope of the UNCITRAL PFIPs instruments. It was recalled that when the UNCITRAL PFIPs instruments were prepared, governments were cautious about working in areas that were not in the core competence of UNCITRAL (issues of bilateral relations, politically sensitive areas, domestic institutions). It was queried whether Governments would be less reluctant to do so at present. A model law that required reaching a high level of specificity, comprehensiveness and harmonization in these areas would therefore not be an option.

59. In addition, it was suggested that the complexity of the subject and the need to preserve as much flexibility as possible in order not to stall innovation in PPPs, indicated providing more general analytical guidance such as that contained in the UNCITRAL Legislative Guide on PFIPs. It was noted that the latter identifies legal obstacles to PFIPs, explains implications if those obstacles are not addressed by States and points out to non-legal obstacles that are also to be dealt with. By providing this analytical information, the Guide empowers policymakers and legislators with choices in legislative and institutional reforms.

60. In response, those that preferred the preparation of a model law considered that updating, revising and expanding the scope of the UNCITRAL PFIPs instruments would not bring the main desired result from the exercise — preparation of a simple easy-to-use model for legislators. It was considered essential for UNCITRAL to prepare such an international model, which in turn should be accompanied by supplementing materials, such as commentaries to provisions of the

model law, guidance on specific issues that raise most difficulties in practical implementation of PPPs and policy papers.

61. Some speakers were convinced that the model law would not be able to provide one solution to all issues of PPPs to be included in a model law. It was therefore emphasized that while the text of the law may be desirable, accompanying guidance (such as that provided in the Guide to Enactment of the Model Law on Public Procurement)⁹ would be absolutely necessary in order not only to equip those that will implement the law with the capacity to do so but also provide them with explanations for possible deviations from the model or as regards options contained therein. Such explanatory guidance would also include discussion on any controversial issues on which a consensus did not emerge.

62. It was suggested that the UNCITRAL Legislative Guide on PFIPs could be updated in parallel with the preparation of a model law and the resulting updated text could become the basis for drafting a guide to enactment that would explain the provisions of the model law and would provide more detailed technical guidance to ministries and other Government departments that used PPPs. The approach to drafting such a guide should, it was urged, be carefully considered from the perspective of the intended end-users of the text, to avoid certain mistakes in the current Guide. While being specific and detailed, the guide should remain simple and easily understood by the intended readers. Complex terms should be avoided, examples and illustrative explanations should be included and various ways of presenting what is expected to be the lengthy material in a user-friendly way should be considered (e.g. the guide could be broken into sections and accompanied by annexes that would for example describe specific features of PPPs per sector). Preparing a glossary of PPP-related terms was also suggested. A set of essential contractual terms (akin to rules and procedures of the International Federation of Consulting Engineers (FIDIC)) could also be included in the guide as an annex or otherwise, which could be of value to contracting parties that could incorporate them by reference in their PPPs contracts, saving the need for negotiating them. This set could also be used as a checklist of core provisions that should be included in the contract.

63. In support of the work on a model law and its guide to enactment and other supplementary materials, it was argued that a shift from the existing model legislative provisions and legislative guide to a model law with the guide to its enactment would result in a big difference for enacting States. It was acknowledged that both options provide only for non-binding guidance since States are not bound to enact their law on the basis of UNCITRAL models and may adjust UNCITRAL models to local circumstances as they deem appropriate. Although the difference may eventually be only in names of instruments and ways of presenting them, not their substance or nature, the form would make a difference in that an easy-to-use model would be more seriously considered and widely used by local policymakers, legislators and assistance-providers.

64. In response to the question why a model law was not prepared in 2003, it was explained that at that time there was no consensus on the definition of PPP and there

⁹ Adopted by the Commission at its forty-fifth session, in 2012. *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17)*, para. 46. Available from www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2012Guide.html.

was no much demand for a model law since PPPs was considered a policy concept not to be regulated by law. These factors have changed since 2003 as explained in chapter II.A above.

4. Considerations to be taken into account in the organization of UNCITRAL work in the area of PPPs

65. For any work on PPPs, it was stated that it would be essential to identify the best or sufficiently good practices in regulating PPPs to provide impartial advice. UNCITRAL might face difficulties in this regard, given vested interests and institutions that represent them, including some private sector consultants and financial institutions. For example, where they are advisors to governments in legislative reforms and providers of technical assistance and capacity-building, and at the same time PPP financiers or project operators, they will have an inherent conflict of interest. It would be equally important to identify poor practices, many of which have been replicated by international consultants and advisors to Governments.

66. UNCITRAL was encouraged to make use of the significant information on PPPs accumulated by various institutions that include databases of contracts, PPP laws and other laws related to PPPs worldwide, surveys of PPPs and results of assessment of PPP legal framework in a number of countries, databases of PPPs experts, advisors, specialists and local focal points. Tools that allow tracing results of various PPPs, investment volumes, renewable energy aspects and data on PPPs grouped per sector were also highlighted.

67. While other international and regional instruments regulating various aspects of PPPs should be consulted in any possible work by UNCITRAL in this area, UNCITRAL was encouraged not to try to achieve harmonization among all such instruments in the light of their diverse scope, focus and purpose. UNCITRAL should instead take a critical look at different texts from the perspective of their utility to its work (whether there would be any added value in using them as the basis for its work or simply for reference). The point was made that UNCITRAL work in this area might necessitate those other instruments to be updated or revised.

68. The importance of bearing in mind what can be achieved within a reasonable period of time was emphasized, taking into account the complexity of issues intended to be addressed. Views varied as regards the volume of work involved. Some considered that the preparation of a model law or an expanded guide should not require much time, as most issues are already addressed in the UNCITRAL PFIPs instruments, while others were of the view that a considerable amount of work remained to bring the existing texts up to date and in order to prepare a model law. While adding clarity to the core elements that have already been addressed in the UNCITRAL PFIPs instruments might be not so time-consuming, the addition of new elements and clarity regarding scope and terminology would require substantial work. The point was also made that preparing a short simple instrument — which should be the goal of the work of UNCITRAL in this area — is considerably more difficult than preparing a large complex instrument. It was emphasized that the current UNCITRAL Legislative Guide on PFIPs to be useful for intended beneficiaries must be rewritten in a simple language and restructured.

69. It was underscored that an intergovernmental forum (the Commission and its working groups) would develop any texts to be prepared by UNCITRAL. Studies and preliminary drafts to be prepared by the Secretariat would be essential to expedite the work of the intergovernmental body. Involvement of experts in the Secretariat's preparatory work and allowing sufficient time for the preparatory work would be needed for producing studies and drafts of adequate quality.

70. It was also noted that deliberations should be as inclusive and comprehensive as possible to achieve a balanced representation of various views and interests and hence a satisfactory result (in addition to member States and observer States, participation of professional associations, academia and civil society organizations would be required). Close cooperation between UNCITRAL and international and regional institutions working in the area of PPPs should to be ensured. The process of preparation of texts would allow local specialists and international experts to exchange ideas, knowledge and experience so as to achieve consensus on what constitute internationally accepted best practices in regulating PPPs.

71. It was agreed that any further work by UNCITRAL in this area and results emanating from that work would be important for technical assistance and local capacity-building by UNCITRAL and others.

III. Conclusions

72. It was agreed that PPPs are increasingly used worldwide not only as means of resource mobilization from the private sector for public needs, but also as a means of delivering better services to the public, drawing on the creativity, innovative forces, expertise and competitive advantages of the private sector. PPPs were considered to be an essential mechanism to achieve sustained and sustainable development and to contribute to poverty alleviation, as they involve joint efforts by the public and private sectors — which to be successful must take into account numerous considerations, including the direct impact of the project on end-users — individual citizens.

73. It was also considered that PPPs could be advantageous given the greater efficiency of the private sector as compared with the public sector in project development and implementation.

74. It was recognized that PPPs have become a legal concept, and the subject of legislation in many jurisdictions and that an inadequate legal framework regulating PPPs has contributed to the failures of PPPs in some jurisdictions. An adequate legal framework would not address all failures, but would provide a system under which PPPs could be undertaken. However, putting an adequate legal framework in place is not a simple task in the light of the complex and intricate issues that it must address.

75. National efforts to design such a framework would benefit from international support in the form of an easy-to-use model, which is currently unavailable. The UNCITRAL PFIPs instruments cannot be considered as such — despite the recognition that their content is good — because of their limited scope, and their length and complexity that make them useful for international experts and specialists rather than for local policymakers, legislators or regulators. In addition,

the multiplicity of international guidance on PPPs, not all of it consistent, makes the task of those engaged in legal reform more difficult.

76. There was unanimity that, in the light of the developments in the regulation of PPPs and the experience with the use of the UNCITRAL PFIPs instruments described in chapter II.A above, UNCITRAL should evaluate its PFIPs instruments to assess how to ensure that they continue to reflect best practices in regulating PPPs. The prevailing view was that the time was also appropriate for UNCITRAL to seek to provide to the international community a model law on PPPs, accompanied by an appropriately detailed guide to enactment.

77. This task is in line with both the overall UNCITRAL mandate and the role of UNCITRAL to identify best practices in regulating a particular commercial transaction and to prepare a legal text that reflects them appropriately.

78. Such considerations as time to be allotted for the project and that harmonization cannot be achieved on all aspects of PPPs would affect the scope of such a project. While the work in this area might be considered as an urgent endeavour with the implication that the project should be developed quite quickly, the magnitude of efforts if the scope of the UNCITRAL PFIPs instruments is to be expanded and clarified is not to be underestimated.

79. Such future work would build on the UNCITRAL PFIPs instruments and work already accomplished, in particular because many concerns about practice with the regulation and implementation of PPPs raised at the colloquium are already addressed in the UNCITRAL PFIPs instruments. It remains to be analysed whether advice they contain remains sufficiently accurate and thorough.

80. The awareness about the content of the UNCITRAL PFIPs instruments should be increased to allow for such critical analysis. The goal should be the identification of gaps and needs for improvement — such as in accuracy or thoroughness — in those instruments, reasons for the existing gaps (intentional choice, new developments or experience accumulated in the use of the instruments). Where such gaps or needs are found, the goal would be to identify how and within what time frame improvements can be made, and which gaps would remain in any event and why.

81. Should the analysis envisaged in the previous paragraph indicate that there was insufficient consensus to provide a model law with a limited number of options to enacting States, it was agreed that there would remain considerable value for the international community in further work on the UNCITRAL PFIPs instruments in their current form.

82. UNCITRAL should consider the importance of not only the ultimate result of its work in this area but the process that would lead to that result. The value of the work suggested above in increasing awareness about the UNCITRAL PFIPs instruments and as technical assistance and local capacity-building tools should not be underestimated. This work would also support the fulfilment of another mandate of UNCITRAL — coordination of the work of organizations active in the field of international trade law and encouraging cooperation among them. Close coordination and cooperation of law-making, technical assistance and capacity-building efforts by various institutions and individuals are necessary in the area of PPPs to stop the current trend of formulating conflicting rules, providing

inconsistent advice and replicating bad practices. While harmonization by UNCITRAL of all the existing texts that provide guidance on PPPs will be difficult or impossible to achieve, by preparing a standard in the area of PPPs UNCITRAL would encourage the international community to start speaking in one voice on issues of PPPs.

83. It was agreed that the complexity of the issue involved would require significant preparatory work before presentation of a resulting text for consideration by an intergovernmental body. In order to ensure that such a text would be universally applicable in the context of the many entities that are parties to PPPs, participation should be as inclusive as possible, and efforts to ensure inclusivity should be undertaken.

84. It was considered that any mandate for future work in the area of PPPs could usefully include the following elements:

(a) To develop a legal text on PPPs, comprising a model law (or, if that were not feasible, model legislative provisions) and accompanying policy and practical guidance;

(b) To allow for flexibility, innovation and creativity, which will facilitate the realisation of sustainable development and related socioeconomic goals;

(c) To distil and identify best practices from existing texts and practices for PPPs, by identifying gaps in the UNCITRAL PFIPs instruments, by revising elements that have become outdated, and by including issues that were not previously amenable to regulation, but have become so as the market has matured;

(d) To address the core provisions applicable to common forms of PPPs, and to consider whether further work is required on other forms of PPPs (such as partnering and alliancing) or specific market sectors, and whether any forms of PPPs should be excluded from the scope of a legal text on PPPs;

(e) To address entire life-cycle of PPPs, including project planning and management;

(f) To identify any significant international obligations that would affect national regulation of PPPs (such as the United Nations Convention against Corruption);

(g) To analyse the extent to which key procedures to ensure transparency and competition, as expressed in the UNCITRAL Model Law on Public Procurement,¹⁰ should apply to PPPs procedures, so as to promote the core values of ensuring value for money and the avoidance of abuse; and

(h) To balance analytical rigour and empirical analysis with a pragmatic approach, so as to ensure the timely issue by UNCITRAL of a text on PPPs that will be of practical utility for legislators in countries at different levels of capacity and experience as regards PPPs.

¹⁰ Ibid., *Sixty-sixth Session, Supplement No. 17 (A/66/17)*, annex I. Also available from www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure/2011Model.html.

C. Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises

(A/CN.9/780)

[Original: English]

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I. Introduction

1. Microfinance has been on the agenda of the Commission since 2009 when the Commission, at its forty-second session, requested the Secretariat to prepare a detailed study including an assessment of the legal and regulatory issues at stake in the field of microfinance. The study was also to include proposals as to the form and nature of a reference document discussing the various elements required to establish a favourable legal framework for microfinance, which the Commission might in future consider preparing with a view to assisting legislators and policymakers around the world.¹

2. The study, discussed at the forty-third session of the Commission, in 2010, considered the role of microfinance in poverty alleviation and achievement of the Millennium Development Goals by facilitating access to financial services for the poor who were not served by the formal financial system. On the understanding that an appropriate regulatory environment would contribute to the development of the microfinance sector, the Commission agreed that the Secretariat should convene a colloquium, with the possible participation of experts from other organizations working actively in that field, to explore the legal and regulatory issues surrounding microfinance that fell within the mandate of UNCITRAL. The colloquium was to

¹ *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 17 (A/64/17).*

result in an official report outlining the issues at stake and containing recommendations on work that UNCITRAL might usefully undertake in the field.²

3. The colloquium, held in January 2011, resulted in a number of findings.³ Despite some successful initiatives at national level, there was no coherent set of global legal and regulatory measures that could serve as a standard for international best practice. Many States were struggling to find an appropriate regulatory framework to promote financial inclusion (the more recent term for ‘microfinance’), and it was suggested that UNCITRAL could make a substantial contribution in this regard. Several issues were identified for future consideration, of which the Commission, at its forty-fourth session, in 2011, chose the following four for further in-depth study by the Secretariat: (i) overcollateralization and the use of collateral with no economic value; (ii) e-money, including its status as savings; whether “issuers” of e-money were engaged in banking and hence what type of regulation they were subject to; and the coverage of such funds by deposit insurance schemes; (iii) provision for fair, rapid, transparent and inexpensive processes for the resolution of disputes arising from microfinance transactions; (iv) facilitating the use of, and ensuring transparency in, secured lending to microenterprises and small and medium-sized enterprises. At that session, the Commission also agreed to include microfinance as an item for its future work.⁴

4. The study by the Secretariat,⁵ submitted at the forty-fifth session of the Commission, in 2012, provided a brief summary of the state of the matter in each of the four topics indicated above, as well as key legal and regulatory issues relating thereto, for consideration by the Commission. Following discussion, the Commission unanimously agreed to hold one or more colloquia on microfinance and related matters, as a matter of priority, with a focus on: facilitating simplified business incorporation and registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises.⁶

5. This note outlines the key findings of the colloquium organized by the Secretariat in Vienna on 16-18 January 2013. The colloquium was structured around presentations and panel discussions on the following topics: the enabling environment for micro-business and the rule of law; incorporation and registration of micro-borrowers; effective alternative dispute resolution (ADR) mechanisms for micro-entrepreneurs; enabling legal environment for mobile payments; legal issues surrounding access to credit for micro-business, small and medium-sized enterprises (MSMEs); and insolvency and winding up of micro-businesses. Speakers and participants included specialists from governments, international organizations, non-governmental organizations, the private sector and academia from all over the world.

² *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17).*

³ See A/CN.9/727.

⁴ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17).*

⁵ See A/CN.9/756.

⁶ *Official Records of the General Assembly, Sixty-seventh Session, Supplement No. 17 (A/67/17).*

II. An enabling legal environment for micro-business

A. An overview

6. About half of the workforce worldwide is employed in the informal sector, which is said to amount to approximately 10 trillion USD annually (i.e. one third of the world economy).⁷ As the Commission for the Legal Empowerment of the Poor put it, members of this workforce “... operate not within the law, but outside it: they enter into informal labour contracts, run unregistered businesses, and often occupy land to which they have no formal rights”.⁸ Reasons for operating in the informal sector include: tax burden, excessive regulation of the formal sector, deterioration in the quality of public goods (e.g. public infrastructure) and of public administration,⁹ and the dynamics of the formal sector. The results, however, do not vary: micro-businesses cannot enforce contracts, get formal bank loans or expand beyond a very small local network.¹⁰ In sum, they have little option “but to trade in the informal economy”.¹¹

7. Certain factors are critical for micro-business to enter and operate in the formal market. One of the most important is formalization including incorporation, licensing, and other registrations. Starting a legally recognised business, however, can be an extremely burdensome process. Formalities may be extremely costly, they may impose entry requirements (e.g. minimum capital) and compliance with cumbersome administrative proceedings (e.g. submission of multiple and different documents for similar purposes). Some of these formalities are holdovers from existing institutions, many of which persist primarily due to pressure groups that can hinder legal reform.¹² These difficulties discourage many viable MSMEs from formalising.

8. Micro borrowers often lack knowledge of their rights and how to protect them.¹³ Furthermore, the formal justice system tend to exclude them “because they cannot afford the costs related to lawyers, or paying court fees ... court procedures can be slow, and it is not uncommon for courts to have a large backlog of cases”.¹⁴ Yet, extrajudicial third-party dispute resolution mechanisms are rarely in place, thus limiting the effectiveness of any microfinance legal framework for client protection. As a result, four billion of the world’s population lack access to justice.¹⁵

⁷ See R. Neuwirth, *Stealth of Nations: The Global Rise of the Informal Economy*, 2011, page 27.

⁸ Report of the Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume 1, 2008, page 15.

⁹ F. Schneider, A. Buehn, C. E. Montenegro, *Shadow Economies All over the World: New Estimates for 162 Countries from 1999 to 2007*, World Bank, 2010, page 7.

¹⁰ Report of the Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume 1, 2008, page 15.

¹¹ *Ibid.*, page 39.

¹² F. Reyes, *Latin American Company Law — A New Policy Agenda: Reshaping the Closely-Held Entity Landscape*, 2013, page 23.

¹³ See A/CN.9/727.

¹⁴ See A/CN.9/756, para. 24.

¹⁵ See Report of the Commission on the Legal Empowerment of the Poor, *Making the Law Work for Everyone*, Volume 1, 2008, page 13; and A/CN.9/756, para. 24.

9. Currently, 2.7 billion adults worldwide do not have a savings or credit account with a bank or other formal institution: this figure includes households and MSMEs as well. However, an estimated 1.7 billion of these unbanked low income people are said to have access to mobile phones¹⁶ which, together with other new technologies, can enable them to make financial transactions that are accessible and reliable.¹⁷ However, for policy makers at the country level as well as global standard-setting bodies, these new models for delivering banking services to the unbanked present challenges because they implicate new actors and new relationships among actors. Unresolved legal issues surrounding the nature of e-money were already noted in the 2011 UNCITRAL Colloquium on Microfinance, together with their potential to negatively affect low income people.¹⁸

10. Most informal businesses have to operate with no more than a limited amount of family capital.¹⁹ With no access to the traditional banking system, they often look to microfinance services when in need of funds. However, increasing commercialization of the sector, intense competition among microfinance institutions (MFIs), and often low levels of literacy — including financial literacy — among borrowers can considerably add to the challenges faced by micro borrowers seeking affordable financing. For instance, micro borrowers may end up paying interest at rates five or six times higher than formal businesses that can access bank services and get more favourable conditions for their loans. Legal reforms that easily, predictably and inexpensively grant micro and small borrowers the status of “legal” persons, would empower them to act as “regular” or “formal” sector borrowers (see para. 7 above). In this regard, it can be noted that an internationally recognized form of business registration would facilitate cross border trade for MSMEs operating in regional markets since it would provide a recognizable international basis for transactions and avoid problems that can arise because of lack of recognition of the business form. The World Bank has found that economies with modern business registration “grow faster”,²⁰ “promote greater entrepreneurship and productivity”,²¹ “create jobs”,²² “boost legal certainty”²³ and “attract larger inflows of foreign direct investment”.²⁴ Legal reforms should also enable micro and small borrowers to obtain loans secured not by adding to their personal liability or that of their family or friends but by pledging their own market valued assets.

11. Unsurprisingly, informal businesses often have very short lives:²⁵ the conditions in which they operate make them particularly vulnerable to market shifts and at more frequent risk of bankruptcy. “They experience small economies of scale, there are higher risks in the establishment process and it is difficult to obtain

¹⁶ See CGAP website: www.cgap.org/topics/mobile-banking.

¹⁷ Ibid.

¹⁸ See A/CN.9/727, paras. 43-44.

¹⁹ Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone, Volume 1, 2008, page 53.

²⁰ World Bank, IFC, Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises, page 21.

²¹ Ibid.

²² Ibid., note 16, page 25.

²³ Ibid., page 21.

²⁴ Ibid., page 14.

²⁵ Report of the Commission on the Legal Empowerment of the Poor, cited, page 55.

financing”.²⁶ Nevertheless, effective and ad hoc exit regimes for these businesses are absent in most of the countries with the result that in certain regimes entrepreneurs under financial stress would simply “close the door and walk away”, while in others they would face potentially lifelong battles against creditors.²⁷ Appropriate legal reforms tailored to the needs of MSMEs would allow viable businesses to recover and continue to operate.

12. In order to help micro, small and medium-sized enterprises to adjust to immediate uncertainty, and graduate from a subsistence form of doing business to a growth mode characteristic of the formal sector, an enabling legal environment is thus needed. Such an environment is not limited to microfinance alone; it relates to the life cycle of a business — its establishment, operation and termination — and it also focuses on the supporting institutional legal framework. Nonetheless it is clearly relevant to microfinance since, “as a market-based approach to fighting poverty, microfinance is focused on developing entrepreneurship and expanding self-employment”.²⁸ Furthermore, an enabling legal environment should not be confined only to micro-business. As definitions of micro-business and small enterprise vary substantially by region and from country to country,²⁹ the same factors defining an enabling legal environment should pertain to both micro and small/medium-sized businesses.

13. The creation of an enabling legal environment also contributes to reinforcing the rule of law at country level which, as stressed by the General Assembly in its Resolution on the Rule of Law,³⁰ is conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable, and equitable development. It is worth noting that most recently the General Assembly, once again “recognizing the important contribution entrepreneurship can make to sustainable development”,³¹ has encouraged “governments to develop and implement policies ... that address the legal, social and regulatory barriers to equal and effective economic participation and promote entrepreneurship”. This appeal has also been extended to the international community which has been asked “to support the efforts of countries to promote entrepreneurship and foster the development of small and medium-sized enterprises and microenterprises”.³²

²⁶ M. Uttamchandani, A. Menezes, *The Freedom to Fail: Why Small Business Insolvency Regimes are critical for Emerging Markets*, *Economist's Outlook*, 2010, page 263.

²⁷ *Ibid.*, page 262.

²⁸ A/CN.9/727.

²⁹ “Lack of a clear definition is the main challenge in ensuring SME finance” see CGAP, *Financial Access Report 2010*, page 37, also including examples of various definitions of SMEs. A definition of SMEs and/or micro-business can be found in the European Union Commission Recommendation of 6 May 2003 (2003/361/EC), in *Microenterprise Results Reporting: Methodology and Statistical Annexes FY 2010 19*, U.S.AID available at www.usaid.gov/our_work/economic_growth_and_trade/micro/MRR_FY10_Methodology_Statistical_Annexes_82211_Final.pdf or. Different definitions of microcredit also exist, see for instance Basel Committee on Banking Supervision, *Microfinance activities and the Core Principles for Effective Banking Supervision*, August 2010, pages 34-35.

³⁰ See A/RES/67/97.

³¹ See A/RES/67/202.

³² *Ibid.*

B. Alternative simplified business forms in the context of microfinance

14. The 2012 Eurobarometer on Entrepreneurship informs that a large majority of EU respondents to the Survey “Entrepreneurship in the EU and beyond” are of the opinion that it is difficult to start one’s own business due to a lack of available financial support (79 per cent) and due to the complexities of the administrative process (72 per cent).³³ About 67 per cent of the respondents think self-employment is not feasible for them: impressions of the feasibility of self-employment reach as low as 19 per cent in one of the countries surveyed. The results in a selected group of non-EU countries are quite similar: the majority of respondents in eleven of the thirteen countries surveyed affirm that self-employment would not be feasible for them (the two exceptions being Brazil and China). A weak or absent enabling legal environment clearly influences people’s perceptions about starting a business.

15. MSMEs need to operate under a recognized business model to attract investment and protect the interests of entrepreneurs. However, “traditional” business models — including incorporated companies and partnerships — present possible barriers to the creation of MSMEs. Such models are often not “fit for purpose” for micro and small businesses as their establishment: (a) is too costly (both in terms of money and time); (b) results in over-regulation (with high compliance costs); and (c) exposes entrepreneurs to significant risks of liability (see also para. 7 above).

16. As a response to this need for new forms of limited liability organizations, new corporate forms (“uncorporations”), including hybrid business forms, are being developed to facilitate the establishment and operation of micro and small and medium-sized businesses. In India, for instance, the Limited Liability Partnership (LLP) blends features of an incorporated company (in providing limited liability) with a partnership (for taxation and financing purposes). Establishment of an LLP can be done quickly, using a web portal, and involves very low cost. In Colombia, a major legal reform effort in the past 15 years has led to the development of a hybrid business form prioritizing flexibility, contractual freedom and limited liability: the so called *sociedad por acciones simplificada* (SAS). An SAS can be formed by one or more shareholders and can be incorporated via a relatively simple private or electronic document at minimal cost. The Simplified Stock Corporation Act (2008) relies on a system of ex post regulation in the form of enforceable standards during operation (as opposed to ex-ante regulation which creates rules to be met during establishment) to target abusive behaviour, thus lowering costs for establishing micro-businesses. In fact, compliance with strict requirements to set up a business, e.g. minimum legal capital or public deeds of incorporation, affects all entrepreneurs. On the other hand, when standards that are enforceable ex post are used (e.g. abus de droit or equal treatment rules, that leave discretion for adjudicators to determine ex post whether violations have occurred), there is a cost only for those entrepreneurs who breach the standards. However, this approach requires effective judicial infrastructure to oversee and enforce ex-post standards. Since the SAS legislation was enacted in 2008 about 181,742 SASes (the data refers

³³ 2012 Flash Eurobarometer on Entrepreneurship, http://ec.europa.eu/enterprise/policies/sme/facts-figuresanalysis/eurobarometer/index_en.htm, page 13.

to November 2012) have been set-up, most of which, it is estimated, were pre-existing informal businesses. The SAS account for over 95 per cent of market share and, according to 2009-2010 data, they have enabled a growth in formalization of business entities of over 25 per cent.

17. The legislation developed by the government of Colombia was inspired by France's legislation, among others. Specialized corporate structures in France enable entrepreneurs to effectively separate personal assets from company assets, through either the form of the structure itself, e.g. EURL (*entreprise unipersonnelle à responsabilité limitée*, a single person limited company), EIRL (*entreprise individuelle à responsabilité limitée*, limited liability individual entrepreneur), or through a declaration of assets as being non-sizeable. Such approaches can provide flexibility for entrepreneurs as well as better information for potential creditors. In Germany, the legislator chose not to create a new legal structure, but to instead facilitate entry by significantly reducing the start-up capital requirements (1 EUR instead of 25,000 EUR) and to reduce other costs of establishment by providing a sample protocol as well as low notary and registration fees. In the 12 months following the legislative reform (1 November 2008-1 November 2009) 19,563 companies were registered; as at January 2013, that number had risen to 76,377. In another example, the Angolan experience of facilitating micro-businesses through the creation of the Entrepreneur Unique Office has stressed the need to: (a) simplify the process of incorporation; (b) speed up the granting of permits to operate businesses; and (c) reduce incorporation fees. In Brazil the difficulty in achieving a better corporate regime for smaller firms, despite various waves of reform, has prompted a reflection on the assistance international standards in this field (now lacking) could have provided to challenge the status quo.

18. It is to be noted that most of these reforms are relatively recent (within the last decade) and that many jurisdictions still struggle to find an appropriate regulatory solution. Common threads to facilitate participation by micro-businesses include the need to provide for flexible, simplified and low-cost corporate structures, accompanied by clear guidance and supported by streamlined and effective administrative and judicial infrastructure.

C. Effective dispute resolution mechanisms for micro-entrepreneurs and small and medium-sized enterprises

19. Dispute resolution has been identified as one of the elements defining the strength of a country's institutional framework for microfinance (another key element being transparent pricing regulation).³⁴ However, as a recent study has highlighted, dispute resolution mechanisms often lack accessibility and effectiveness, which suggests a need for new solutions to encourage the appropriate design of such mechanisms for microfinance.³⁵

20. In the meantime, the microfinance industry has been mainly relying on self-regulation which, on its own, is not enough to provide efficient client protection. Although "financial institutions are the first line of defence when it

³⁴ Economist Intelligence Unit, Global microscope on the microfinance business environment 2012, page 23.

³⁵ Ibid.

comes to resolving disputes”,³⁶ it has been noted that only a small number of countries require financial institutions to implement procedures for resolving customer complaints, set limits for timeliness of response, and ensure accessibility.³⁷ This corroborates the view that claims are likely to be better solved through self-regulatory channels if efficient external systems for solving disputes are also accessible to clients.

21. Depending on the country’s situation, such systems could include simplified court procedures, expedited commercial mediation and arbitration, or financial ombudsman offices. They could also include more than one mechanism, since these are not “mutually exclusive”.³⁸

22. States’ replies to the microfinance questionnaire circulated in 2011 by the Secretariat upon request of the Commission³⁹ indicate that in some cases small claims tribunals have been set up, as in Israel, the Philippines and states in the United States. Other countries have established ombudsman services or specialized institutions for the resolution of disputes resulting from financial claims. However, not all of these systems (whether ombudsman, arbitration or otherwise) can render binding decisions. Some systems rely more on voluntary compliance by the party at fault: for instance in Italy, where, if a financial institution does not comply with the decision of the *arbitro bancario finanziario*,⁴⁰ a notice of non-fulfilment is made public.

23. Trinidad and Tobago, one of the few low-income countries with a financial ombudsman, has an Ombudsman Office based on a voluntary scheme.⁴¹ The Office not only provides mediation services free of charge to aggrieved bank (and insurance) clients (individuals and small business), but it also promotes financial literacy among potential clients, using various formal and informal channels. However satisfactory, the experience of the Office prompts consideration of the importance of enshrining such regimes in law so that significant areas of complaint are not left outside the jurisdiction of the Ombudsman (due to a lack of “buy-in” by financial services providers participating in the scheme). For instance, the terms of reference of the Office do not include complaints in relation to general interest rate policies or pricing of products or services. Furthermore, “giving statutory backing to the Ombudsman scheme [would] also facilitate the introduction of appropriate sanctions for non-compliance”.⁴²

24. In general, legislation on ADR mechanisms addressing the needs of MSMEs doesn’t seem to be widespread. Only recently, for instance, new legislation on arbitration has been passed in Colombia,⁴³ which establishes that arbitration centres

³⁶ See CGAP, Financial Access Report 2010, page 31.

³⁷ Ibid.

³⁸ Ibid.

³⁹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, cited, para. 246.

⁴⁰ The title can be roughly translated as “financial banking arbitrator”. The functions, however, cannot be compared to those of arbitrators in arbitration proceedings.

⁴¹ Ibid.

⁴² Office of the Financial Services Ombudsman, Annual Report 2011, Trinidad and Tobago, page 8.

⁴³ Law 1563/2012, 12 July 2012, available at: www.cancilleria.gov.co/sites/default/files/Normograma/docs/ley_1563_2012.htm.

must offer free arbitration proceedings for low-value cases (up to USD 13,000 approximately). These are intended to be short proceedings in which the parties do not require representation by a lawyer. The Ministry of Justice will issue regulations to set the minimum number of free arbitration proceedings to be offered annually by arbitration centres. The new law also makes it possible to use online mechanisms at any stage of the arbitration proceedings and for any purpose, thus reducing administrative cost. As a further development of this law (since it is based on its provisions), Colombia is in the process of issuing a regulation on on-line dispute resolution that aims at resolving low value disputes including those involving micro and small business. Prior to this recent legislation on arbitration, the Chamber of Commerce of Bogotá supported the development of arbitration for MSMEs, offering free proceedings in those disputes where one of the parties was an MSME. The Chamber's arbitration rules also provide for a sole arbitrator proceeding with a decision to be rendered within one month (the term can be extended for an additional month). It is estimated that in the last four years approximately 300 MSMEs have benefitted from this service.⁴⁴ Still in Colombia, the Banco Caja Social in the last decade initiated a pilot conciliation process to recover non-performing small loans from clients, in addition to the bank's established use of collection houses and litigation. After the completion of the pilot, the bank found that the conciliation mechanism had produced a significantly higher outcome in the recovery of small amount loans than the other two methods, i.e. the use of collection houses and litigation in court.⁴⁵

25. Other countries have perceived the need for legislation (or regulation) on ADR mechanisms applicable to microfinance. In Nigeria, for example, "microfinance banks in Lagos state have been calling for a special court to try loan default cases, to which the Central Bank of Nigeria agreed in 2011. The court has not yet been established, although the Central Bank is currently backing two bills that have direct ties to improving dispute resolution: the Financial Ombudsman Bill, which would help to resolve financial disputes more quickly, and the Alternative Dispute Resolution (ADR) Bill, which would promote and regulate ADR in Nigeria".⁴⁶

26. Alternative dispute resolution mechanisms may also be of significant assistance in resolving disputes other than the most common complaints in microfinance. The International Financial Corporation has noted that "when ADR structures are efficient, they may be the most effective way to recover secured assets ..."⁴⁷ and this could be applicable in the context of secured lending to microborrowers. The Model Inter-American Law on Secured Transactions, prepared by the Organisation of American States (OAS), explicitly provides for ADR mechanisms to be utilized to resolve all kinds of disputes, including those relating to enforcement (see Article 68). Colombia is in the process of modernizing its

⁴⁴ See Portafolio.co, Nueva Ley de Arbitraje, 10 October 2012 available at: www.portafolio.co/opinion/nueva-ley-arbitraje.

⁴⁵ A. Alvarez, The private sector approach to commercial ADR: commercial ADR mechanisms in Colombia, 2010, available at www.wbginvestmentclimate.org/uploads/Private%20Sector%20Approach%20to%20Commercial%20ADR_%20the%20case%20of%20Colombia%20.pdf.

⁴⁶ Economist Intelligence Unit, Global microscope on the microfinance business environment 2012, page 59.

⁴⁷ IFC, Secured Transactions Systems and Collateral Registries, January 2010, page 54, available at www.wbginvestmentclimate.org/uploads/SecuredTransactionsSystems.pdf.

legislative framework on secured transactions and the draft law includes a provision on ADR, based on the OAS Model Law.

27. The above examples indicate that an efficient dispute resolution framework for microfinance users would require “laws and regulations governing relations between service providers and users and [ensuring] fairness, transparency and recourse rights”.⁴⁸ Such a system would promote accessibility both through recourse mechanisms under financial institutions’ internal procedures, and dispute resolution through a third-party ADR mechanism. Facilitating access to redress mechanisms also implies the possibility for complainants to lodge a claim in their own language, at little or no cost, and to have easy-to-reach points of access to the system.⁴⁹ An efficient legal regime for microfinance would ensure enforceability of outcomes reached in mediation, arbitration proceedings or via an ombudsman. Finally, such a system would promote “financial literacy and capability by helping users of financial services to acquire the necessary knowledge and skills to manage their finances”.⁵⁰

D. An enabling legal environment for mobile payments

28. Branchless banking⁵¹ (of which mobile payments are a subset) has been identified as an effective means of achieving financial inclusion by facilitating access to financial services that is both convenient and affordable. Given the high levels of penetration of mobile phone access in many countries around the globe (for instance in Pakistan there are 110 million cell phone users but only 15 million bank account users; and 400,000 telecom agents as against only 12,700 bank branches), technology is an effective means of providing such access. Benefits of branchless banking, whether through mobile phones or other arrangements, include: improved access for people in remote areas; reduced transaction costs; improved efficiency for customers and service providers; and fewer losses of funds (as a result of a reduction in the number of cash transactions).

29. There are thought to be some 50 mobile payments models currently in existence, with a wide range of regulatory frameworks and practices in place. In Kenya, for instance, the Safaricom experience uses a blend of existing and amended laws, and the creation of new laws, to provide an appropriate regulatory framework. Guiding principles of the country legislative framework include efficiency and accessibility (encouraging client access to financial services, reducing barriers to entry for new entrants), client protection (responsibility for which should lie with

⁴⁸ O. P. Ardic, J. A. Ibrahim, N. Mylenko, *Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set*, The World Bank, Consultative Group to Assist the Poor, January 2011, page 2.

⁴⁹ See also CGAP, *A Guide to Regulation and Supervision of Microfinance*, Consensus Guidelines October 2012, page 59.

⁵⁰ O. P. Ardic, J. A. Ibrahim, N. Mylenko, *Consumer Protection Laws and Regulations in Deposit and Loan Services: A Cross-Country Analysis with a New Data Set*, The World Bank, Consultative Group to Assist the Poor, January 2011, page 2.

⁵¹ Branchless banking generally refers to the delivery of financial services outside conventional bank branches, using agents or other third-party intermediaries as the principal interface with customers, and relying on technologies (POS terminals and mobile phones) to transmit the transaction details.

the provider, and include accessible and efficient procedures and channels for resolution of client queries or complaints), technological neutrality (in which the regulatory framework provides for electronic retail transfers irrespective of the underlying technology used).

30. A new “e-money” law was recently issued in Peru,⁵² under which e-money is defined as a monetary value stored in an electronic device, widely accepted as a means of payment, can be converted back to cash, and is not considered a deposit. The new law seeks to ensure security, transparency and reliability for clients as well as foster competition and innovation among businesses. For that purpose, it allows the provision of e-money based services only to entities supervised by the Superintendencia de Banca, Seguros y AFP — financial intermediaries already in the market and new firms that can enter the market as specialized e-money issuers. The new law is complemented by a comprehensive legal framework already in place at the time the law was passed that addresses inter alia payment systems, anti-money laundering, integral and operational risk regulation, internal audit and retail agents’ regulation. The most important purpose of the law is to boost financial inclusion; thus, it is expected that the regulations accompanying the law, to be issued by the Superintendencia de Banca, Seguros y AFPs, will define a simplified e-money “account”, similar to the concept of basic deposit accounts already existing in Peruvian legislation. That is, a low-risk product with minimal pre-requisites for contracting, i.e. a valid Peruvian national identification document, in order to open the account at a retail agent. Such accounts have balance and transaction limits, per month and per day.

31. In Sri Lanka, the Mobile Payment Guidelines⁵³ promote safety and effectiveness of mobile payment services and enhance user confidence. The Guidelines require the licensed service provider to adhere to all applicable laws, including the Electronic Transactions Act No. 19 of 2006. The Act includes features to recognise mobile transactions as legally valid electronic transactions, thus facilitating the transition to this form of business. The Act is largely influenced by UNCITRAL texts (including the UNCITRAL Model Law on Electronic Commerce, 1996, and the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005).

32. Notwithstanding the wide range of regulatory frameworks and practices, of which the above are just a few examples, there appears to be increasing convergence on a number of principles that are crucial in developing mobile payments legislation, including: use of agents by banks and non-bank e-money issuers; regulation of e-money issuers; protection of the “float” (i.e., the public’s funds held in the form of e-money by the e-money issuer) of non-bank e-money issuers;⁵⁴ and financial client protection, to name just a few. Emerging concerns include interoperability as between branchless banking schemes; competition and fair access to payment systems and communications infrastructure; and security of data.

⁵² Law nr. 29985 was approved by the Congress on 12 December 2012 and published on 17 January 2013.

⁵³ Mobile Payment Guidelines No. 1 and 2 of 2011 issued pursuant to Regulations under Payment and Settlement Systems Act No. 28 of 2005.

⁵⁴ See CGAP, A Guide to Regulation and Supervision of Microfinance, Consensus Guidelines, October 2012, page 77.

33. An enabling legal environment for mobile payments should thus create conditions to address these issues, while promoting innovation, fostering fluid market entry and exit by diverse players, and facilitating sustainable market development. The legal environment needs to be dynamic, adapting and evolving as the market enters different stages. The initial focus would be on facilitating innovation by removing barriers to entry and ensuring a level playing field, providing equal legal standards for diverse players engaging in the same activity. As innovations are implemented the enabling environment would turn to mitigating operational risk and enhancing client protection. As consolidation sets in, prudential regulation and addressing systemic risks becomes more relevant. A mature market needs to remain competitive and efficient to deliver productivity gains.

34. A number of components can be identified for building an enabling environment for mobile payments, including precise definitions of key concepts such as “deposit”, “payment” and “electronic money” which would provide clarity and uniformity in interpretation. Coordination between regulatory agencies would be important to ensure a coherent regulatory environment including the development of technological risk regulation and mitigation strategies prior to electronic money services becoming available. Further, development of a competitive market structure would foster innovation, remove barriers to entry and lower costs. New prudentially supervised entities should be created to manage the e-money: such capital structure entities should ideally allow all types of service providers to enter the market. Client protection should not be downplayed: allocation of the burden of loss concerning mobile payments should be borne by the service provider: countries where mobile financial services are offered directly by telecom agents may thus consider issuing separate regulations for establishing the responsibilities of their agents.

35. The legal environment for mobile payments should also take into account that such payments are at the intersection of two established areas of international law: namely electronic transactions and international payments. Existing UNCITRAL instruments, including the Convention on the Use of Electronic Communications in International Contracts, the Model Law on Electronic Commerce, and the Model Law on International Credit Transfers, provide the necessary building blocks for developments in mobile payments. As UNCITRAL develops further guidance relevant to the topic, coordinated guidance with other standard setting bodies relevant to branchless banking should be considered.

E. Legal issues of access to credit for micro-business, small and medium-sized enterprises

36. Businesses worldwide identify access to credit as one of the main obstacles they face. This holds particularly true for MSMEs. “Good credit information systems and strong collateral laws help overcome this obstacle”.⁵⁵ In the case of microfinance and micro-business, provisions addressing transparency in loan terms, overcollateralization and abusive collection practices also have a role to play. It is important to clarify that transparency in lending is not an issue of prudential

⁵⁵ World Bank, IFC, *Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises*, page 22.

regulation (which has to do with the safety and soundness of deposit-taking and systemic risk regulation in the macro-economy). Rather it is a concept relating to clients' rights and their protection, and as such it is relevant for commercial law.

37. There is considerable evidence that many MFIs price their products in a non-transparent manner, obscuring the true price of loans and confusing clients through techniques such as “flat” interest and complex fee structures. A “downward spiral” process draws responsible MFIs into these practices in order to compete, because transparent prices look more expensive than non-transparent prices, even though the underlying product is the same. An absence of “truth-in-lending” legislation in many countries has allowed this situation to perpetuate, resulting in non-transparent, non-competitive and dysfunctional markets in which lack of price competition allows some institutions to generate high profits from the poorest in society. Truth-in-lending makes use of APR (annual percentage rates) or EIR (effective interest rates) to compare the true cost of various types of loans. The APR and EIR are standardized annualized rates, presenting the actual cost of the loan to the borrower. To be most accurate for the client, they should include not only interest but also all other compulsory fees (e.g. training fees, insurance, and security deposit), allowing the borrower to make an informed decision.

38. Transparent pricing data from fifty-nine MFIs in the Philippines demonstrates the existence of a “price curve” in microfinance. The smallest loan sizes have the highest prices, because of the correlation with the higher operating cost to the MFI of servicing these loans. This price curve needs to be considered when addressing the effectiveness of regulated price caps⁵⁶ in microfinance — a common feature of microfinance regulatory environments (for example in India, Colombia and the West Africa Economic and Monetary Union region). An unintended consequence of such caps is that they can lead to a reduction in the supply of smaller loans (those typically aimed at the most financially excluded in society) as these loans cannot be sustainably delivered without charging higher prices, whereas larger micro-loans can have prices under the cap and still be profitable for lenders. Therefore, the frequently advocated introduction of interest caps can, in the absence of transparency in pricing, be ineffective. Overall, a non-transparent pricing regime introduces serious market imperfections and confusion, affecting consumers, MFIs, investors and regulators alike.

39. Transparency is thus crucial, and self-regulation in this realm has not proven sufficient to protect clients, notwithstanding efforts launched by the industry, such as the global “Smart” Campaign (which includes, but is not exclusively about, transparency).⁵⁷ While self-regulation signals a commitment to responsible finance and is an important step for pricing transparency to function effectively, it includes no legal enforcement mechanism, relying rather on market forces to distinguish among MFIs. Furthermore, self-regulation is voluntary, while transparency works best when consistent, i.e. when clients can compare a product across all lenders and

⁵⁶ A “price cap” is more inclusive than an “interest rate cap”. It may include other costs, such as processing fees, and sometimes the cost of other services that are bundled with the loan, such as insurance, see for instance [mfTransparency.org](http://mftransparency.org) at www.mftransparency.org/zambias-new-price-cap-good-intentions-with-unintended-consequences/.

⁵⁷ The Smart Campaign is a global effort to promote client protection in the microfinance industry. The Campaign is based on a set of principles that assist MFIs in delivering financial services respectful of clients' rights. See www.smartcampaign.org/.

receive the same information, ideally in the same format. Truth-in-lending legislation in the United States, the Philippines and Cambodia demonstrates this point clearly: laws in these countries set up pricing disclosure regimes, mostly through the use of APR or EIR of the requirement that prices be calculated via the declining interest rate method, offering protection to borrowers against pricing abuse.

40. Transparent pricing is therefore an essential element in creating an enabling environment for micro-business: although important for any loan agreement, transparency issues are of most concern to unsophisticated borrowers who cannot afford counsel. The following can be suggested as essential when building transparency into an enabling legal environment: (a) standard pricing formulas (with appropriate disclosure standards); (b) standard repayment schedules; (c) enforcement of sanctions to ensure implementation of disclosure requirements; and (d) education of clients and MFIs about disclosure requirements as well as relevant communication mechanisms.

41. As mentioned above, credit reporting and the legal rights of borrowers and lenders in secured transactions are among the measures that better facilitate access to credit and make its allocation more efficient; and they work best when implemented together. Information-sharing through credit reporting systems or bureaus (though not the only risk assessment tool)⁵⁸ helps lenders assess the creditworthiness of clients, reduces processing time for loans and leads to lower default rates, thereby facilitating access to credit, particularly for small firms. For instance, one study noted that in countries where credit bureaus exist only 27 per cent of small and medium-sized enterprises (SMEs) report high financing constraints, against 49 per cent in countries without credit bureaus. Similarly 40 per cent of SMEs are able to obtain a bank loan in countries with credit bureaus, as opposed to 28 per cent in countries without. As noted at the 2011 UNCITRAL Colloquium on Microfinance, therefore, adequate legislation is needed to support the development of, and proper regulation of credit bureaus, which play an important role in providing accurate financial information to lenders to help reduce imprudent lending, thus limiting losses and leading to cheaper credit for all.⁵⁹

42. The report “Selected legal issues impacting microfinance”, prepared by the Secretariat in 2012, notes that while microfinance does not necessarily involve secured lending, when it does “fragile borrowers ... may be utilizing essential household items to secure loans for micro trade as well as consumption purposes”.⁶⁰ Although there are MFIs that do not require collateral, for example Fundoz Mikro in Poland and Grameen Bank in Bangladesh, there is an increasing trend to make use of collateral, as a complementary product to traditional unsecured methods such as group lending. Since the valuation of collateral in microloans is generally difficult, due to the type of assets used, overcollateralization is almost a standard practice in this market and much more prevalent than in secured loans for bigger businesses. The extent of overcollateralization also depends on a country’s legal framework and the efficiency of courts in expeditiously enforcing payment of debts. Evidence suggests that microlenders take collateral simply because the legal system allows them to do so

⁵⁸ World Bank, IFC, *Doing Business 2013 Smarter Regulations for Small and Medium-Size Enterprises*, page 72.

⁵⁹ A/CN.9/727, para. 32.

⁶⁰ A/CN.9/756, para. 3.

at a reasonable cost. This corroborates the view that it is difficult to define secured microlending as true asset-based lending since some of the features of asset-based lending, such as determining advances on the basis of the collateral value, are missing.

43. As with secured lending to non-micro businesses, however, a secured micro-lending model should be based on the borrower's ability to generate income (and thus repay the debt) rather than on the collateral, which is secondary and to which recourse is had only in the case of default. Therefore, an enabling legal environment for MSMEs, while being guided by the secured transactions regime as set out in the UNCITRAL Legislative Guide on Secured Transactions, could consider certain adaptations to target the particular needs of microborrowers (for example, limited enforceability or exemption of certain assets from enforcement, alternative enforcement mechanisms, e.g. ADR) and to facilitate registration and thus transparency of microloans (for example, through reduction of or exemption from registry fees).

F. A legal framework for insolvency and winding up processes of MSMEs

44. Insolvency regimes are fundamental to a sound investment climate and help promote commerce and economic growth.⁶¹ An important factor is that they enhance the willingness of creditors to lend,⁶² which is particularly relevant for MSMEs. According to the 2012 INSOL Africa Roundtable, there are still countries where banks will not lend to MSMEs because of the risk of non-recovery and lack of confidence in the court system.⁶³ As previously mentioned (see para. 11), MSMEs are particularly vulnerable since "they bear an excessive burden of risk...[and] the global financial crisis has exacerbated this problem, creating a scarcity of working capital for SMEs, a decline in equity finance, increased rates of rejected applications for finance, higher interest rate spreads, larger collateral requirements and an increase in insolvency".⁶⁴ Commercial insolvency regimes, however, are typically too complex and expensive for MSMEs and consumer insolvency regimes, from which MSMEs could benefit, may not exist or take insufficient account of the commercial nature of the debt. Moreover, the informal mechanisms (described in the UNCITRAL Legislative Guide on Insolvency as voluntary restructuring negotiations) widely used for the resolution of corporate insolvency in a number of developed countries, as well as expedited procedures (also addressed in the Legislative Guide) may not be widely available elsewhere. This is particularly relevant in developing countries, where the economy is often largely based on the informal sector: when informal entrepreneurs find themselves in a situation of financial distress, with no access to funds to overcome it, they become insolvent. A lack of appropriate legal regimes and mechanisms or outdated

⁶¹ World Bank, IFC, *Doing business 2013, Smarter Regulations for Small and Medium-Size Enterprises*, page 72.

⁶² M. Uttamchandani, A. Menezes, *The Freedom to Fail: Why Small Business Insolvency Regimes are Critical for Emerging Markets*, *Economist's Outlook*, 2010, page 264.

⁶³ A. Idigbe, O. Kalu, *Best practice and tailored reforms in African insolvency: lessons from INSOL*, December 2012, footnote 6.

⁶⁴ M. Uttamchandani, A. Menezes, *The Freedom to Fail: Why Small Business Insolvency Regimes are Critical for Emerging Markets*, *Economist's Outlook*, 2010, pages 263-264.

or inefficient legal regimes dealing with insolvency prevent viable small businesses from surviving or being revived, as there is no means by which to find a satisfactory settlement with creditors. Given their characteristics, MSMEs thus need alternative insolvency regimes that are expedited, streamlined and cost-efficient, and which should facilitate “exit and re-entry of the entrepreneurs” in the market.

45. An insolvency regime covering MSMEs should draw both from the regimes regulating the insolvency of corporations and those regulating insolvency of natural persons. Both have features that meet the needs of MSMEs: the corporate regime focuses on asset maximization and preservation of the company; insolvency of natural persons focuses on discharge or providing a fresh start to support and promote entrepreneurial activity. An insolvency system covering MSMEs should combine these characteristics: it should aim to maximize assets and preserve the company on one hand, and provide for discharge and a fresh start for the entrepreneurs involved on the other. The goal would be to distinguish the effects of insolvency on the enterprise from those on the individuals behind the enterprise. Continuity is possible for an incorporated entity, but more difficult for an individual operating without the protection of incorporation. A balance between the interests of the different stakeholders is required, and punitive approaches should be avoided. An insolvency regime covering MSMEs should also be adaptable to the social and economic features of each jurisdiction and it should consider the definition of small and medium-sized enterprise provided in that jurisdiction.

46. The example of OHADA can be provided. OHADA is modernizing its Uniform Act on Insolvency. The draft submitted by the Permanent Secretariat to OHADA member states (which are reviewing it and so the final version might eventually differ) makes the insolvency framework, *inter alia*, more adaptable to the needs of MSMEs. The new regime would provide simplified procedures for reorganization and liquidation of MSMEs both in the pre-insolvency phase and when the MSME debtor is insolvent. Broadly speaking, the *ad hoc* regime for MSMEs would provide shorter time-frames, lighter evidentiary requirements, fewer procedural steps, and permit fewer appeals (or none at all). However, courts would have the discretion to refuse to apply the simplified procedure and could decide to use the “standard” framework. Reforms are taking place in some Indian states as well.⁶⁵ Those states have amended the Provincial Insolvency Act from 1920, focusing on removing criminal punishments and reducing stigma; and introducing less cumbersome procedural requirements. The Reserve Bank of India has promoted a Debt Restructuring Scheme for viable SMEs, which is worked out and implemented within 90 days from the date of receipt of request for restructuring from the borrower. Furthermore, the establishment of specialized debt recovery tribunals has expedited the resolution of claims, increasing the probability of repayment by 28 per cent and reducing interest rates on loans by 1 to 2 percentage points.⁶⁶

47. In Colombia, a recent law⁶⁷ has established an insolvency system for natural persons that introduces hybrid proceedings and simplified procedures, removes criminal liability for the insolvent debtor and promotes discharge: discharge is also

⁶⁵ Some of the states include Andhra Pradesh, Tamil Nadu, Goa and Uttar Pradesh.

⁶⁶ World Bank, IFC, *Doing business 2013*, Smarter Regulations for Small and Medium-Size Enterprises, page 22.

⁶⁷ Ley 1564 de 2012, 12 July 2012, available at: www.alcaldiabogota.gov.co/sisjur/normas/Norma1.jsp?i=48425.

applicable to merchants. However, apart from discharge, merchants remain subject to the corporate insolvency regime, which makes no differentiation as to size or type of the enterprise's operation and is essentially designed to address problems of large enterprises, thus bringing with it high direct costs, complex requirements and procedures, and sophisticated mechanisms for creditors' participation.

48. An efficient framework to address the insolvency of MSMEs cannot be based on amended legislation alone, however. Like all insolvency systems, institutional and administrative arrangements for making the system work must also be developed or strengthened to ensure the effectiveness and efficiency of the insolvency resolution mechanisms developed. Resolving disputes, for instance, is particularly relevant and should not be limited to the court-based system: alternative dispute resolution regimes, including arbitration and mediation, could also be made available. Other elements to consider include insolvency representatives, the administrative structure of the regime, strong credit information systems (through credit bureaus, for instance), and capacity-building for key players involved in the insolvency proceedings (e.g. judges).⁶⁸

III. The way forward

49. Micro, small and medium-sized enterprises, which are often established informally without carefully considering and clarifying their business structure, continue to suffer the detrimental effects of sub-optimal legal rules in many respects. These firms usually lack the organization and resources necessary to lobby for the required legislative overhaul. On the other hand, the informal sector perpetuates non-compliance with the law, increasing risks for loss of tax revenue, corruption, and a poor environment for investment. It will not naturally evolve into a formal sector, which allows businesses to grow, obtain credit on normal terms, increase employment and contribute to the tax base. Excessive regulation, too many laws and too many outdated laws, will discourage transition of business to the formal sector. An improved legal infrastructure for MSMEs is needed which should rest on a global policy vision and not just isolated devices. Simply adapting traditional system laws to MSMEs will not work. Experience has shown that transposing laws from other, more highly-developed, jurisdictions is similarly unhelpful, since law needs to fit the culture and circumstances of the country. It will thus be important to prepare principles that are global in nature and can be tailored by countries according to their needs. UNCITRAL has proven to be well-placed as a forum for developing such general principles and legislation that is acceptable by a wide range of countries with different legal traditions. Therefore, the Commission could play a leading role in helping to create a level playing field by promoting best practices and sharing knowledge with countries seeking guidance in this area.

50. There was broad consensus among participants at the Colloquium recommending that a Working Group be established to address the legal aspects necessary for the creation of an enabling legal environment for MSMEs. It was stressed that work in establishing such an environment would be consistent with the Commission's primary mandate to promote coordination and cooperation in the

⁶⁸ See also M. Uttamchandani, A. Menezes, *The Freedom to Fail: Why Small Business Insolvency Regimes are Critical for Emerging Markets*, *Economist's Outlook*, 2010, pages 267-268.

field of international trade, including regional cross-border trade. This was consistent also with the findings of the 2011 UNCITRAL Colloquium that microfinance had become a globally recognized form of cross border finance, that it kept growing world-wide, that legal, regulatory and market gaps kept the sector from operating as well as it should and that this had created a role for international legal standard-setting.⁶⁹ Noting that cross-border recognition of these new and varied legislative issues and emerging structures was needed for MSMEs operating in regional markets in order to provide a recognizable international basis for transactions and avoid problems that can arise because of a lack of business recognition,⁷⁰ participants further suggested that a flexible tool, such as a legislative guide or a model law according to the topics, would contribute to harmonizing efforts in this sector and provide momentum for reforms which would further encourage micro-business participation in the economy. At the same time, it was pointed out that consideration could be given to addressing certain of the subject matters of the Colloquium in the context of relevant existing Working Groups, so as to make best use of Secretariat resources.

51. Whether handled in a single Working Group or allocated to various Working Groups, the guidance provided by the Commission should, nevertheless, be developed in a strongly coordinated fashion, so to result in a coherent and homogeneous framework addressing the business cycle of MSMEs. The starting point could be guidance that allows for simplified business start-up and operation procedures. In this regard, attention would be drawn to simplified corporate structures with easy establishment and minimal formalities, limited liability, flexible management and capitalisation structure, plus ample freedom to contract. Considering the current absence of any internationally recognized standards or direction for countries wishing to adopt effective new forms, such a legal framework would significantly contribute to the formalization of thousands of enterprises that would otherwise remain in the informal sphere.⁷¹

52. The Commission may then wish to focus on difficulties faced by MSMEs in accessing redress mechanisms, in particular court-based mechanisms. The Commission may thus wish to consider whether it would be appropriate to undertake preparation of notes⁷² on how a system of dispute resolution in the field of microfinance should be organized. Such notes could be designed for use by legislators and administrators in considering whether a country has established a system that effectively serves the needs of MSMEs. Furthermore, given the exponential increase in Internet usage around the world (and the corresponding ability to resolve disputes online), consideration could be given to the feasibility of

⁶⁹ A/CN.9/727, paras. 6-7.

⁷⁰ In this respect, contract law differs significantly from other fields of law, such as company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs. See, International Chamber of Commerce, ICC Position on the European Commission proposal for a regulation on a Common European Sales Law, July 2012, page 2, available at ICC Position on the European Commission proposal for a regulation on a Common European Sales Law.

⁷¹ F. Reyes, *Latin American Company Law — A New Policy Agenda: Reshaping the Closely-Held Entity Landscape*, 2013, page ii.

⁷² For instance, in the past the Commission prepared notes to assist arbitration practitioners during the course of arbitral proceedings, see UNCITRAL Notes on Organizing Arbitral Proceedings (1996).

using online dispute resolution (ODR) methods for microfinance-related disputes. ODR systems have the potential to reach the low income people residing in rural areas: in Africa, Internet usage increased by nearly 3000 per cent over the last 10 years, in the Middle East by nearly 2,250 per cent, in Latin America by over 1,200 per cent (for instance Brazil ranks fifth, Mexico twelfth and Colombia eighteenth in the world in number of individuals connected to the internet), and in Asia by nearly 800 per cent. Globally, Internet usage has increased by 528 per cent over the last decade: approximately one third of the world's population is now connected to the Internet. That number is expected to increase to 47 per cent by 2016.⁷³ The Commission might thus consider whether the legal standards currently under consideration in UNCITRAL's Working Group III, dealing with low-value cross-border e-commerce disputes, could be adapted to a microfinance context.

53. Electronic transfers (including mobile payments) offer MSMEs operating in the informal sector the opportunity to have effective access to financial services. UNCITRAL's existing instruments on e-commerce and international credit transfers can accommodate mobile payment systems, as recognized at the Colloquium (see para. 35 above). In order to broaden their scope, however, it was suggested that UNCITRAL should monitor market developments with a view to broadening the scope of these legal instruments, being careful to avoid duplication with other standard-setting bodies working in the field. The development by the Commission of a document summarizing the recommendations of relevant bodies would provide a reference guide for countries designing laws in this area, as well as the recompilation of best practices gathered from the successful experiences of countries that have set an enabling legal environment for mobile financial services and transactions, and would like to share laterally to other peer countries their experiences. The provision of a clear definition of key concepts such as deposit, payment and electronic money, as well as guidance on apportioning of the risks between providers and clients, would be of particular importance.

54. An enabling legal environment promoting access to credit for MSMEs would address commercial law matters arising in the context of secured and unsecured credit agreements. Guidance from the Commission, based on best practices, could deal with transparency in lending and enforcement in all kinds of lending transactions. The benefits of applying the recommendations of the UNCITRAL Legislative Guide on Secured Transactions to MSMEs should be the basis for discussion. Additional issues for guidance could include: (i) use of possessory and non-possessory security interests; (ii) assets in which security rights may not be created or are unenforceable (e.g. employment benefits and household items); (iii) exemption of microfinance secured transactions from any registration or searching fee; (iv) acquisition finance (e.g. financial leasing); (v) unfair collection and enforcement practices; (vi) asset valuation and over-collateralization; (vii) the importance of group guarantees; and (viii) the importance of credit bureaus.

55. Finally, the Commission may wish to address the insolvency of MSMEs with the objective to ensure fast-track procedures and business rescue options so as to develop adequate and workable alternatives to formal insolvency processes in line

⁷³ See Internet World Stats: Usage and Population Statistics, available at www.internetworldstats.com/stats.htm.

with both the key characteristics of an effective insolvency system and the needs of MSMEs.⁷⁴ Guidance could focus, *inter alia*, on matters such as use of informal procedures; commencement of proceedings, including expedited proceedings; applicable remedies, e.g. reorganization or liquidation; treatment of assets; and the administrative structure of the insolvency regime. Guidelines already developed by international organizations, such as UNCITRAL's Legislative Guide on Insolvency Law (2004) and INSOL's Statement of Principles for a Global Approach to Multi-Creditor Workouts, can serve as building blocks for this work.

⁷⁴ A. Idigbe, O. Kalu, Best practice and tailored reforms in African insolvency: lessons from INSOL, December 2012, page 2.

D. Settlement of commercial disputes: possible future work in the field of settlement of commercial disputes

(A/CN.9/785)

[Original: English]

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I. Introduction

1. To facilitate discussions of the Commission on topics to be considered in priority by the Working Group after completion of its current work on the preparation of a legal standard in treaty-based investor-State arbitration, this note contains a brief outline on the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996)¹ and on the matter of arbitrability. This note also includes a list of topics that have been raised by arbitration practitioners, including at the occasion of a round table organized jointly by the Secretariat and the International Arbitration Institute, Paris, in April 2012, as areas where the lack of solutions or harmonized solutions create difficulties in practice and may warrant further deliberations.

2. By way of historical background, it may be recalled that Working Group II (Arbitration and Conciliation) resumed its work in 2000, following a mandate given by the Commission to the Working Group at its thirty-second session, in 1999.² Welcoming the opportunity to discuss the desirability and feasibility of further development of the law of international commercial arbitration, the Commission considered that the time had come to assess the extensive and favourable experience with national enactments of the UNCITRAL Model Law on International Commercial Arbitration (1985)³ (“the Model Law on Arbitration”), as well as the

¹ UNCITRAL Yearbook, vol. XXVII: 1996, part three, annex II.

² *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17 (A/54/17)*, para. 337.

³ *Official Records of the General Assembly, Fortieth Session, Supplement No. 17 (A/40/17)*, annex I; UNCITRAL Yearbook, vol. XVI: 1985, part three, annex I.

use of the UNCITRAL Arbitration Rules (1976)⁴ and the UNCITRAL Conciliation Rules (1980),⁵ and to evaluate, in the universal forum of the Commission, the acceptability of ideas and proposals for improvement of arbitration laws, rules and practices.⁶

3. The Commission considered a number of topics for possible future work in that regard, based on a note it had before it at that session entitled “Possible future work in the area of international commercial arbitration” (A/CN.9/460).⁷ The extensive list of possible topics set out in that note included matters that are the subject of current UNCITRAL projects, such as online dispute resolution or guidance on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)⁸ (“the New York Convention”), as well as topics that have been the subject of legislative work by the Working Group.

4. In respect of the latter, since the Working Group resumed its work in 2000, the Commission has adopted the following texts in the field of dispute settlement: at its thirty-fifth session, in 2002, the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use;⁹ at its thirty-ninth session, in 2006, legislative provisions amending the Model Law on Arbitration on the form of arbitration agreement and interim measures, as well a Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the New York Convention;¹⁰ and at its forty-third session, in 2010, the UNCITRAL Arbitration Rules (as revised in 2010).¹¹

5. At its forty-third session, in 2010, the Commission entrusted the Working Group with the task of preparing a legal standard on the topic of transparency in treaty-based investor-State arbitration. The result of the work of the Working Group on that topic, the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration, will be before the Commission at its current session, for consideration and possible adoption (see A/CN.9/783). The Commission will also have before it draft instruments on the applicability of those rules to the settlement of disputes arising under existing investment treaties (see A/CN.9/784).

⁴ *Official Records of the General Assembly, Thirty-first Session, Supplement No. 17* (A/31/17), para. 57; UNCITRAL Yearbook, vol. VII: 1976, part one, chap. II, sect. A, para. 57.

⁵ *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), chap. V, sect. A, para. 106; UNCITRAL Yearbook, vol. XI: 1980, part three, annex II.

⁶ *Official Records of the General Assembly, Fifty-fourth Session, Supplement No. 17* (A/54/17), para. 337.

⁷ *Ibid.*, paras. 333-380.

⁸ United Nations, *Treaty Series*, vol. 330, No. 4739, p. 3; Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards of the United Nations Conference on International Commercial Arbitration, New York, 20 May-10 June 1958 (United Nations publication, Sales No. 58.V.6).

⁹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), annex I (model law only); UNCITRAL Yearbook, vol. XXXIII: 2002, part three, annexes I and II.

¹⁰ *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 87-181 and annexes I and II to the Report.

¹¹ *Ibid.*, *Sixty-fifth Session, Supplement No. 17* (A/65/17), para. 187 and annex I to the Report.

II. Topics noted by the Commission for future work

6. The topics which have been noted by the Commission for future work include the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) and the topic of arbitrability.

1. Revision of the UNCITRAL Notes on Organizing Arbitral Proceedings

7. Further to initial discussions at its twenty-sixth session, in 1993,¹² the Commission finalized the UNCITRAL Notes on Organizing Arbitral Proceedings (also referred to below as the “Notes”) at its twenty-ninth session, in 1996.¹³ At that session, the Commission approved the principles underlying the Notes, among which were that the Notes must not impinge upon the beneficial flexibility of arbitral proceedings; that it was necessary to avoid establishing any requirement beyond the existing laws, rules or practices, and in particular to ensure that the sole fact that the Notes, or any part of them, were disregarded would not lead to a conclusion that any procedural principle had been violated or was a ground for refusing enforcement of an award; and that the Notes should not seek to harmonize disparate arbitral practices or recommend using any particular procedure.¹⁴

8. At its thirty-sixth session, in 2003, the Commission heard proposals that a revision of the Notes could be considered as a topic of future work.¹⁵ At its forty-fifth session, in 2012, the Commission recalled the agreement at its forty-fourth session,¹⁶ in 2011, that the Notes ought to be updated pursuant to the adoption of the 2010 UNCITRAL Arbitration Rules.¹⁷ At its forty-fifth session, the Commission confirmed that the Secretariat should undertake the revision of the Notes as its next task in the field of dispute settlement, and that it would decide at a future session whether the draft revised Notes should be considered by the Working Group before being submitted to the Commission.¹⁸

9. A conference was held in Vienna on 21-22 March 2013 in cooperation with the Vienna International Arbitral Centre (VIAC) of the Austrian Federal Economic Chamber on the topic, inter alia, of the UNCITRAL Notes on Organizing Arbitral Proceedings and matters that could be considered in their revision.¹⁹ In addition, a questionnaire on whether and how the Notes should be revised was made available to practitioners, through various distribution channels, including on the website of UNCITRAL. To facilitate the discussion of the Commission on the matter of the

¹² Ibid., *Forty-eighth Session, Supplement No. 17* (A/48/17), paras. 291-296. For discussions at the session of the Commission, in 1994, of a draft entitled “Draft Guidelines for Preparatory Conferences in Arbitral Proceedings”, see Ibid., *Forty-ninth Session, Supplement No. 17* (A/49/17), paras. 111-195; for discussions at the session of the Commission, in 1995, of a draft entitled “Draft Notes on Organizing Arbitral Proceedings”, see Ibid., *Fiftieth Session, Supplement No. 17* (A/50/17), paras. 314-373.

¹³ Ibid., *Fifty-first Session, Supplement No. 17* (A/51/17), paras. 11-54.

¹⁴ Ibid., para. 13.

¹⁵ Ibid., *Fifty-eighth session, Supplement No. 17* (A/58/17), para. 204.

¹⁶ Ibid., *Sixty-sixth session, Supplement No. 17* (A/66/17), paras. 205 and 207.

¹⁷ Ibid., *Sixty-seventh session, Supplement No. 17* (A/67/17), para. 70.

¹⁸ Ibid., *Sixty-seventh session, Supplement No. 17* (A/67/17), para. 70.

¹⁹ For the presentations made at the occasion of the joint annual UNCITRAL-VIAC-YAAP Conference, see www.viac.eu/en/news-events/news-en/9-nicht-kategorisiert/127-presentations-viac-seminar (available on 12 April 2013).

revision of the Notes, the following comprises a brief and non-exhaustive overview of suggestions made by practitioners during that joint conference as well as in response to the questionnaire:

(a) General comment on the Notes: It was confirmed that the Notes are widely used, and constitute a useful tool to assist arbitrators and parties in the organization of arbitral proceedings. It was also underlined that the Notes are different from many existing guidelines, because they assist arbitration practitioners by listing and briefly describing questions on which decisions on organizing arbitral proceedings may be usefully made, without promoting one particular approach or practice;

(b) Place of arbitration (see section 3 of the Notes): It was suggested that the Notes should provide more information to users on the legal implications of the choice of the place of arbitration in differentiating the physical place of arbitration (determined by factual factors such as convenience, proximity of evidence, and so on) and the seat of arbitration (determined by legal factors);

(c) Costs (see section 5 of the Notes): It was proposed that a revised draft of the Notes address issues of costs, and cost control. The existing Notes address only deposits in relation to costs;

(d) Use of electronic means (see e.g. section 8 of the Notes): The terminology in the Notes addressing communication needs to be updated. In addition, the Notes could include suggestions regarding whether electronic means of communication and electronic submissions are appropriate and cost-effective in the circumstances, and the obstacles as well as the benefits posed by electronic means of communication. More radical proposals, including creating an online “wiki” page for the Notes, such that practitioners could provide comments in relation to each paragraph of the Notes, thereby creating a living document, were also made;

(e) Document production and disclosure (see sections 10 and 13 of the Notes): It was suggested that the Notes could better identify issues for the parties’ and tribunal’s consideration in the standards to be applied in the production of documents, and in the matters of e-disclosure and e-production of documents;

(f) Experts (see section 16 of the Notes): It was proposed to complement the Notes with more recent developments in relation to experts, such as expert teaming or expert conferencing. Guidance was requested regarding advantages and disadvantages of party-appointed or tribunal-appointed experts;

(g) Multi-party proceedings (see section 18 of the Notes): It was said that information on how to address issues specific to multi-party arbitration that may arise at various stages of the proceedings would be useful, and that that matter should be covered in more detail in the Notes. It was suggested that an update in this regard might include providing notes on the question of mass claims;

(h) The refusal of a respondent to participate in proceedings and dilatory tactics: It was suggested that the Notes could provide possible solutions available to parties and tribunals where a respondent refuses to participate in proceedings, or uses dilatory tactics. In particular, it was said that the Notes ought to provide more information on how to ensure efficiency of proceedings in such situations and on any steps that could be taken to ensure that any award would be enforceable;

(i) Impact of arbitration on third parties: Third parties can be affected by arbitral proceedings, including for instance when interim measures are granted, and it was proposed that the Notes provide information in that context;

(j) Investment treaty arbitration: It was suggested that some separate guidance on existing practices in the field of treaty-based investor-State arbitration may be warranted in relation to some areas covered by the Notes.

10. Should the Commission decide that a revision of the Notes ought to be considered by the Working Group as a matter of priority, a more detailed annotated list of possible areas of revision would be presented by the Secretariat to the Working Group.

2. Arbitrability

11. Since its thirty-sixth session, in 2003, the Commission has mentioned on a number of occasions that the topic of arbitrability was an important issue that should be given priority as a topic for future work.²⁰

12. Various issues relating to arbitrability, including the arbitrability of intra-corporate disputes, arbitrability in the fields of immovable property, insolvency or unfair competition have been identified by the Commission as areas for possible consideration.²¹ It was said that it would be for the Working Group to consider whether arbitrable matters could be defined in a generic manner, possibly by way of an illustrative list, or whether a legislative provision should be prepared in respect of arbitrability, identifying topics not considered arbitrable.

13. In the context of previous deliberations of the Commission on that matter, it was also cautioned that the topic of arbitrability was a matter raising questions of public policy, which was notoriously difficult to define in a uniform manner, and that providing a pre-defined list of arbitrable matters could unnecessarily restrict a State's ability to meet certain public policy concerns that were likely to evolve over time.²² To the extent that the issue should be considered, the purpose should not be to strive for uniformity, but to highlight in a transparent manner different views on that topic.²³ At its forty-fourth session, in 2011, the Commission affirmed that the issue of arbitrability should be maintained by the Working Group on its agenda.²⁴

14. The Commission may wish to note that the form and content of any future work on arbitrability would need to be further defined. In that respect, the Commission may wish to consider whether that topic could adequately be addressed as part of the project of the guide on the New York Convention currently under

²⁰ Ibid., *Fifty-eighth session, Supplement No. 17 (A/58/17)*, para. 204; *Fifty-ninth session, Supplement No. 17 (A/59/17)*, para. 60; *Sixtieth session, Supplement No. 17 (A/60/17)*, para. 178; *Sixty-first session, Supplement No. 17 (A/61/17)*, para. 187; *Sixty-second session, Supplement No. 17 (A/62/17, Part I)*, para. 177; *Sixty-third session, Supplement No. 17 (A/63/17)*, para. 316; *Sixty-sixth session, Supplement No. 17 (A/66/17)*, para. 203.

²¹ Ibid., *Fifty-eighth Session, Supplement No. 17 (A/58/17)*, para. 204; *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 60; *Sixtieth Session, Supplement No. 17 (A/60/17)*, para. 178; (see also the reports of the Working Group on the work of its forty-second session (A/CN.9/573, para. 100) and forty-fourth session (A/CN.9/592, paras. 90)).

²² Ibid., *Sixty-first session, Supplement No. 17 (A/61/17)*, para. 185.

²³ Ibid., *Fifty-fourth session, Supplement No. 17 (A/54/17)*, para. 352.

²⁴ Ibid., *Sixty-sixth session, Supplement No. 17 (A/66/17)*, para. 203.

preparation by the Secretariat; for example, guidance on arbitrability and information regarding the treatment of arbitrability of certain matters in various jurisdictions could be provided in the section relating to article V(2)(a) of the Convention. At its current session, the Commission will have before it excerpts of the guide (see A/CN.9/786).

15. In the event the Commission considers that the outcome of any future work on arbitrability should result in a legislative text amending the Model Law on Arbitration, it may wish to decide whether it would be appropriate for consideration at a later stage, as part of a possible general revision of the Model Law on Arbitration, which is currently silent on that matter.

III Issues raised as topics for possible future work

16. The Commission may wish to note the following topics that have been raised by arbitration practitioners as areas where the lack of solutions or harmonized solutions create difficulties in practice and may warrant further deliberation as topics of possible future work.

1. Multiple, concurrent proceedings in the field of investment arbitration

17. It has been suggested that the subject of concurrent proceedings is increasingly important, particularly in the field of investment arbitration, and may warrant further consideration by UNCITRAL. In particular, it has been suggested that it is not unusual for one arbitration to be initiated in relation to a particular dispute, and concurrently for related parties to initiate parallel proceedings, requesting, in whole or in part, the same relief. In certain investment arbitration proceedings, this is said often to involve a parent company invoking the benefit of a treaty against a given State while its subsidiary, with a different legal domicile, invokes the benefit of another treaty against the same State on the basis of the same facts. In other cases, practitioners have observed a difficulty where a foreign company launches an arbitration on the basis of the investment treaty corresponding to its legal domicile while a local subsidiary initiates a separate claim on the basis of the same facts pursuant to the same contract and under the same investment treaty.

18. Addressing the subject of concurrent proceedings would also be in the spirit of promoting a harmonized and consistent approach to arbitration. In order to further consider the concrete proposals to avoid multiple recovery in relation to the same facts in the context of international arbitration, the Commission may wish to note that the Secretariat will organize jointly with other interested institutions a conference on that topic, in November 2013, and will report to the Commission on matters raised at that conference.

2. Dispute boards

19. Dispute boards first came to prominence internationally in 1995 when the World Bank introduced the concept into its procurement regime. The purpose of a dispute board is to pre-empt issues as they arise between the parties to a contract and then make recommendations as to their resolution. These recommendations need not be contractually binding, unless the parties mandate that they should be so. If the parties to the contract are not willing to accept the recommendation of the

board or give effect to a binding decision, then the matter will proceed to formal resolution via arbitration or litigation. Originally, dispute boards were confined to the field of construction contracts. Now, dispute boards are to be found in wide ranging sectors of activity, such as space agency procurement, ship construction and IT contracts.²⁵

20. It was suggested that that matter would greatly benefit from a harmonized text that could be promoted and widely used by parties to contracts, as dispute boards have proven to be a useful dispute resolution mechanism.

3. Other topics

21. Other topics mentioned as worthy of consideration included:

(a) Guidance on the role of the home State of the investor in an investment arbitration: It was suggested that it would be beneficial to have some guidance in respect of the home State of the investor in an investment arbitration. One proposal was to draft guidelines on good practices for the home State in an investment arbitration, in particular as that State has access to the travaux préparatoires of international instruments;

(b) Mass claim arbitration: In the light of the great variety of mass claims being processed in international arbitration, work on mass claim arbitration has been suggested as a possible topic for harmonization;

(c) Enforcement of settlement agreements: In support of embarking on future work regarding issues relating to the enforcement of settlement agreements arising in conciliation and mediation, the Commission may wish to note that the UNCITRAL Congress in 2007 addressed that topic, as did the Working Group in its preparation of the UNCITRAL Model Law on International Commercial Conciliation;

(d) Power to conclude arbitration agreements: The question of which law applies to the authority of a person to bind a party to an arbitration agreement, and to the form and content a proxy must have, was seen as a matter that created difficulties in practice as national laws are silent on that issue;

(e) Third party funding: Third party funding is a practice which consists in an arrangement between a professional funder and a party to the arbitration to finance all or part of a party's legal costs and expenses. The Commission may wish to consider whether the issues raised by that practice should be further studied.

²⁵ The International Chamber of Commerce, adopted a set of Dispute Board Rules in 2004 (see www.iccwbo.org/). The Forum for International Conciliation and Arbitration (FICACIC) adopted its Dispute Board Rules in 2008 (see www.ficacic.com).

E. Commercial fraud

(A/CN.9/788)

[Original: English]

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I. Introduction

1. The Commission has considered the issue of international commercial fraud on several occasions beginning with its thirty-fifth session in 2002,¹ and the reports of the Secretariat to the Commission describing work undertaken in this regard are available on the UNCITRAL website.² In addition, a colloquium on commercial fraud was held by UNCITRAL in April 2004 covering the topic in the context of the following broad areas: work in other international organizations; banking and trade fraud; investigation; cyber fraud; prevention; transport; insurance; recovery; money-laundering; insolvency; prosecution; procurement; the role of professionals; and securities (see A/CN.9/555). Following the colloquium, the Commission approved the preparation of a study intended to assist Governments and the international commercial community in combating commercial fraud.³

2. Two meetings of a group of experts on commercial fraud were held in October 2005 and January 2007, respectively. Those sessions contributed to the preparation of the study requested, which is referred to as the “Indicators of commercial fraud” (A/CN.9/624, Add.1 and Add.2), and serves to identify common characteristics in typical fraudulent schemes that provide warning of their nature, and to explain those characteristics. At the request of the Commission, the

¹ *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 17* (A/57/17), paras. 279-290; *Ibid.*, *Fifty-eighth Session, Supplement No. 17* (A/58/17), paras. 231-241; *Ibid.*, *Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112; *Ibid.*, *Sixtieth Session, Supplement No. 17* (A/60/17), paras. 216-220; *Ibid.*, *Sixty-first Session, Supplement No. 17* (A/61/17), paras. 211-217; *Ibid.*, *Sixty-second Session, Supplement No. 17* (A/62/17 (Part I)), paras. 196-203; *Ibid.*, *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 339-347; *Ibid.*, *Sixty-fourth Session, Supplement No. 17* (A/64/17), paras. 345-355; and *Ibid.*, *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 232.

² See A/CN.9/540, 2003; A/CN.9/555, 2004; A/CN.9/600, 2006; A/CN.9/624, Add.1 and 2, 2007; and A/CN.9/659, Add.1 and 2, 2008.

³ *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 17* (A/59/17), paras. 108-112.

“Indicators of commercial fraud” were circulated to Member States for comment in 2007 (A/CN.9/659, Add.1 and Add.2), following which the Commission in 2008 requested the Secretariat to make such adjustments and additions as were advisable to improve the materials and then to publish the materials as a Secretariat informational note for educational purposes and fraud prevention. The Commission also expressed its view that the materials could be incorporated by the Secretariat as a component of its broader technical assistance work, which could include dissemination and explanation to Governments and international organizations intended to enhance the educational and preventive advantages of the materials. Further, Governments and international organizations could be encouraged in turn to publicize the materials and make use of them in whatever manner was appropriate, including tailoring them to meet the needs of various audiences or industries.⁴

3. In addition, as requested by the Commission,⁵ the Secretariat has continued to participate in the work of the United Nations Office on Drugs and Crime (UNODC) on economic crime and identity fraud. In particular, the UNCITRAL Secretariat has participated in UNODC’s core group of experts on identity-related crime, which was formed to bring together on a regular basis representatives from Governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. The most recent meeting of the core group of experts took place in January 2013, and resulted in a draft Economic and Social Council resolution (E/CN.15/2013/L.6/Rev.1) requesting UNODC to continue its efforts, in consultation with UNCITRAL, “to promote mutual understanding and the exchange of views and expertise between various stakeholders, and in particular between public and private sector entities, on issues pertaining to identity-related crime through the future work of the core group of experts on identity-related crime, including draft model legislation on identity-related crime”.

4. At its forty-fifth session in 2012, the Commission was reminded that more than a decade had passed since it first considered the issue of commercial fraud. It was said that “commercial fraud remained a major obstacle to international trade and noted that, given the vital role of the private sector in combating commercial fraud, UNCITRAL was in a unique position to coordinate ongoing efforts in that field and thereby help draw the attention of legislators and policymakers to that important issue”.⁶ In addition, it was proposed that the Secretariat could organize a colloquium on commercial fraud, resources permitting.⁷ In order to consider the feasibility and desirability of holding such a colloquium, the Secretariat held an informal meeting of experts in the field who met in Vienna, Austria, from 29-30 April 2013.

5. The informal meeting of experts reviewed the work on commercial fraud undertaken by UNCITRAL to date and considered whether or not future work in the area would be useful and, if so, the possible scope of that work.

⁴ Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), paras. 342-343 and *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 348.

⁵ Ibid., *Sixty-third Session, Supplement No. 17* (A/63/17), para. 347 and *Sixty-fourth Session, Supplement No. 17* (A/64/17), para. 354.

⁶ Ibid., *Sixty-seventh Session, Supplement No. 17* (A/67/17), para. 232.

⁷ Ibid.

II. The Indicators of commercial fraud

6. The informal meeting of experts reviewed the Indicators of commercial fraud and made several suggestions to align the text with developments in the field since the document was last revised in 2010.

7. The informal meeting of experts agreed that the Indicators of commercial fraud should be published in an appropriate manner as soon as practicable and given the widest possible circulation. In this regard, it was suggested that, were a Colloquium to be held, it could be of significant benefit in facilitating the distribution and further updating of the Indicators of commercial fraud.

III. Possible future work on commercial fraud

A. Colloquium

8. The informal meeting of experts suggested that a number of important areas in respect of commercial fraud warranted further attention in a broader forum. It was recalled that the UNCITRAL colloquium in 2004 provided a useful model for addressing issues in a context that attracted interest and participation from a wide spectrum of those combating commercial fraud.

9. In particular, it was observed that developments in electronic communications posed particular challenges through identity theft of corporations and banks, the inability of receivers of messages to identify senders with certainty, and the proliferation of websites that mimicked those of legitimate entities but that were controlled by fraudsters. It was observed that the consequences of such developments impacted every aspect of business, finance and trade from the sale of goods, information and services to online dispute resolution.

10. It was also suggested that the areas explored in the 2004 colloquium warranted revisiting in light of recent developments such as cloud computing, mobile payment systems, and expanded access to the Internet and the global financial crisis, which had exacerbated the impact of commercial fraud. It was noted that Internet usage has expanded at a dramatic rate around the world, increasing by 528 per cent over the last decade. It was further noted that 1/3 of the world's population is now connected to the Internet, increasing over the last decade by 3,000 per cent in Africa, 2,250 per cent in the Middle East, 1,200 per cent in Latin America and 800 per cent in Asia.⁸

11. It was recalled that the Commission agreed in 2004⁹ that it would be useful if, wherever appropriate, examples of commercial fraud were discussed in the particular contexts of projects undertaken by UNCITRAL so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations, and the Secretariat was requested to facilitate such discussions where appropriate. The informal meeting of experts expressed the view that while some of the UNCITRAL texts address issues of fraud, many do not and that even where

⁸ Internet World Stats: Usage and Population Statistics, www.internetworldstats.com (last visited 6 May 2013).

⁹ Ibid., *Fifty-ninth Session, Supplement No. 17 (A/59/17)*, para. 111.

fraud is addressed, the attention given to it is focused on its impact on existing obligations and not in identifying and preventing it. However, it was noted that identity management and mobile payments were on the list of topics for possible future work by Working Group IV.¹⁰ It was also suggested that the type of expertise necessary to formulate normative rules of commercial law in discrete fields is not necessarily the type of expertise necessary to identify possibilities of commercial fraud or how to address them; therefore, it was suggested that it might be useful to focus separately on the commercial fraud potential and dangers in the areas on which UNCITRAL Working Groups are focused.

12. Recognizing the unique value of the Indicators of commercial fraud, it was suggested that a colloquium could update the text and consider additions that might be appropriate, consider how to promote them, and to mobilize energies outside the United Nations to promote and keep them up to date.

13. The informal meeting of experts was of the view that in light of the continued threat to international trade posed by commercial fraud, the need for further coordination and education, and the unique position occupied by UNCITRAL to bring together governmental representatives and other organizations affected by commercial fraud, an international colloquium sponsored by UNCITRAL should be considered.

B. A mechanism for future work

14. The informal meeting of experts recalled that the report to the Commission on the 2004 colloquium had emphasized that education and training played a significant role in fraud prevention and could help address the problems resulting from under-reporting the incidence of commercial fraud.¹¹ The report further noted that prevention was primarily within the purview of commercial law and self-regulation by the commercial community, and was manifested through standards such as those affecting corporate governance, standards of professional conduct and audits.¹² The meeting suggested that a process through which the Indicators of commercial fraud could be regularly updated would be invaluable.

15. The informal meeting of experts suggested that there was coordination, education and cooperation among commercial fraudsters and that similar efforts were essential in order to prevent and combat commercial fraud.

16. The meeting highlighted the need for regular opportunities to gather together to exchange information for those engaged in combating commercial fraud. In light of the limited resources available to UNCITRAL, it was suggested that private organizations could be encouraged to continue anti-fraud activities in the future through informal cooperation with, as well as encouragement and support from, UNCITRAL.

¹⁰ Ibid., *Sixty-sixth Session, Supplement No. 17* (A/66/17), paras. 236-237 and 239. See also two notes by the Secretariat: "Present and possible future work on electronic commerce" (A/CN.9/728) and "Overview of identity management" (A/CN.9/WG.IV/WP.120).

¹¹ Document A/CN.9/555, para. 63.

¹² Ibid.

17. The informal meeting of experts recommended that attention be given to encouraging coordination, ongoing education and training by other organizations.

IV. Recommendations for consideration by the Commission

18. In light of these considerations, the informal meeting of experts suggested that it would be valuable for a colloquium to be organized by UNCITRAL, in consultation with UNODC, on the following topics:

- (a) Commercial fraud in the emerging technological landscape including:
 - (i) Theft of corporate identities;
 - (ii) Impact of commercial fraud on and misuse of cloud computing;
 - (iii) Abuse of mobile payments including its impact on microfinance initiatives;
 - (iv) Abuse of online dispute resolution by fraudsters;
- (b) Impact of the global financial crisis on commercial fraud;
- (c) Emerging commercial fraud threats to global trade;
- (d) Endorsement, promotion and updating of the Indicators;
- (e) Identification of work being done to combat commercial fraud and consideration of projects in the fields addressed at the 2004 Colloquium, particularly banking and trade fraud, cyber fraud, securities fraud, and fraud prevention; and
- (f) The feasibility and desirability of informal coordination to continue opportunities for coordination.

F. Proposal by the Government of the United States regarding UNCITRAL future work: provisional agenda item 16¹

(A/CN.9/789)

[Original: English]

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I. Introduction

1. The forty-sixth session of the Commission will consider, under provisional agenda item 16, planned and possible future work by UNCITRAL, and will have before it a note by the Secretariat (A/CN.9/752 and Add.1) and an additional note by the Secretariat on planned and possible future work by UNCITRAL (A/CN.9/774). In that regard, the Government of the United States of America submitted a proposal regarding UNCITRAL future work, the text of which is reproduced below in the form in which it was received by the Secretariat.

II. Proposal by the Government of the United States

The United States greatly appreciates the notes prepared by the Secretariat on planned and possible future work,² designed to bring to the attention of States the important concerns regarding the organization's priorities and resource constraints. The United States has consistently supported the provision of adequate resources to support the important work being done by UNCITRAL, and we believe that it has been one of the most productive bodies in the United Nations system. The high level of output the UNCITRAL secretariat produces for all the meetings is even more impressive when considering the small number of officers working in the Secretariat and the vast scope of the work that UNCITRAL addresses. It is regrettable, as was reported at the last session of the Commission, that "UNCITRAL cannot continue, with its existing resources, to generate legal texts at the current rate and work toward the implementation and use of all UNCITRAL texts to the extent necessary."³

¹ Provisional Agenda Item 16 is entitled "Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests." United Nations document A/CN.9/759 (2013).

² Notes by the Secretariat, A Strategic Direction for UNCITRAL, United Nations document A/CN.9/752 and Add.1 (2012); Planned and Possible Future Work, United Nations document A/CN.9/774 (2013).

³ A/CN.9/752/Add.1, para. 25.

At its 2012 session, the Commission took note of the following strategic considerations:

- (a) The subject areas that should be accorded the highest priority, by reference to the role and relevance of UNCITRAL;
- (b) Achieving the optimal balance of activities given current resources;
- (c) The sustainability of the existing *modus operandi*, i.e. current emphasis on formal rather than informal negotiations when developing texts, given current resources;
- (d) The mobilization of additional resources and the extent to which UNCITRAL should seek external resources for its activities, such as through joint activities and cooperation with other bodies.⁴

The Commission agreed to “provide further guidance on *inter alia*, those matters at its forty-sixth session.”⁵

Sustainability of existing *modus operandi*

For a number of years, States have proposed that UNCITRAL should adopt a more flexible approach to methods of work to address resource concerns and ensure that the highest-priority, most valuable projects are able to proceed.⁶ The Secretariat has suggested that more than one topic might be given to a specific working group. We submit that another way of achieving a more flexible work plan would be for UNCITRAL to focus on authorizing individual projects and allocating the needed resources to them, rather than maintaining six working groups that are generally devoted exclusively to one area of law for many years. We thus suggest that UNCITRAL should no longer structure its work priorities using a system of six semi-permanent working groups devoted to a particular area of law, each of which are expected to receive two weeks of meeting time every year.⁷

For example, instead of having a standing entity labelled as “Working Group IV — Electronic Commerce”, the Commission would approve further work on the in-progress instrument on electronic transferable records and determine the resources that the project will require in the next year (in terms of Secretariat attention and conference resources). Taking into account UNCITRAL’s current annual entitlement to 14 weeks of conference services (including meeting space and interpretation),⁸ those resources could then be allocated to specific projects as

⁴ Report of the United Nations Commission on International Trade Law, forty-fifth session (25 June-6 July 2012), United Nations document A/67/17, para. 229.

⁵ *Id.*, para. 231.

⁶ See e.g., Report of the United Nations Commission on International Trade Law, forty-fourth session (27 June-8 July 2011), United Nations document A/66/17, para. 343.

⁷ At its 2003 session, the Commission agreed that working groups should normally meet for a one-week session twice a year, but that extra time could be allocated to a working group if another working group did not make full use of its entitlement. Report of the United Nations Commission on International Trade Law, thirty-sixth session (30 June-11 July 2003), United Nations document A/58/17, paras. 273, 275.

⁸ The United States does not support a further reduction in the allocation of conference resources. At its 2011 session, the Commission agreed to a reduction in the habitual 15-week total entitlement per year in view of the extraordinary constraints placed on the Commission and its

needed — rather than, by default, assuming that each working group devoted to a particular topic will receive two weeks of meeting time. (A proposed allocation of resources for the next year is provided below.)

This approach would require the Commission to evaluate whether the topics being addressed continue to remain the highest priorities when resources become available upon the completion of a project. By contrast, the use of semi-permanent working groups that propose their own future areas of work means that only rarely will a working group deem its useful work to be exhausted. Understandably, experts in each area of law will often continue to believe that further valuable work can be done in their area of expertise. Even where that may be the case, such work may not be more valuable — in terms of furthering the mandate of UNCITRAL — than new work in areas that are not currently so fortunate as to have a working group assigned to them. Given the scarcity of resources, UNCITRAL cannot afford to continue operating under the implicit presumption that the conclusion of one project in an area of law will be followed by further work on that same topic.

As another method of conserving resources, we also believe that the Commission should consider, in appropriate cases, the development of draft instruments outside of the full intergovernmental discussions used by working groups. Formal review by UNCITRAL Member States is, of course, necessary for the approval and finalization of any instruments. However, in the past, the Commission itself has at times considered a text developed by the Secretariat (with input from experts) without prior negotiations in a working group context.⁹ The United States encourages UNCITRAL to consider the use of such an approach when appropriate, as well as other tools including expanded use of experts' meetings, regional meetings (including those where host government resources may be available), and use of special rapporteurs who, working closely with the Secretariat, could facilitate preparation of draft materials for consideration.¹⁰

Mobilization of additional resources

States have also recognized that, as another tool for tackling additional areas of work in an efficient manner, UNCITRAL should seek to increase cooperation with other international organizations, consistent with its primary mandate.¹¹ A

secretariat to reduce regular budget expenditures during the 2012-2013 biennium. Report of the forty-fourth session, *supra* note 5, para. 347.

⁹ See A Strategic Direction for UNCITRAL, *supra* note 1, para. 33 (noting that “the Secretariat has undertaken substantial preparation of a text on several occasions,” such as when “a draft text was developed by the Secretariat and referred directly to the Commission as there was no existing working group with the relevant expertise (e.g. the Legal Guide on Electronic Funds Transfers (1987) and the Legislative Guide on Privately Financed Infrastructure Projects (2000)” and when “preparation of the draft text was entrusted to the Secretariat and referred directly to the Commission (e.g. Recommendations on the use of the UNCITRAL Arbitration Rules (2012))”).

¹⁰ See Note by the Secretariat, UNCITRAL rules of procedure and methods of work, A/CN.9/638/Add.1, paras. 31-33, 36-42 (2007).

¹¹ See Establishment of the United Nations Commission on International Trade Law, General Assembly resolution 2205 (XXI), A/RES/2205 (Dec. 17, 1966), para. 8 (“The Commission shall further the progressive harmonization and unification of the law of

project-based resource allocation approach as described above would make it easier for UNCITRAL to engage in joint projects with other organizations such as UNIDROIT or the Hague Conference, as such collaboration would not have to wait for an existing working group to become “vacant”. Given that these other private law bodies face similar resource constraints, all three organizations should analyse their work programmes to identify projects that could be jointly developed. Indeed, at this year’s Governing Council meeting, UNIDROIT strongly supported the idea of substantive cooperation with UNCITRAL on future projects, with the two organizations developing instruments jointly.

Moving forward, we believe that UNCITRAL should make such collaboration a priority. We welcome recent efforts at cooperation such as the joint publication of the paper on “UNCITRAL, Hague Conference and UNIDROIT Texts on Security Interests”.¹² However, we believe that collaboration should not be limited to joint studies and attendance of Secretariat staff at meetings of the other organizations. Rather, we recommend that the organizations’ Secretariats seek to identify projects that could be developed jointly, in ways that maximize the comparative advantages of each organization.

Subject matters that should be accorded highest priority

In terms of evaluating future work, the Commission has repeatedly decided that assessment of specific projects should be based on the need for and feasibility of future work as it relates to the development of international trade law.¹³ A key criterion in assessing need in this context is the effect that a proposal will have on inclusive economic development and the rule of law, particularly in developing countries.¹⁴ As the Commission has also decided, “[a]s a general rule, the Commission should not refer subject-matters to a working group until after preparatory studies had been made by the Secretariat and the consideration of these studies by the Commission had indicated not only that the subject-matter was a

international trade by: (a) Co-ordinating the work of organizations active in this field and encouraging co-operation among them...”).

¹² See Report of the forty-fifth session, *supra* note 3, paras. 165-66.

¹³ As the Secretariat notes (A/CN.9/774, para. 19), the focus on need and feasibility dates back to the original report of the Secretary-General concerning the formation of UNCITRAL. Report of the Secretary-General, A/6396 (1966). That report notes that “the unification process is desirable per se only when there is an economic need and when unifying measures would have a beneficial effect on the development of international trade.” *Id.*, para. 204. It also addresses feasibility, noting that “[i]t should therefore be less difficult to adopt national rules to the needs of international trade, than to unify rules on such matters as family law, succession, personal status, and other subjects deeply rooted in national or religious traditions.” *Id.*, para. 222.

¹⁴ The role of UNCITRAL in promoting the rule of law had been on the agenda of the Commission since 2008, in response to a request from the General Assembly. In 2012, UNCITRAL participated in a high level meeting of the General Assembly, where the role of UNCITRAL in promoting the rule of law was highlighted. See Report of the forty-fifth session, *supra* note 3, paras. 195-227.

suitable one but that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner.”¹⁵

Allocating resources to projects

Taking into account the above considerations, and assuming that 14 weeks of meeting time will again be available, the United States proposes that resources might be allocated as follows for the upcoming year:

| <i>Project</i> | <i>Allocation of Meeting Time</i> |
|--|---|
| Follow-on transparency work, as needed, and/or new arbitration topics | Two weeks |
| Preparation of legal standards for online dispute resolution for cross-border electronic transactions | Two weeks |
| Development of an instrument on electronic transferable records | Two weeks |
| Preparation of a model law on secured transactions | Two weeks |
| Development of a legislative guide or model law on the creation of an enabling environment for microbusiness and small and medium-sized enterprises (microfinance) | Two weeks |
| Colloquium on cross-border insolvency to identify specific projects for future work (including projects related to general topics already under discussion) | One-half week |
| Colloquium on commercial fraud | One-half week |
| Drafting of a model law on public-private partnerships (PPPs) | No meetings – work by Secretariat and experts |
| 2014 Commission meeting, including review of work by Secretariat and experts on a model law on PPPs (if appropriate) | Three weeks |

The Secretariat paper suggests the possible reduction of the six existing working groups to five. However, we believe that using the more flexible approach outlined above — with resources allocated to specific projects rather than semi-permanent working groups — could permit UNCITRAL to conserve resources without eliminating useful topics. Only five projects would be the subject of full intergovernmental negotiations, thus reducing the burden on the Secretariat; at the same time, UNCITRAL could remain engaged on several other topics and be undertaking the necessary preparatory work for launching new projects in the future.

This suggested allocation of resources would entail a slightly different approach to several areas in which new or continued work has been proposed, including through use of some of the more flexible methods of work described above. The impact on particular projects is discussed below.

¹⁵ Report of the United Nations Commission on International Trade Law, eleventh session (30 May-16 June 1978), United Nations document A/33/17, paras. 67-68; Note by the Secretariat, UNCITRAL rules of procedure and methods of work, A/CN.9/638, para. 20 (2007).

Microfinance and related topics

Consistent with the decision of the Commission at its last session and the recommendation of the January 2013 colloquium on microfinance and related topics, we believe that, consistent with the proposal made by the Government of Colombia, work should begin on a legislative guide or model law addressing the elements necessary for the creation of an enabling legal environment relating to the life cycle of micro and small businesses: simplified business incorporation, dispute resolution, access to credit, mobile payments, and insolvency.

At its forty-fifth session, the Commission decided that holding a second colloquium on microfinance and related topics “should rank as a first priority for UNCITRAL”.¹⁶ The Commission decided that the colloquium should focus on “facilitating simplified business incorporation and registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises.”¹⁷ That colloquium, held in January 2013, developed a “broad consensus among participants” that UNCITRAL should “address the legal aspects necessary for the creation of an enabling legal environment for MSMEs. It was stressed that work in establishing such an environment would be consistent with the Commission’s primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade.”¹⁸

The Secretariat report underscores the crucial importance of establishing an enabling legal environment for micro and small businesses in developing countries to effectively reach international markets through electronic and mobile commerce.¹⁹ Moreover, “[t]he creation of an enabling legal environment also contributes to reinforcing the rule of law at country level which, as stressed by the General Assembly in its Resolution on the Rule of Law, is conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable, and equitable development.”²⁰ Thus, consistent with the colloquium’s recommendation,

¹⁶ Report of the forty-fifth session, *supra* note 3, para. 126.

¹⁷ *Id.*

¹⁸ Note by the Secretariat, Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, A/CN.9/780, para. 50 (2013). The Secretariat report points out that “cross-border recognition of these new and varied legislative issues and emerging structures [is] needed for MSMEs operating in regional markets in order to provide a recognizable international basis for transactions and avoid problems that can arise because of a lack of business recognition.” *Id.*

¹⁹ *Id.*, para. 52 (noting that “[g]lobally, Internet usage has increased by 528 percent over the last decade: approximately one third of the world’s population is now connected to the Internet” and that this “number is expected to increase to forty seven per cent by 2016”); see also Note by the Secretariat, Possible future work on online dispute resolution in cross-border electronic commerce transactions, United Nations document A/CN.9/706, para. 9 (2010) (observing that “[o]ne of the main drivers underlying e-commerce growth is the rising number of individuals connected to the Internet”).

²⁰ Microfinance, *supra* note 17, para. 13 (footnote omitted).

we believe that work should begin on a legislative guide or model law addressing these topics.²¹

Insolvency

The United States suggests that a colloquium to identify specific projects and possible future areas of work be scheduled in lieu of any full intergovernmental meetings on insolvency for the next year. Then, under the flexible approach to resource allocation outlined in the first section of this paper, work on insolvency could be resumed once an appropriately specific project is identified and approved by the Commission.

With respect to insolvency, Working Group V has now completed the two projects to which it has been devoting its time for the last several years. It has completed a set of revisions to the Guide to Enactment for the Model Law on Cross-Border Insolvency, and has also completed a new section of text for the Legislative Guide on Insolvency. Both of these documents are being presented to the Commission for finalization and approval. The most recent report of Working Group V notes that, although the Working Group may not have technically exhausted its mandate in terms of the legal issues that may be worth considering, it does not have a plan for what its work on those topics would produce.²² Thus, the Working Group has concluded that a colloquium could be useful to determine what future projects (on currently-planned topics as well as other proposed topics) could be the most valuable.²³

We agree with the Working Group's conclusion that a colloquium would be appropriate; the valuable instruments that Working Group V has developed in this area of law have been extremely influential, and UNCITRAL should consider additional projects that could utilize the extraordinary expertise of the delegates and observers who have participated in these past efforts. However, in light of the uncertainty regarding what concrete projects would be suitable for immediate work,

²¹ With respect to the report of the Secretary-General discussed in footnote 12 above, certain aspects of corporate law affecting international trade are cited as an example of work that might be pursued. United Nations document A/6396, para. 207 (noting that "it would be beneficial to international trade if more efforts were made in the direction of ... rules relating to corporations entering into foreign trade relations"). The General Assembly also requested UNCITRAL to engage in work on legal problems related to different kinds of multinational enterprises. See General Assembly resolution 2928, A/RES/2928 (XXVII), para. 5 (1972).

²² Report of Working Group V (Insolvency Law) on the work of its forty-third session (New York, 15-19 April 2013), United Nations document A/CN.9/766, para. 108 (noting that while the working group "had not yet completed its work on implementing the mandate received from the Commission," it nevertheless "was not yet clear how that part of the mandate could best be pursued").

²³ Id. ("The Working Group heard a proposal to hold a colloquium to examine how and by what type of instrument that remaining part of the mandate might be addressed, as well as to identify possible topics for future work. The Working Group agreed that such a colloquium could be useful; however, the suggestion that it should take the place of the Working Group sessions necessary to complete the mandate granted by the Commission did not attract sufficient support. Several delegations suggested that Commission approval should be sought for any future projects but that view did not attract sufficient support.").

we do not believe that working group meetings would be a prudent use of increasingly scarce resources while those projects are being identified.

Public-private partnerships (PPPs)

While further work on PPPs may be useful, it can be advanced through alternative methods of work led by the Secretariat. Such an approach would be consistent with the successful practice of the Commission in developing the Legislative Guide on Privately Finance Infrastructure Projects and the Model Law of Public Procurement.²⁴

In May 2013, UNCITRAL held a colloquium on PPP issues to discuss the possible value of future work that would expand on the closely-related instruments that Working Group I has produced in the past — namely, the Legislative Guide on Privately Finance Infrastructure Projects (which includes a set of legislative recommendation) and a set of Model Legislative Provisions on Privately Financed Infrastructure Projects. The colloquium concluded that, in light of increasing use of PPPs and developments in recent years, further work in this area might be useful. The most likely candidate for a future project would be a model law, which many colloquium participants noted would have greater visibility — and would be easier to promote — than the existing instruments.

Because of the work that has already been done on legislative recommendations and model legislative provisions, a basic model law could be developed without the expenditure of the resources that would be entailed by full intergovernmental negotiations in a working group. As noted above and in the Secretariat paper, the development of a text outside of a working group — with subsequent review by the Commission — could permit UNCITRAL to maximize its productivity despite the serious resource constraints. Based on the discussions at the colloquium, the United States believes that such an approach would be the ideal method for developing a model law on PPPs. As the Commission has previously approved the instruments developed by Working Group I, which cover most issues that a model law would need to address, the primary task remaining is merely a technical drafting exercise. The draft of a model law could be developed through an experts' group led by the Secretariat; then at a Commission session, Member States could review the document and either make any edits necessary to finalize it or, if needed, refer it for further work.

Commercial fraud

We support the organizing of a colloquium on commercial fraud in coordination with UNODC, as proposed at the last session of the Commission.²⁵ At the

²⁴ As noted above, *supra* note 8, a draft text was developed by the Secretariat and referred directly to the Commission concerning the Legislative Guide on Privately Financed Infrastructure Projects (2000). At the 2011 session of the Commission, States called for the utilization of “drafting groups for finalizing text, as had successfully been done during the current session in respect of the Model Law on Public Procurement.” Report of the forty-fourth session, *supra* note 5, para. 343.

²⁵ Report of the forty-fifth session, *supra* note 3, para. 232.

April 2013 UNCITRAL Expert Group Meeting on Commercial Fraud, there was broad support for holding another colloquium as a follow-up to the 2004 Colloquium and updating the work that UNCITRAL had previously done on commercial fraud indicators.²⁶ It was widely felt that given the vital role of the private sector in combating commercial fraud, UNCITRAL was in a unique position to coordinate ongoing efforts in that field and thereby help draw the attention of legislators and policymakers to that important issue.²⁷ In particular, it was pointed out that developments in electronic telecommunications pose new challenges and that the consequences of such developments impact every aspect of business, finance, and trade. It was further suggested that it might be useful to focus separately on the potential for commercial fraud in the areas on which UNCITRAL working groups are currently focused, such as online dispute resolution and electronic transferability of records. While these texts may attempt to address issues of fraud, the expertise necessary to formulate normative rules of commercial law in these fields may not necessarily be the same expertise required to identify possibilities of commercial fraud or how to address them in an instrument.²⁸

International contract law

We also support organizing a colloquium celebrating the 35th anniversary of the Convention on the International Sale of Goods in 2015. At the 2005 UNCITRAL Colloquium celebrating the 25th Anniversary of the CISG, the Convention was recognized as probably the single most successful treaty in the history of modern commercial law.²⁹ Since that colloquium, 16 more States have become party to the Convention, bringing the total number of parties to 79.³⁰

A proposal at the last session of the Commission called for consideration of a new global initiative on international contract law.³¹ A number of delegations, including the United States, expressed clear opposition to any effort to develop a new global framework for international contract law. Nonetheless, the Secretariat was requested “to organize symposiums and other meetings ... to assist the Commission in the assessment of the desirability and feasibility of future work in the field of general

²⁶ Note by the Secretariat, Commercial Fraud, A/CN.9/788, paras. 8-12, 18 (2013).

²⁷ *Id.*, paras. 13-17.

²⁸ *Id.*, para. 11. At the 2004 session of the Commission (following the 2004 Colloquium on international commercial fraud), it was decided that “it would be useful if, wherever appropriate, examples of commercial fraud were to be discussed in the particular contexts of projects worked on by the Commission so as to enable delegates involved in those projects to take the problem of fraud into account in their deliberations.” The Secretariat “was requested to facilitate such discussions where it seemed appropriate.” Report of United Nations Commission on International Trade Law on its thirty-seventh session (14-25 June 2004), United Nations document A/59/17, para. 111.

²⁹ Hebert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J. L. & Comm. 451 (2005).

³⁰ For the parties to the CISG see Status 1980 — United Nations Convention on Contracts for the International Sale of Goods, available at www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html.

³¹ Possible future work in the area of international contract law: Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law, United Nations document A/CN.9/758 (2012).

contract law.”³² To fulfil this mandate, UNCITRAL co-sponsored a symposium in January 2013 at Villanova Law School on “Assessing the CISG and Other International Endeavours to Unify International Contract Law,” and held an expert meeting on contract law in February 2013 at the UNCITRAL Regional Centre for Asia and the Pacific.³³

Based on the discussions at those meetings, the United States continues to oppose a new global initiative on international contract law, as an initiative of the scale proposed would be an enormous project, consuming considerable resources for many years, with limited likelihood of success. The scope of the CISG was intentionally limited to exclude issues on which a consensus could not be reached, and we have seen no evidence that those differences have fundamentally changed in recent years. Moreover, the UNIDROIT Principles of International Commercial Contracts already provide a useful complement to the CISG. At both its 2007 and 2012 sessions, the Commission endorsed the UNIDROIT Contract Principles — commending them for their intended purposes, identifying them as complementary to the CISG, and congratulating UNIDROIT on preparing “general rules for international commercial contracts.”³⁴ Thus, we believe that there are more practical, positive, and forward-looking alternatives that build on the existing platform of the CISG and the UNIDROIT Principles, and that UNCITRAL should focus on these alternatives.

³² A summary of the debate is contained in the report of the forty-fifth session, *supra* note 3, paras. 127-32.

³³ Information concerning the symposium is available at www.law.villanova.edu/Flash%20Stories/Norman%20J%20Shachoy%20Symposium.aspx. The papers relating to the symposium will be published in Issue 58:4 of the Villanova Law Review. The papers relating to the regional Expert Meeting held in Songdo, Incheon in South Korea will be published in an issue of the Comparative Law Journal of the Pacific — *Journal de Droit Comparé du Pacifique* (CLJP-JDCP).

³⁴ Report of forty-fifth session, *supra* note 3, para. 140; Report of the United Nations Commission on International Trade Law on the work of its fortieth session (25 June-12 July 2007), United Nations document A/67/17 (Part I), para. 213.

G. Proposal by the Government of Colombia

(A/CN.9/790)

[Original: Spanish]

Note by the Secretariat

At its forty-sixth session, the Commission may wish to consider item 16 of the provisional agenda (Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests). The Commission will have before it a note by the Secretariat on the planned and possible future work of UNCITRAL (A/CN.9/774). In this connection, the Government of Colombia has submitted a proposal, the text of which is reproduced below in the form in which it was received by the Secretariat.

Annex

Proposal for the establishment of a new working group on “Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises”

I. Introduction

At its forty-fifth session, the Commission approved the proposal of the Government of Colombia for the convening of a second colloquium on microfinance, with a focus on facilitating simplified business registration and incorporation.¹

The Government of Colombia’s proposal stated that one crucial aspect of the area of microfinance, besides the granting of credit, was the creation of simplified corporate business vehicles to promote formalization and transparency for the beneficiaries of microloans. There is clear scope for UNCITRAL to deal with this area of trade law.

The Commission agreed that “the holding of such a colloquium should rank as a first priority for UNCITRAL”.² The colloquium on microfinance and related matters took place in January 2013 with the participation of experts, specialists and representatives of governments, international organizations, non-governmental organizations, the private sector and academia from all over the world.³

¹ Superintendency of Companies, *Communication No. 2012-01-17-0670*, addressed to Renaud Sorieul, Registrar of UNCITRAL, 21 June 2012.

² *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17* (A/66/17), para. 126.

³ Organized by the UNCITRAL Secretariat; references [in the Spanish original] in English since, when this text was prepared, the official text was not available in Spanish. Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises. Note by the Secretariat, document A/CN.9/780, para. 5 (May 2013).

The main conclusion reached by the colloquium was that UNCITRAL should set up a new working group on microfinance and related matters. The Secretariat summarized the outcome of the colloquium as follows:

“...There was broad consensus among participants at the Colloquium recommending that a Working Group be established to address the legal aspects necessary for the creation of an enabling legal environment for MSMEs. It was stressed that work in establishing such an environment would be consistent with the Commission’s primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade.”⁴

II. The importance of micro-business and small and medium-sized enterprises in developing countries

In a developing economy, small and microenterprises are the fabric of entrepreneurship and provide a base for medium-sized and large enterprises. The creation of the latter will depend on the degree to which small and microenterprises are able to integrate in a stable and sound way into a formal process of business operation.⁵

Governments must introduce public policies and focus their efforts on strengthening the business sector⁶ and, perhaps more importantly, promoting the establishment of an enabling legal environment tailored to micro-businesses and small and medium-sized enterprises.

One important consideration in the establishment of this enabling legal environment is the effect it would have on microfinance and micro-business. The Secretariat’s report emphasized the importance of this issue in the following terms:

“In order to help micro, small and medium-sized enterprises to adjust to immediate uncertainty, and graduate from a subsistence form of doing business to a growth mode characteristic of the formal sector, an enabling legal environment is thus needed. Such an environment is not limited to microfinance alone; it relates to the life cycle of an enterprise — its establishment, operation and termination — and it also focuses on the supporting institutional legal framework. Nonetheless it is clearly relevant to microfinance since, ‘as a market-based approach to fighting poverty, microfinance is focused on developing entrepreneurship and expanding self-employment’.⁷ Furthermore, an enabling legal environment should not be confined only to micro-business. As definitions of micro-business and small enterprise vary substantially by region and from country to country,⁸ the same

⁴ Ibid., para. 50. [*Translator’s Note*: MSME = micro-business, small and medium-sized enterprises].

⁵ [*Translator’s Note*: reference missing in Spanish original].

⁶ Public policy agenda included in this study: *Bank Financing to Small and Medium-Sized Enterprises (SMEs) in Colombia*, Constantinos Stephanou, World Bank, Camila Rodriguez, affiliation not provided to SSRN, World Bank Policy Research Working Paper No. 4481, 1 January 2008.

⁷ A/CN.9/727.

⁸ “Lack of a clear definition is the main challenge in ensuring SME finance”, see CGAP, *Financial Access Report 2010*, p. 37, also including examples of various definitions of SMEs. A definition of SMEs and/or micro-business can be found in the European Commission Recommendation of 6 May 2003 (2003/361/EC), in *Microenterprise Results Reporting*:

factors defining an enabling legal environment should pertain to both micro and small/medium-sized businesses.”⁹

It is thus necessary to establish a legal environment that enables entry-level formalization mechanisms, including crucial aspects such as the creation of simplified-regime corporations, access to credit, dispute resolution and simplified insolvency regimes, in other words a legal framework taking account of the entire economic cycle of micro-business and small and medium-sized business.¹⁰

III. Promotion of sustainable development and the rule of law

The United Nations Millennium Declaration¹¹ on development and the eradication of poverty has highlighted the potential of entrepreneurial initiative to contribute to specific sustainable development objectives.

When UNCITRAL is setting priorities in its work, it should consider the impact which the establishment of this enabling legal environment for micro-business and SMEs may have on inclusive, sustainable and equitable development and the promotion of the rule of law, as was frequently stated at the above-mentioned colloquium.

The link between creating this enabling legal environment, promoting development and strengthening the rule of law has also been recognized by the United Nations General Assembly, as confirmed by a recent Secretariat report:¹²

“The creation of an enabling legal environment also contributes to reinforcing the rule of law at country level, which, as stressed by the General Assembly in its Resolution on the Rule of Law,¹³ is conducive to the growth of a fair, stable and predictable system for generating inclusive, sustainable, and equitable development. It is worth noting that most recently the General Assembly, once again ‘recognizing the important contribution entrepreneurship can make to sustainable development’,¹⁴ has encouraged ‘governments to develop and implement policies

Methodology and Statistical Annexes FY 2010 19, USAID, available at www.usaid.gov/our_work/economicgrowth_and_trade/mlcro/MRR_FY10_Methodology_Statistical_Annexes_82211_Final.pdf. Different definitions of microcredit also exist; see, for instance, Basel Committee on Banking Supervision, *Microfinance Activities and the Core Principles for Effective Banking Supervision*, August 2010, pp. 34-35. [Translator’s Note: SME = small and medium-sized enterprises; CGAP = Consultative Group to Assist the Poorest].

⁹ Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, Note by the Secretariat, A/CN.9/780, para. 12 (May 2013).

¹⁰ In the same way, the World Bank states “... There is a host of advantages brought about by the depth and importance of the SME sector. That also implies that the SME sector must be taken into account when drafting legislation or designing a regulatory system for enterprises, including the crucial aspect of restructuring and liquidating distressed businesses”. José M. Garrido, in *Issues in the Treatment of the Insolvency of SMEs in Asia*, FAIR, Kuala Lumpur, 2011, p. 3.

¹¹ Available at www.un.org.

¹² Cited in: Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, Note by the Secretariat, A/CN.9/780, para. 13 (May 2013).

¹³ A/RES/67/97.

¹⁴ A/RES/67/202.

...that address the legal, social and regulatory barriers to equal and effective economic participation and promote entrepreneurship'. This appeal has also been extended to the international community which has been asked 'to support the efforts of countries to promote entrepreneurship and foster the development of small and medium-sized enterprises and microenterprises'".¹⁵

The impact on the rule of law is particularly relevant for the regulation of micro and small enterprises, given that at least half the global labour force and one third of the global economy operate in the informal sector.

In a country like Colombia, it is not easy to determine the number of micro and small enterprises in operation, since this sector has developed largely informally.¹⁶

Informal enterprises operate outside the law and are sometimes involved in organized crime.¹⁷

The Secretariat's report points out: "...The results, however, do not vary: microbusinesses cannot enforce contracts, get formal bank loans or expand beyond a very small local network.^{18,19} In sum, they have little option 'but to trade in the informal economy'"²⁰ and the report concludes: "...the informal sector perpetuates non-compliance with the law, increasing risks for loss of tax revenue, corruption, and a poor environment for investment. It will not naturally evolve into a formal sector, which allows businesses to grow, obtain credit on normal terms, increase employment and contribute to the tax base."²¹

3.1. The informal sector in Colombia

A recent World Bank study,²² entitled *Informality: exit and exclusion* (Perry et al., 2007), explains the nature of informality in Colombia as a function of both economic "exclusion"²³ and the "exit"²⁴ into informality of enterprises in the formal sector.²⁵

¹⁵ Ibid.

¹⁶ "Existing studies have estimated the size of the informal economy in Colombia between 35 and 44 percent of GDP, a figure that has apparently grown over the past decade", Cardenas and Mejia (March 2007) and Perry (May 2007) for a view of the causes and implications of the informal sector. Cited in: *Bank Financing to Small and Medium-Sized Enterprises (SMEs) in Colombia*, Constantinos Stephanou, World Bank, Camila Rodriguez, affiliation not provided to SSRN, World Bank Policy Research Working Paper No. 4481, 1 January 2008.

¹⁷ Microfinance: creating an enabling legal environment for micro-business and small and medium-sized enterprises, Note by the Secretariat, A/CN.9/780, para. 6 (May 2013).

¹⁸ Ibid., citing *Report of the Commission on the Legal Empowerment of the Poor; Making the Law Work for Everyone*, Vol. 1, 2008, p. 15.

¹⁹ Idem supra 15.

²⁰ Ibid., supra 16, citing the same report, p. 39.

²¹ Idem supra 15 para. 49.

²² Contained in report 42698-CO, 2010, *Informality in Colombia, Implications for Worker Welfare and Firm Productivity*, Colombia and México Country Management Unit, Human Development Department, Latin America and the Caribbean Region, World Bank, 1 March 2010, available at www.dnp.gov.co.

²³ "The concept of 'exclusion' reflects the way informality has been traditionally viewed in Latin America, namely, that informal workers and firms would generally prefer to be formal — registering with the authorities, paying taxes, having access to social security — but are

According to the study, informality is a symptom of inadequate regulation which increases costs and detracts from the benefits of formalization.²⁶ It is thus imperative to consider creating an enabling legal environment for microenterprises and small and medium-sized enterprises which will put an end to exclusion and reduce the incentive for formally established enterprises to exit from the formal system.

In recent years, the Government of Colombia has implemented major reforms intended to promote development and the rule of law in various areas of commercial law, with the understanding that regulation, used as a cross-cutting policy tool, improves the conditions for access to markets and credit, reduces transaction costs and increases company competitiveness.²⁷

The reforms introduced in this area in Colombia include reforms intended to make the procedures for the registration and creation of trading companies simpler and more flexible, by means of Law 1258 of 2008 (Simplified Stock Corporation (SAS) Law); Law 1563 of 2012 on national and international arbitration, which introduces an alternative mechanism for online resolution of disputes for small claims; Law 1564 of 2012, which establishes an insolvency regime for natural persons not engaged in commercial activities, with hybrid proceedings for the discharge of insolvency; and the draft reform of the secured transactions regime which is currently before the Colombian Congress.²⁸

According to statistics from 2009-2010, these reforms promoted a rate of growth and formalization among business entities of over 25 per cent.²⁹

IV. Promotion of development and international trade

In the Commission's review of the strategic direction of UNCITRAL and in issues related to resource allocation, the need to set priorities for the Commission has become clear.³⁰ When there are competing proposals, setting priorities in UNCITRAL's work programme requires a consideration not only of its current and likely future scope and its relevance in the field of international trade and

prevented from doing so for reasons related to the state of the economy, the functioning of the labour market or the regulatory environment."

²⁴ "The concept of 'exit', by contrast, posits that some workers and firms are informal as a matter of choice. That is, some workers and firms, having considered the benefits and costs of formality, opt out of the formal sector. Given the benefits and costs (real or perceived) and existing opportunities and constraints, these workers and firms actually prefer informality."

²⁵ Luis Guillermo Vélez Cabrera, "Formalización Empresarial, la Base de Perdurabilidad para el Desarrollo Económico", ["Formalization of Enterprises, the Basis for Sustainability of Economic Growth"], *Revista Coyuntura Pyme de ANIF*, April 2013, Ed. 41.

²⁶ Likewise, as stated in the Secretariat report: "Excessive regulation, too many laws and too many outdated laws, will discourage transition of business to the formal sector" (A/CN.9/780, para. 49).

²⁷ Ibid., supra note 23.

²⁸ A/CN.9/780, paras. 16, 24, 26 and 47 (May 2013).

²⁹ Ibid., para. 16.

³⁰ A/CN.9/752/Add.1.

commerce,³¹ but also of the impact which this topic may have on the development of international law.³²

The colloquium emphasized not only the economic imperative to establish an enabling legal environment for enterprises, but also the effect of this environment on the development of international trade. The Secretariat's report concluded:

"...It was stressed that work in establishing such an environment would be consistent with the Commission's primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade. This was consistent also with the findings of the 2011 UNCITRAL Colloquium that microfinance had become a globally recognized form of cross-border finance, that it kept growing worldwide, that legal, regulatory and market gaps kept the sector from operating as well as it should and that this had created a role for international legal standard-setting.³³ Noting that cross-border recognition of these new and varied legislative issues and emerging structures was needed for MSMEs operating in regional markets in order to provide a recognizable international basis for transactions and avoid problems that can arise because of a lack of business recognition,³⁴ participants further suggested that a flexible tool, such as a legislative guide or a model law according to the topics, would contribute to harmonizing efforts in this sector and provide momentum for reforms which would further encourage micro-business participation in the economy."³⁵

In respect of simplified business incorporation and registration, the Secretariat report cites³⁶ the International Chamber of Commerce, which maintained that: "...company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs".

In addition, the World Bank found that "...economies with modern business registration 'grow faster',³⁷ 'promote greater entrepreneurship and productivity',³⁸ 'create jobs',³⁹ 'boost legal certainty'⁴⁰ and 'attract larger inflows of foreign direct investment'".⁴¹

³¹ Ibid., para. 24.

³² A/CN.9/774, para. 22.

³³ A/CN.9/727, paras. 6-7.

³⁴ In this respect, contract law differs significantly from other fields of law, such as company law, where businesses are bound by the forms of legal entity created by the legislator, and the diversity of national forms of legal entity does indeed cause problems for SMEs. See International Chamber of Commerce, *ICC Position on the European Commission Proposal for a Regulation on a Common European Sales Law*, July 2012, p. 2, available at ICC Position on the European Commission Proposal for a Regulation on a Common European Sales Law. [Translator's Note: sic].

³⁵ A/CN.9/780, para. 50.

³⁶ See quote above, note 32.

³⁷ World Bank/IFC, *Doing Business 2013, Smarter Regulations for Small and Medium-Size Enterprises*, p. 21, cited in Secretariat report A/CN.9/780, para. 10.

³⁸ Ibid.

³⁹ Ibid., note 16, p. 25, cited in Secretariat report A/CN.9/780, para. 10.

⁴⁰ Ibid., p. 21, cited in Secretariat report A/CN.9/780, para. 10.

⁴¹ Secretariat report A/CN.9/780, para. 10.

One fundamental consideration in the future development of international trade will be the ability of micro and small enterprises in countries with developing economies or economies in transition to access international markets, particularly through electronic commerce. The Secretariat report also concludes that:

“...Internet usage increased by nearly 3,000 per cent over the last 10 years, in the Middle East by nearly 2,250 per cent, in Latin America by over 1,200 per cent (for instance Brazil ranks fifth, Mexico twelfth and Colombia eighteenth in the world in number of individuals connected to the Internet), and in Asia by nearly 800 per cent. Globally, Internet usage has increased by 528 per cent over the last decade: approximately one third of the world’s population is now connected to the Internet. That number is expected to increase to 47 per cent by 2016.”⁴²

However, for micro and small enterprises to actually access the global electronic commerce market, an enabling legal environment that promotes trust in cross-border electronic transactions and provides an enduring and continuous trading system will need to be developed.

V. Proposal for development on the initiative of a country with a developing economy or economy in transition (*a bottom-up approach*)

In order to decide judiciously on the priority to be assigned to the work of UNCITRAL in establishing an enabling legal environment for microenterprises and small and medium-sized enterprises, account must be taken of the proposals submitted by developing countries as well as those of highly developed countries. The Secretariat report explains that:

“...An improved legal infrastructure for MSMEs is needed which should rest on a global policy vision and not just isolated devices. Simply adapting traditional system laws to MSMEs will not work. Experience has shown that transposing laws from other, more highly developed, jurisdictions is similarly unhelpful, since law needs to fit the culture and circumstances of the country. It will thus be important to prepare principles that are global in nature and can be tailored by countries according to their needs. UNCITRAL has proven to be well-placed as a forum for developing such general principles and legislation that is acceptable by a wide range of countries with different legal traditions. Therefore, the Commission could play a leading role in helping to create a level playing field by promoting best practices and sharing knowledge with countries seeking guidance in this area.”⁴³

VI. Elements required for the establishment of an enabling legal environment

At its forty-fifth session in 2012, UNCITRAL decided that the colloquium on microfinance should focus on “facilitating simplified business incorporation and

⁴² See Internetworldstats: Usage and Population Statistics, available at www.internetworldstats.com, cited in Secretariat report A/CN.9/780, para. 52.

⁴³ Secretariat report A/CN.9/780, para. 49.

registration; access to credit for micro-businesses and small and medium-sized enterprises; dispute resolution applicable to microfinance transactions; and other topics related to creating an enabling legal environment for micro-businesses and small and medium-sized enterprises”.⁴⁴

In accordance with this decision, the colloquium concluded that: “...a flexible tool, such as a legislative guide or a model law according to the topics, would contribute to harmonizing efforts in this sector and provide momentum for reforms which would further encourage micro-business participation in the economy.”⁴⁵

6.1. Facilitating simplified business incorporation and registration

The colloquium concluded that:

“...The starting point could be guidance that allows for simplified business start-up and operation procedures. In this regard, attention would be drawn to simplified corporate structures with easy establishment and minimal formalities, limited liability, flexible management and capitalization structure, plus ample freedom to contract. Considering the current absence of any internationally recognized standards or direction for countries wishing to adopt effective new forms, such a legal framework would significantly contribute to the formalization of thousands of enterprises that would otherwise remain in the informal sphere”.⁴⁶

The Secretariat report contains relevant information on the Colombian experience of simplified business incorporation and registration.⁴⁷

There is also a reference to a study by the Superintendency of Companies of Colombia, showing the impact of simplified and more flexible business incorporation in Colombia, which is annexed to this document.

European Commission studies⁴⁸ show that differences in company law can also hamper cross-border trade and limit international business operations: “...Currently

⁴⁴ Commission report on its 45th session, A/67/17, para. 126.

⁴⁵ Secretariat report A/CN.9/780, para. 50.

⁴⁶ F. Reyes, *Latin American Company Law — a New Policy Agenda: Reshaping the Closely-Held Entity Landscape*, 2013, p. ii, cited in Secretariat report A/CN.9/780, para. 51.

⁴⁷ “In Colombia, a major legal reform effort in the past 15 years has led to the development of a hybrid business form prioritizing flexibility, contractual freedom and limited liability: the so called *sociedad por acciones simplificada* (SAS). An SAS can be formed by one or more shareholders and can be incorporated via a relatively simple private or electronic document at minimal cost. The Simplified Stock Corporation Act (2008) relies on a system of ex post regulation in the form of enforceable standards during operation (as opposed to ex-ante regulation which creates rules to be met during establishment) to target behaviour, thus lowering costs for establishing micro-businesses. In fact, compliance with strict requirements to set up a business, e.g. minimum legal capital or public deeds of incorporation, affects all entrepreneurs. On the other hand, when standards that are enforceable ex post are used (e.g. abus de droit or equal treatment rules, that leave discretion for adjudicators to determine ex post whether violations have occurred), there is a cost only for those entrepreneurs who breach the standards. However, this approach requires effective judicial infrastructure to oversee and enforce ex-post standards. Since the SAS legislation was enacted in 2008 about 181,742 SASes (the data refers to November 2012) have been set-up, most of which, it is estimated, were pre-existing informal businesses. The SAS account for over 95 per cent of market share and, according to 2009-2010 data, they have enabled a growth in formalization of business entities of over 25 per cent”. Secretariat report A/CN.9/780, para. 16.

on average only 93 per cent of the EU companies involved in the sales of goods export inside of the EU.⁴⁹ The majority of them (62 per cent in B2B and 57 per cent in B2C) export to no more than three other MS.⁵⁰ One of the reasons for this relatively low level of cross-border trade — besides a lack of interest in export — is that some companies are hindered by [the] regulator (e.g. differences in tax regulations, contract law, administrative requirements and company law) and practical barriers (e.g. language, transportation and after-sales maintenance). Recent business surveys show that the regulatory barriers are a greater hindrance to the expansion of cross-border trade than the practical ones.”⁵¹

6.2. Other issues to be considered in the establishment of an enabling legal environment

The colloquium concluded that there are other elements essential to the establishment of an enabling legal environment which are relevant to the life cycle of the enterprise. These include dispute resolution mechanisms, electronic transfers, mobile payments, access to credit and insolvency.

6.2.1. Further issues to be considered in the establishment of an enabling legal environment

The colloquium highlighted the difficulties faced by microenterprises and small and medium-sized enterprises in obtaining access to justice and the need to set up appropriate dispute resolution systems in the area of microfinance. In report A/CN.9/756,⁵² the Secretariat described the situation relating to dispute resolution mechanisms and the problem of obtaining access to justice for the poor.

“The Commission may thus wish to consider whether it would be appropriate to undertake preparation of notes⁵³ on how a system of dispute resolution in the field of microfinance should be organized. Such notes could be designed for use by legislators and administrators in considering whether a country has established a system that effectively serves the needs of MSMEs.”⁵⁴

“Micro borrowers often lack knowledge of their rights and how to protect them.”⁵⁵ Furthermore, the formal justice system tend to exclude them ‘because they cannot

⁴⁸ European Commission, Brussels, 11 October 2011, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, {SEC(2011) 1165 Final}, COM(2011) 635 final, p. 10.

⁴⁹ See annex for calculations of transaction and opportunity costs (annex III). [*Translator’s Note*: annex not included in Spanish original].

⁵⁰ EB 320, p. 55 and 321, p. 56.

⁵¹ EB 320 and EB 321, the SME Panel and EBTP surveys. Similarly, a survey by Eurochambres in 2010 found that the differences in legislation were the main difficulty in cross-border trade for 36 per cent of the respondents. It was conducted among 1,330 companies in 12 EU MS and Croatia. 83 per cent of the respondents were involved in B2C transactions while 57 per cent were delivering products cross-border.

⁵² Para. 23 et seq.

⁵³ For instance, in the past the Commission prepared notes to assist arbitration practitioners during the course of arbitral proceedings, see *UNCITRAL Notes on Organizing Arbitral Proceedings* (1996).

⁵⁴ Secretariat report A/CN.9/780, para. 52.

⁵⁵ See A/CN.9/727.

afford the costs related to lawyers, or paying court fees ...court procedures can be slow, and it is not uncommon for courts to have a large backlog of cases'.⁵⁶ Yet, extrajudicial third-party dispute resolution mechanisms are rarely in place, thus limiting the effectiveness of any microfinance legal framework for client protection. As a result, four billion of the world's population lack access to justice."^{57,58}

At its forty-fourth session, the Commission⁵⁹ noted that a favourable legal and regulatory framework for microfinance included the provision of fair, efficient, transparent and inexpensive procedures for resolution of disputes arising from microfinance transactions, and that the lack of such procedures for microfinance clients was an issue to be further examined.

We thus have an opportunity to consider the issue in more detail with the aim of establishing a new working group to explore the subject in greater depth.

6.2.2. Mobile banking and e-money

Technological advances in mobile banking and e-money systems are making them increasingly important as financial services and a means of financial inclusion,⁶⁰ a fact that makes establishing adequate legal guidelines necessary.⁶¹ Key concepts must also be defined, along with a harmonized approach to the regulation of these operations that balances financial inclusion needs with the need to protect vulnerable client populations.⁶²

The colloquium concluded that: "electronic transfers (including mobile payments) offer MSMEs operating in the informal sector the opportunity to have effective access to financial services. UNCITRAL's existing instruments on e-commerce and international credit transfers can accommodate mobile payment systems, as recognized at the Colloquium (see para. 35 of document A/CN.9/780). In order to broaden their scope, however, it was suggested that ...provision of a clear definition of key concepts such as deposit, payment and electronic money, as well as guidance on apportioning of the risks between providers and clients, would be of particular importance."⁶³

6.2.3. Access to credit

Access to credit for small, medium-sized and microenterprises is an area of future work for UNCITRAL, as the Commission has decided.⁶⁴ The Commission likewise decided that transparency in lending is not an issue of prudential regulation, but a

⁵⁶ See A/CN.9/756, para. 24.

⁵⁷ See *Report of the Commission on the Legal Empowerment of the Poor, Making the Law Work for Everyone*, Vol. 1, 2008, p. 13, and A/CN.9/756, para. 24.

⁵⁸ Secretariat report A/CN.9/780, para. 8.

⁵⁹ *Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 17 (A/66/17)*, paras. 242 and 246.

⁶⁰ See A/CN.9/756, IV. Electronic Money (E-money), p. 18 et seq.

⁶¹ Unresolved legal issues surrounding the nature of e-money were already noted in the 2011 UNCITRAL Colloquium on Microfinance, together with their potential to negatively affect low-income people. See A/CN.9/727, paras. 43-44, cited in Secretariat report A/CN.9/780, para. 9.

⁶² A/CN.9/756, para. 54.

⁶³ Secretariat report A/CN.9/780, para. 53.

⁶⁴ At its forty-fourth session (A/CN.9/727).

concept relating to clients' rights and their protection and, as such, of relevance for commercial law.⁶⁵

The colloquium concluded that "an enabling legal environment promoting access to credit for MSMEs would address commercial law matters arising in the context of secured and unsecured credit agreements. Guidance from the Commission, based on best practices, could deal with transparency in lending and enforcement in all kinds of lending transactions."⁶⁶

6.2.4. Insolvency of microenterprises and small and medium-sized enterprises

The colloquium stressed the need to lay down rules governing insolvency of microenterprises and small and medium-sized enterprises, since the existing rules cannot be appropriately adapted to suit the scale and the needs of this sector of business, factors that mean that small enterprises may not be viable and may not recover after insolvency because they cannot reach a refinancing agreement with their creditors.

In view of the specific characteristics of micro and small enterprises, there is a need for alternative insolvency mechanisms which are more rapid and flexible and less costly, and different from those traditionally designed by large enterprises.⁶⁷

The colloquium recommended the inclusion of insolvency in UNCITRAL's work in order to increase the viability of micro and small enterprises, stating specifically that "...the Commission may wish to address the insolvency of MSMEs with the objective to ensure fast-track procedures and business rescue options so as to develop adequate and workable alternatives to formal insolvency processes in line with both the key characteristics of an effective insolvency system and the needs of MSMEs".^{68,69}

VII. Conclusion

As shown throughout this proposal, there is an urgent need to launch a global reflection on the importance of microfinance and related matters in order to establish an enabling legal environment for microenterprises and small and medium-sized enterprises.

In this proposal, the Government of Colombia suggests that the Commission should create a mandate for a new working group focused on the enterprise life cycle, particularly in relation to micro and small enterprises, which are the ones involved in microfinance. The working group should begin with the facilitation of simplified business incorporation and registration and other matters, such as those referred to above, related to and necessary for creating an enabling legal environment for this type of business activity.

The Government of Colombia looks forward to the discussion of this matter at the forthcoming session of the Commission.

⁶⁵ Secretariat report A/CN.9/780, para. 36.

⁶⁶ Secretariat report A/CN.9/780, para. 54.

⁶⁷ Secretariat report A/CN.9/780, paras. 54 and 55.

⁶⁸ A. Idigbe, O. Kalu, *Best Practice and Tailored Reforms in African Insolvency: Lessons from JNSOL*, December 2012, p. 2.

⁶⁹ Cited in Secretariat report A/CN.9/780, para. 55.

Appendix

In Colombia, the Superintendency of Companies has conducted a preliminary study of the combined effect on business formalization procedures of two laws: Law 1258 of 2008 (SAS Law) and Law 1429 of 2010 (First Employment Law). These two laws form part of the policy to make procedures simpler and more flexible.⁷⁰

The measurement index used in this study to assess the level of formalization is the number of unregistered microenterprises divided by the total number of microenterprises.

The Superintendency compared the number of active businesses between April 2010 and January 2013, using information from the Single Business Registry (*Registro Unico Empresarial* — RUE) to observe the potential combined effect of the two laws, beginning in 2010 when they were both in force for the first time.

* Table 1

The simplified stock corporation (*sociedad por acciones simplificada* — SAS) was the only type of business which saw an increase in registration of new businesses, while other forms of incorporation declined.

* Table 2

In a more detailed study by size of the enterprise, designed to reveal the origins of the 192,602 SAS businesses apparently active in January 2013, we see that there are 132,873 businesses registered as completely new SAS businesses, i.e. they were not SAS businesses in 2010 and did not originate in an existing business structure, and that they are concentrated in the sphere of micro and small enterprises (92 per cent of all new SAS businesses). The effect of the increase in the number of businesses registering under this more flexible procedure is just one example of the potential impact on formalization exerted by regulatory frameworks more appropriate to the real situation of microenterprises and small and medium-sized enterprises.

⁷⁰ Luis Guillermo Vélez Cabrera, “Formalización Empresarial, la Base de Perdurabilidad para el Desarrollo Económico”, [“Formalization of Enterprises, the Basis for Sustainability of Economic Growth”], *Revista Coyuntura Pyme de ANIF*, April 2013, Ed. 41.

Table 1*
Active businesses, end April 2010 and end January 2013

| | <i>Associative work enterprises</i> | <i>Single-person enterprises</i> | <i>Other enterprises</i> | <i>Agrarian transformation enterprises</i> | <i>Corporations</i> | <i>Collectives</i> | <i>Limited partnerships</i> | <i>Foreign companies</i> | <i>Limited companies</i> | <i>Simplified stock corporations (SAS)</i> | <i>All companies</i> |
|-----------------------------|---|--------------------------------------|------------------------------|--|---------------------|--------------------|---------------------------------|------------------------------|------------------------------|--|--------------------------|
| End January 2013 | 12 574 | 55 182 | 8 030 | 31 | 41 724 | 289 | 27 249 | 2 564 | 320 760 | 192 602 | 661 005 |
| End April 2010 | 22 120 | 103 474 | 4 795 | 117 | 74 629 | 864 | 44 619 | 3 236 | 616 117 | 54 508 | 924 569 |
| Difference 2013 vs. 2010 | (9 546) | (48 292) | 3 235 | (86) | (32 905) | (575) | (17 370) | (762) | (295 357) | 138 094 | (263 564) |

* Data taken from the Single Business Registry.

Table 2*
SAS enterprises in 2013 and their origins

| <i>Originating from SAS in 2013</i> | <i>Enterprise size</i> | | | | |
|---|-------------------------|--------------------------------|------------------------|-------------------------|--------------|
| | <i>Large enterprise</i> | <i>Medium-sized enterprise</i> | <i>Microenterprise</i> | <i>Small enterprise</i> | <i>Total</i> |
| Originating from another type of enterprise | 904 | 3 386 | 15 803 | 10 127 | 30 220 |
| Already formed as SAS in 2010 | 337 | 1 442 | 22 365 | 5 365 | 29 509 |
| New enterprise created as SAS | 266 | 1 161 | 122 655 | 8 791 | 132 878 |
| Total | 1 507 | 5 989 | 160 823 | 24 283 | 192 602 |

* Data taken from the Single Business Registry.

VIII. CASE LAW ON UNCITRAL TEXTS (CLOUT)

The secretariat of the United Nations Commission on International Trade Law (UNCITRAL) continues to publish court decisions and arbitral awards that are relevant to the interpretation or application of a text resulting from the work of UNCITRAL. For a description of CLOUT (Case Law on UNCITRAL Texts), see the user guide (A/CN.9/SER.C/GUIDE/1/Rev.2), published in 2000 and available on the Internet at www.uncitral.org.

A/CN.9/SER.C/ABSTRACTS may be obtained from the UNCITRAL secretariat at the following address:

UNCITRAL secretariat
P.O. Box 500
Vienna International Centre
A-1400 Vienna
Austria

Telephone (+43-1) 26060-4060 or 4061
Telefax: (+43-1) 26060-5813
E-mail: uncitral@uncitral.org

They may also be accessed through the UNCITRAL homepage on the Internet at www.uncitral.org.

Copies of complete texts of court-decisions and arbitral awards, in the original language, reported on in the context of CLOUT are available from the secretariat upon request.

IX. TECHNICAL ASSISTANCE TO LAW REFORM

Note by the Secretariat on technical cooperation and assistance

(A/CN.9/775)

[Original: English]

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I. Introduction

1. Pursuant to a decision taken at its twentieth session in 1987, technical cooperation and assistance activities aimed at promoting the use and adoption of its texts represent one of the priorities of the United Nations Commission on International Trade Law (UNCITRAL).¹

2. In its resolution 67/89 of 14 January 2013, the General Assembly reaffirmed the importance, in particular for developing countries and economies in transition,

¹ *Official Records of the General Assembly, Forty-second Session, Supplement No. 17 (A/42/17)*, para. 335.

of the technical cooperation and assistance work of the Commission and reiterated its appeal to bodies responsible for development assistance, as well as to Governments in their bilateral aid programmes, to support the technical cooperation and assistance programme of the Commission and to cooperate and coordinate their activities with those of the Commission.

3. The General Assembly welcomed the initiatives of the Commission towards expanding, through its Secretariat, its technical cooperation and assistance programme, and noted with interest the comprehensive approach to technical cooperation and assistance, based on the strategic framework for technical assistance suggested by the Secretariat to promote universal adoption of the texts of the Commission and to disseminate information on recently adopted texts.

4. The General Assembly also stressed the importance of promoting the use of texts emanating from the work of the Commission for the global unification and harmonization of international trade law, and to this end urged States that have not yet done so to consider signing, ratifying or acceding to those conventions, enacting model laws and encouraging the use of other relevant texts.

5. The status of adoption of UNCITRAL texts is regularly updated and available on the UNCITRAL website. It is also compiled annually in a note by the Secretariat entitled "Status of conventions and model laws" (for the Commission's forty-sixth session, see A/CN.9/773).

6. This note sets out the technical cooperation and assistance activities of the Secretariat subsequent to the date of the previous note submitted to the Commission at its forty-fifth session in 2012 (A/CN.9/753 of 26 April 2012), and reports on the development of resources to assist technical cooperation and assistance activities.

7. A separate document (A/CN.9/776) provides information on current activities of international organizations related to the harmonization and unification of international trade law and on the role of UNCITRAL in coordinating those activities.

II. Technical cooperation and assistance activities

A. General approaches

8. Technical cooperation and assistance activities undertaken by the Secretariat aim at promoting the adoption and uniform interpretation of UNCITRAL legislative texts. Such activities include providing advice to States considering signature, ratification or accession to UNCITRAL conventions, adoption of an UNCITRAL model law or use of an UNCITRAL legislative guide.

9. Technical cooperation and assistance may involve: undertaking briefing missions and participating in seminars and conferences, organized at both regional and national levels; assisting countries in assessing their trade law reform needs, including by reviewing existing legislation; assisting with the drafting of national legislation to implement UNCITRAL texts; assisting multilateral and bilateral development agencies to use UNCITRAL texts in their law reform activities and projects; providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce

and arbitration centres, on the use of UNCITRAL texts; and organizing training activities to facilitate the implementation and interpretation of legislation based on UNCITRAL texts by judges and legal practitioners.

10. Some of the activities undertaken in the relevant time period are described below. Activities denoted with an asterisk were funded by the UNCITRAL Trust Fund for Symposia.

Initiatives for a regional approach

11. The Secretariat continued participation in the Asia-Pacific Economic Cooperation (APEC) Ease of Doing Business Project on enforcing contracts in coordination with the Korean Ministry of Justice. The project aims at strengthening the legislative and institutional framework for the enforcement of contracts in APEC as well as adjacent economies (Philippines and Thailand in 2012, Indonesia and Peru in 2011)*. At the Second International Conference on Enforcing Contracts (Seoul, 7 November 2012)*, recommendations to improve legal environment for enforcing contracts in Thailand and the Philippines were presented. In 2013, the project will focus on Brunei Darussalam (ranked 158th out of 185 countries), Saudi Arabia (124th) and Vietnam (44th) and adoption of UNCITRAL texts on arbitration, sale of goods and electronic communications will be suggested as possible law reform measures in these States (Saudi Arabia, 6-8 May 2013, Brunei Darussalam and Viet Nam scheduled for late May or early June)*. The Secretariat's participation in the project has been made possible through the voluntary contribution received from the Government of the Republic of Korea.

12. Other regional initiatives involving the Secretariat include the ongoing partnership with the Deutsche Gesellschaft für Internationale Zusammenarbeit ("GIZ"). The Secretariat attended a meeting to discuss future projects in the Balkan region with focus on activities implemented to date in the context of the Open Regional Fund for South East Europe (ORF-SEE) fund on legal reform and to identify broad areas of intervention for a possible phase three of the programme. Phases one and two focused on the United Nations Convention on Contracts for the International Sale of Goods and alternative dispute resolution methods respectively (Belgrade, 14-16 June 2012).

13. The Secretariat delivered a presentation on UNCITRAL's efforts in the harmonization of law, at the Middle Eastern regional conference, organized by the Protection Project, Johns Hopkins University School of Advanced International Studies and Beirut Arab University, in an effort to promote UNCITRAL texts in the Arab region (Beirut, 9-11 September 2012)*.

Promotion of the universal adoption of fundamental trade law instruments

14. One approach relies on promoting primarily the adoption of fundamental trade law instruments, i.e., those treaties that are already enjoying wide adoption and the universal participation to which would therefore seem particularly desirable.

15. The treaties currently considered under that approach are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards² (the New York Convention, a United Nations convention adopted prior to the establishment of the

² United Nations, *Treaty Series*, vol. 330, No. 4739.

Commission, but actively promoted by the Commission), whose universal adoption has already been explicitly called for by the General Assembly,³ and the CISG.

General promotion of the work of UNCITRAL

16. Secretariat staff took part in the following:

(a) Represented UNCITRAL and delivered a presentation at high-level meeting “Foro Centroamericano de Derecho y Derecho Internacional Privado”, upon invitation of the Central American Court of Justice (Panama City, 30-31 January 2013); and

(b) Presented UNCITRAL’s work and exchanged views with the Members of the Committee on International Trade (INTA) of the European Parliament (Brussels, 21 March 2013).

Promotion of recent treaties

17. The Secretariat continues to promote recently adopted instruments, including at the regional level, in order to encourage their signature and adoption by States with a view to facilitating their early entry into force.

18. The United Nations Convention on the use of Electronic Communications in International Contracts (the “Electronic Communications Convention”) has entered into force on 1 March 2013. The Secretariat has continued to actively promote its adoption, especially in the Asia-Pacific region (for a list of the relevant activities in that region, see paras. 63-65).

B. Specific activities

Sale of goods

19. The Secretariat has continued to pursue universal adoption of the CISG. Accessions to the text have been supported by dedicated workshops and conferences as well as by bilateral meetings and other interactions. With regard to the March 2013 accession by Brazil, the Secretariat was involved in recent years in several related events (Rio de Janeiro, 23-30 June 2009;⁴ Sao Paulo, 29-30 April 2010;⁵ and Sao Paulo, 3-4 November 2011*⁶).

20. The Secretariat has also continued to support States in the process of revision of declarations lodged upon becoming party to the CISG, with a view to reconsidering them, where appropriate, in order to further harmonize the scope of application of the convention.

21. In addition, the Secretariat remains active in promoting uniform interpretation of the CISG, both through activities related to the Case law on UNCITRAL texts (CLOUT)⁷ and through delivery of targeted trainings for judges, practitioners and

³ United Nations General Assembly, Resolution 62/65 of 8 January 2008, para. 3.

⁴ A/CN.9/695, para. 12 (b).

⁵ A/CN.9/724, para. 52.

⁶ A/CN.9/753, para. 21.

⁷ See A/CN.9/777 for more information.

students, such as delivery of a CISG workshop for the Czech Judicial Academy (Brno, Czech Republic, 14 June 2012)* and provision of a CISG seminar at the Faculty of Law, University of Vienna (Vienna, 15 October-7 November 2012).

22. Finally, the Secretariat has continued to promote the adoption and uniform interpretation of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), as amended by the Protocol of 11 April 1980 (Vienna) (the “Limitation Convention”),⁸ including by inviting States to consider the adoption of the amended version of the Limitation Convention when already a party to the unamended one.

Dispute resolution

23. The Secretariat has been engaged in the development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement. The Secretariat has also been engaged in training activities, in the promotion of instruments relating to arbitration and conciliation as well as in supporting ongoing legislative work. Given the high rate of adoption of these texts, the demand for technical assistance in the field of dispute resolution remains particularly acute.

(i) Development of instruments and tools to provide information on the application and interpretation of UNCITRAL texts in the field of dispute settlement

24. Regarding the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), a website (www.newyorkconvention1958.org) has been established in order to make the information gathered in the preparation of the UNCITRAL guide on the New York Convention publicly available; an updated version of the website was presented at the fifty-eighth session (New York, 4-8 February 2013) of Working Group II (Arbitration and Conciliation) (see A/CN.9/765, paras. 95-98).

25. Regarding the UNCITRAL Model Law on International Commercial Arbitration (1985, amended in 2006), the Secretariat has co-organized the following events related to the 2012 Digest of Case Law on the Model Law (the “Digest”): on 8-10 June 2012*, a launch event co-organized in Singapore with the Singapore Ministry of Law; and on 1 March 2013, a conference co-organized in Berlin, Germany, with the Ministry of Justice and the German Institution of Arbitration (DIS).

(ii) Supporting ongoing legislative work and training activities

26. The Secretariat has provided comments on:

(a) Draft legislation on arbitration, including for the Governments of Cook Islands, Palestine, Qatar and Slovakia;

(b) Draft legislation on mediation, including for the Government of Egypt; and

(c) Draft arbitration rules of arbitral institutions, including, at the request of the Stockholm Chamber of Commerce (SCC), on the SCC UNCITRAL Arbitration

⁸ United Nations, *Treaty Series*, vol. 1511, No. 26119, p. 3 and No. 26121, p. 99.

Rules 1976 and 2010, the SCC Appointing Authority Rules 1976, the SCC Appointing Authority Rules 2010 and the SCC Ad Hoc Administrative Services.

27. The Secretariat provided technical assistance to support the establishment of a commercial arbitration centre in Ramallah (Ramallah, State of Palestine, 14-16 December 2012).

28. The Secretariat also contributed, within the framework of the USAID Judicial Independence and Legal Empowerment Project, to the preparation of a judicial training for the High School of Justice in Georgia, with the aim of training judges in Georgia in the field of international commercial arbitration.

29. The UNCITRAL Regional Centre for Asia and the Pacific co-organized, with the Ministry of Justice of the Republic of Korea and the Korean Commercial Arbitration Board, a conference on Asia-Pacific Perspectives on International Commercial Arbitration (Seoul, 22-23 November 2012, see para. 58)*.

30. The Secretariat co-organized, with the International Arbitral Centre of the Austrian Federal Economic Chamber (VIAC) and the Young Austrian Arbitration Practitioners (YAAP), the annual joint Conference on arbitration (Vienna, 21-22 March 2013).

31. Other events on international arbitration in which the Secretariat participated or contributed included:

(a) A seminar on the role of the United Nations in International Arbitration at the invitation of the International Arbitration Academy (Paris, 16 July 2012);

(b) A seminar hosted by the Chartered Institute of Arbitrators, to present a talk entitled “UNCITRAL’s role in dispute resolution, as the promoter of the New York Convention and other legal standards” (London, 6 September 2012);

(c) A plenary session of the International Cotton Advisory Committee in relation to the enforcement of arbitral awards under the New York Convention (Interlaken, Switzerland, 9 October 2012);

(d) The Third Economic and Financial Forum for the Mediterranean, including a session on Conciliation and Arbitration, organized by the Milan Chamber of Commerce (Milan, 12-13 November 2012);

(e) A workshop organized by the International University MITSO (Belarus) in collaboration with the Ministry of Foreign Affairs of Belarus, and UNCTAD, UNCITRAL and ICSID, on the subject of Investment Dispute Settlement (Minsk, 19-20 November 2012);

(f) A conference entitled “The Role of State Courts in Arbitration” organized by the Cairo Regional Centre for International Commercial Arbitration, to present technical assistance tools such as the Digest of Case Law on the Model Law on Arbitration and the project for a guide to the New York Convention that aim (inter alia) to assist judges in the interpretation and application of the Model Law and New York Convention (Sharm El Sheikh, Egypt, 27-28 November 2012);

(g) The Twentieth Annual Croatian Arbitration Days Conference, on the topic of Investment Arbitrations in Central and Eastern Europe (Zagreb, 5-7 December 2012);

(h) The Mauritius International Arbitration Conference, where a presentation was made on the work of UNCITRAL and the United Nations Office of Legal Affairs in the promotion of the rule of law and the role of the United Nations in international dispute resolution (Mauritius, 10-11 December 2012); and

(i) A workshop on the harmonization of trade law in ASEAN, including in the area of dispute resolution (Singapore, 11-12 March 2013, see para. 59).

Electronic commerce

32. The Secretariat has continued promoting the adoption of UNCITRAL texts on electronic commerce, in particular in cooperation with other organizations and emphasizing a regional approach (see paras. 10, 63-65 and A/CN.9/776). It has also provided comments on draft regional and national legislation, for example, a draft law on electronic communication and transactions prepared by the Government of Botswana.

33. As a result of those promotional activities, the United Nations Convention on the Use of Electronic Communications in International Contracts entered into force on 1 March 2013 with the Dominican Republic, Honduras and Singapore as States Parties. In addition, several new national enactments of legislation on electronic commerce and electronic signatures were recorded (see A/CN.9/773).

34. The Secretariat also engaged in informal consultation with legislators and policymakers from various jurisdictions, including those from South Africa and Viet Nam.

Procurement

35. In accordance with requests of the Commission and Working Group I (Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the 2011 UNCITRAL Model Law on Public Procurement (the “Model Law”) and its accompanying Guide to Enactment (2012).⁹

36. The aims of such cooperation are to ensure that regional requirements and circumstances are understood by reforming Governments and organizations are informed of the policy considerations underlying those texts, so as to promote a thorough understanding and appropriate use of the Model Law, at both regional and national levels.¹⁰ The Secretariat is taking a regional approach to this cooperation, and activities with the multilateral development banks in several regions, focusing on good governance and anti-corruption (in which procurement reform plays a pivotal role), are envisaged.

37. To this end, the Secretariat has participated as speaker/presenter at a wide range of international events, including:

(a) Participation as a speaker at the 8th Regional Public Procurement Forum hosted by the Government of Albania, the ADB, EBRD, IsDB and WB, and attended by government officials from Albania, Armenia, Azerbaijan, Bosnia and

⁹ Available at www.uncitral.org/uncitral/en/uncitral_texts/procurement_infrastructure.html.

¹⁰ See documents A/CN.9/575, paras. 52 and 67, A/CN.9/615, para. 14, and A/66/17, paras. 186-189.

Herzegovina, Georgia, Kyrgyz Republic, Kosovo, Moldova, Montenegro Serbia, Tajikistan, the former Yugoslav Republic of Macedonia, Turkmenistan and Ukraine, and by representatives from the host organizations. The topics addressed were e-procurement and framework agreements under the UNCITRAL Model Law on Public Procurement (2011), in the context of harmonization of international and regional procurement regimes (Tirana, 22-25 May 2012);

(b) Continuing participation in the EBRD and UNCITRAL initiative, in partnership with the OSCE, on enhancing public procurement regulation in the CIS countries and Mongolia.¹¹ Within the framework of that Initiative, during the period under review, a Public Procurement Policy Workshop for the Government of Azerbaijan took place in Baku, from 31 May to 1 June 2012*, a Public Procurement Draft Law Review Session for the Government of Kyrgyzstan took place in Vienna, from 6 to 8 March 2013, and a public procurement workshop for the Government of Tajikistan took place in Vienna, from 9 to 11 April 2013. The topics addressed the use of the Model Law and Guide to Enactment in order to upgrade and modernize procurement laws and practice in the region. Under the same Initiative, the diagnostic analysis of the public procurement legislation of the following countries for its compliance with the UNCITRAL Model Law on Public Procurement was completed: Azerbaijan, the Kyrgyz Republic, Mongolia and the Russian Federation;

(c) Participation as a speaker at the VIII Annual Conference of the Inter-governmental Procurement Network, hosted by the Interamerican Network on Government Procurement (Spanish acronym, RICG); Government of Panama and PanamaCompra; Organization of American States (OAS), the Interamerican Development Bank (IDB), the Canadian International Development Agency (CIDA) and the International Development Research Center (IDRC/ICA). The conference considered national efforts in procurement reform and implementing and improving procurement performance, and the UNCITRAL Model Law on Public Procurement (2011) was presented in the context of international standards and procurement reform (Panama City, 11-13 September 2012)*;

(d) Participation in a workshop organized by the World Bank in cooperation with ADB and EBRD, delivering a presentation on international practices in public procurement, focussing on the Model and Guide to Enactment, the scope of UNCITRAL's activities and the importance of partnerships with other donors to ensure coherence and consistency in reforms (Dushanbe, 7-9 October 2012)*;

(e) Provision of technical support and cooperation to the UNODC Corruption and Economic Crime Branch, in particular regarding coordination in the implementation of article 9 of United Nations Convention against Corruption (UNCAC) regarding public procurement, and supporting the UNODC project entitled "Public-Private Partnership for Probity in Public Procurement", as noted in the 4th session of the Conference of the State Parties to the UNCAC (Marrakech, 24-28 October 2012). These activities included advising the Governments of India and Mexico on reform of their public procurement legal and regulatory framework, and participating in Expert Group and other meetings (24-26 September 2012);

¹¹ www.ppi-ebd-uncitral.com/index.php/en/the-initiative.

(f) Participation as a speaker at a Conference of the Public Procurement Network on the UNCITRAL Model Law on Public Procurement (2011) and possible future work in public-private partnerships (Stockholm, 3-4 December 2012);

(g) Conducting a seminar at the EBRD, pursuant to the EBRD UNCITRAL Initiative, to explain the principles of the Model Law and its use with other international and regional texts on public procurement, to further harmonization in its implementation (London, 11 January 2013)*;

(h) Participation in the Thomson Reuters Conference on “Government Contracts: Year in Review”, which is convened to provide expert briefings to local and international practitioners, policymakers and academics on the past year’s legal developments affecting public procurement. The session was entitled “Transatlantic Dialogue”, and included discussions of corporate compliance systems, comparative approaches to sanctions and debarment, the proposed EU Directives on public procurement and strategies for harmonization (Washington, D.C., 19 February 2013);

(i) Participation as a speaker at the AFDB-EBRD Regional Conference on Public Procurement, in a session on “New ideas in reform: the UNCITRAL Model Law and the World Trade Organization’s Agreement on Government Procurement”. The main purpose of the conference is to provide a forum to reflect upon the status of public procurement legal frameworks in the MENA region (Egypt, Jordan, Morocco and Tunisia) and to encourage their ongoing and future legal regulatory reform (Marrakech, 22-24 April 2013)*; and

(j) Participation in the US-European Procurement Leadership Roundtable: Key issues for Future Reform in Procurement Law, hosted by the Ruhr-Universität Bochum, Germany, and the George Washington University Law School (Washington D.C., United States of America) in cooperation with American Bar Association, Public Contract Law Section, United Kingdom Procurement Lawyers Association and the Forum Vergabe e.V.; Deutscher Anwaltverein; on emerging issues in United States and European procurement, the UNCITRAL Model Law and the World Trade Organization’s Agreement on Government Procurement, focussing on enhancing transatlantic cooperation in anti-corruption, compliance efforts, bid protests/challenges, mergers and acquisitions, export controls, academic issues and bar association initiatives (Vienna, 19 February 2013).

Supporting ongoing legislative work and training activities

38. The Secretariat has also provided ongoing advice to the Governments of Jamaica, Trinidad and Tobago (with the support of the IADB) on reform of their public procurement legal and regulatory framework.

39. Presentation of the UNCITRAL Model Law on Public Procurement and Guide to Enactment (2011 and 2012) to students of international public procurement law and policy at the University of Nottingham, United Kingdom and to students of EBRD-MAE-CONSIP Tor Vergata Master Programme in Public Procurement, to encourage broader understanding of the Model Law’s provisions and its use as a tool for procurement reform (Nottingham, United Kingdom, 14-15 January 2012 and Rome, Italy, 11-12 April 2013);

40. Presentation of the UNCITRAL Model Law on Public Procurement and Guide to Enactment (2011 and 2012) to students of Public Procurement for Sustainable Development, at ITC-ILO and the University of Turin; again to encourage broader understanding of the Model Law's provisions and its use as a tool for procurement reform (Turin, Italy, 29 February-1 March 2012); and

41. Conducting a training session on UNCITRAL for FAO, organized and financed by UNITAR and with the participation of IDLO. Topics covered included: public procurement and infrastructure development, international commercial arbitration and conciliation, online dispute resolution, international transport of goods and an overview of other areas within UNCITRAL's mandate (Rome, 21-23 May 2012).

Insolvency

42. The Secretariat has promoted the use and adoption of insolvency texts, particularly the Model Law on Cross-Border Insolvency and the Legislative Guide on Insolvency Law, through participation in various international fora. Such activities included:

(a) Delivered a presentation at the Policy Conference "Financial Restructuring and Bankruptcy Law" on regional and global practices in Financial Restructuring and Bankruptcy Law: lessons for UAE/Dubai. The purpose of the conference was to engage in a discussion of best practice; both regional and international, based on the laws of the United Kingdom, United States and Singapore and focusing on several key insolvency issues in the context of a new draft insolvency law for Dubai and the United Arab Emirates (Dubai, United Arab Emirates, 13-16 May 2012)*;

(b) To give a workshop on UNCITRAL's work on insolvency law at the 50th anniversary conference of the AIJA (International Association of Young Lawyers) to raise awareness of the work of UNCITRAL, particularly as it relates to enterprise group insolvency (Barcelona, Spain, 30 August 2012);

(c) Participation as speaker at the 3rd INSOL Africa Roundtable on Insolvency law, with the aim to facilitate discussion of Insolvency Law reform in the African region in the context of issues of particular concern to that region, such as micro- and small enterprises, as well as to promote consideration of the need to address cross-border insolvency. Also held consultations with senior government officials to discuss the proposal to establish an UNCITRAL Regional Centre in Kenya (Nairobi, 6-9 September 2012)*;

(d) Participation at the Global Forum on Law, Justice and Development Week (GFLJD) organized by the World Bank which is an annual event designed to address how law and justice contribute to better development outcomes through opportunity, inclusion and equity (Washington, D.C., 10-14 December 2012); and

(e) To participate and speak at the Canadian Annual Review of Insolvency Law, hosted by the University of British Columbia. The conference is the key insolvency event in Canada attracting a significant number of Canadian and United States practitioners and providing an update on notable developments in insolvency law (recent cases etc.) in the last 12 months (Montreal, Canada, 8-9 February 2013).

Security interests

43. The approach taken by the Secretariat in providing technical assistance related to UNCITRAL texts on security interests (the United Nations Convention on the Assignment of Receivables in International Trade,¹² the UNCITRAL Legislative Guide on Secured Transactions,¹³ its Supplement on Security Rights in Intellectual Property¹⁴ and the draft UNCITRAL Guide on the Implementation of a Security Rights Registry)¹⁵ is twofold. The first approach focuses on disseminating information about those texts to Government officials, legislators, judges, academics and practitioners and thus, promoting their implementation. Such activities included participation at the following events:

(a) Lectures on secured financing at Moscow State Institute of International Relations (MGIMO) and consultations with officials of the Ministry of Economic Development of the Russian Federation (Moscow, 13-20 October 2012);

(b) Expert group meeting with representatives of the Ministry of Justice and the Federal Notary Chamber of the Russian Federation on the draft pledge provisions of the Russian Civil Code and the new law on pledge registration (Vienna, 27-28 November 2012);

(c) Lecture on registration of security interests at the Colloquium on Publicity as a Factor of Efficiency of Security Interests at the Law School of the University of Auvergne (Clermont-Ferrand, France, 1 February 2013); and

(d) Lecture on Intellectual Property Financing at the Lazarski University/Center for International Legal Studies L.L.M. in Transnational Commercial Practice Programme (Salzburg, Austria, 26 March 2013).

44. The second approach focuses on providing technical assistance to States in their secured transactions law reform activities. An example of such activities is the technical assistance provided to the Russian Federation with respect to pledge and pledge registration law. Another example is the cooperation with international financial institutions, such as the World Bank, the International Finance Corporation (IFC), and other organizations, such as the National Law Centre on Inter-American Free Trade, in the context of their technical assistance to States. The objective of this cooperation is to ensure that technical assistance is provided consistent with UNCITRAL texts on secured transactions. Examples of such an approach include the adoption of secured transactions laws that are consistent with the UNCITRAL Legislative Guide on Secured Transactions in Colombia, Guatemala and Mexico.

45. The Secretariat also engages in informal consultation with legislators and policymakers from various jurisdictions, in some instances as a follow-up to the aforementioned activities. Finally, the Secretariat is making progress in its work with the World Bank with a view to preparing a set of principles for effective and efficient secured transactions.

¹² United Nations publication, Sales No. E.04.V.14.

¹³ United Nations publication, Sales No. E.09.V.12.

¹⁴ United Nations publication, Sales No. E.11.V.6.

¹⁵ www.uncitral.org/uncitral/en/commission/working_groups/6Security_Interests.html.

Online dispute resolution

46. The Secretariat attended as speaker at the LawTech Europe Conference, on the Working Group's latest deliberations on Online Dispute Resolution (Prague, 12 November 2012).

Other capacity-building activities

47. The Secretariat took part as a resource person in the UNCTAD training on "Integrating the Trade dimension in the United Nations Development Assistance Frameworks" and delivered a presentation on the importance of trade law reform. The activity targeted government officials of various Asian countries, receivers of the United Nations assistance in economy and trade related issues. It was the third of a series of workshops based on the training manual developed by the Inter-Agency Cluster on Trade and Productive Capacity of which UNCITRAL is a member. Following the structure of the manual the workshop focused on various aspects of trade, including legal aspects, that should be considered in preparing country development plans in the context of the UNDAF (United Nations Development Assistance Framework) (Kathmandu, 23-27 April 2012).

48. The Secretariat has also been engaged in other capacity-building activities aimed at increasing the knowledge of international trade law. Among these, cooperation with the International Training Centre of the International Labour Organization (ITC-ILO) and the University of Turin may be noted.

49. In the framework of that cooperation, the Secretariat has continued to contribute to the management and delivery of the Master Course on Public Procurement for Sustainable Development and of the Master of Laws course in International Trade Law. These master level courses form an integral part of the broader educational programme denominated "Turin School of Development".¹⁶

50. International development agencies and other institutions managing comprehensive technical assistance programmes may wish to consider sponsoring the participation of students in such courses in order to strengthen local capacity in partner countries over the longer term.

¹⁶ www.itcilo.org/en/training-offer/turin-school-of-development-1.

III. Activities of the UNCITRAL Regional Centre for Asia and the Pacific

51. Since the Commission's forty-fifth session, the Regional Centre for Asia and the Pacific has carried out its activities in line with the lines of action for technical assistance of the Secretariat (A/66/17, para. 255) as well as the specific priorities identified for the Regional Centre (A/67/17, para. 184), namely assessing needs and mapping existing projects relating to trade law reform, with a view to increasing coordination among them, and establishing contacts with entities already significantly engaged in trade law reform. Particular importance was given to coordination with other regional entities, and, among them, with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). Contacts were also made with the United Nations Information Centres in Australia and Japan to provide better media coverage of the activities of the Regional Centre and of legislative reform initiatives.

52. In light of existing initiatives and requests, the Regional Centre kept its focus on East Asia and the Pacific as geographic areas and on alternative dispute resolution, sale of goods and electronic commerce as thematic areas for its work. Closer cooperation was sought with institutions already involved in the field, such as the Asian Development Bank Pacific Liaison and Coordination Office, located in Sydney, Australia, and active in trade law reform in support of private sector development in the Pacific, the Korean Legislative Research Institute of the Republic of Korea and the Centre for Asian Legal Exchange at Nagoya University in Japan.

53. The work of the Regional Centre highlighted the interest of States and other stakeholders in the use of uniform texts in trade law reform as a means to increase legal predictability and reduce costs in cross-border trade. This interest was reinforced by the absence of regional economic integration organizations with comprehensive legislation-making authority and by the broad support for the pursuit of economic development as a matter of priority expressed by several Asian and Pacific States.

54. At the policymaking level, the Regional Centre contributed to the discussion on the nexus between trade law reforms based on uniform texts, economic development as a catalyser for social stability and conflict prevention, and the rule of law (e.g., at the workshop held at the University of Hokkaido, Sapporo, Japan, 22 February 2013).

55. A number of initiatives were undertaken at the operational level.

56. Alternative dispute resolution attracts steady interest in the region for a number of reasons. According to a widespread opinion, Asian values favour harmony and reconciliation over adversarial methods for the settlement of disputes. This attitude may, for instance, demand a less stringent separation between conciliation and arbitration proceedings. Moreover, the increasing involvement of Asian countries in international trade and investment, including as investors, increased their exposure to international arbitration. Finally, arbitration has been increasingly invoked as the preferred method of dispute resolution also for non-commercial international disputes. All of those factors coalesce to increase the

interest for alternative dispute resolution mechanisms in the region and the demand for related capacity-building exercises.

57. In this area, the Regional Centre organized with the Ministry of Justice of the Republic of Korea and the Korean Commercial Arbitration Board a major event on “Asia-Pacific Perspectives on International Commercial Arbitration” (Seoul, 22-23 November 2012), discussing all UNCITRAL texts relating to arbitration as well as its current work in the field. It is envisaged that that meeting will take place on an annual basis. Other events relating to alternative dispute resolution to which the Regional Centre contributed include participation in the “Asia-Pacific Mediation Conference 2012: Mediation and its Impact on National Legal Systems” organized by the City University of Hong Kong (Hong Kong, China, 16-17 November 2012) as well as in a workshop on international commercial arbitration organized by the Royal Academy for Judicial Professions of the Kingdom of Cambodia (Phnom Penh, 9 August 2012). That workshop aimed, in particular, at increasing the familiarity of the Cambodian judiciary with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the “New York Convention”) and the UNCITRAL Model Law on International Commercial Arbitration (the “Model Arbitration Law”), as both texts have been adopted by Cambodia.

58. Moreover, significant work was done to disseminate awareness on and promote the use of the 2012 UNCITRAL Digest of Case Law on the Model Arbitration Law, a tool that has raised great interest and received general praise (see para. 25). The Model Arbitration Law has been widely adopted in Asia and the Pacific and in some subregions, such as South-East Asia, is considered as a *de facto* standard. Recent enactments of that model law in the relevant region include, according to several sources, the new Arbitration Law of Saudi Arabia (Royal Decree No. M/34 dated 24/5/1433 H/16 April 2012).

59. The Regional Centre has actively pursued the promotion of universal participation in the New York Convention in its region. In this respect, it should be noted that Tajikistan became a party to the New York Convention on 14 August 2012. The consideration of that treaty action was promoted by a capacity-building project in support of Tajikistan’s accession to the World Trade Organization sponsored by the United States Agency for International Development (USAID). The Regional Centre has been closely monitoring the process of consideration of adoption of the New York Convention by Myanmar, including by contributing to dedicated events (Yangon, Myanmar, 12 December 2012). Special attention was given to the importance of that treaty in the context of the harmonization of arbitration laws in member States of the Association of South-East Asian Nations (ASEAN), including by contributing to the “ASEAN Senior Law Officials Meeting (ASLOM) Workshop on the Harmonization of the Trade Laws of ASEAN Member States” (Singapore, 11-12 March 2013). Myanmar became the 149th State party to the New York Convention on 16 April 2013.

60. Special attention was also given to promoting of the adoption of the New York Convention in Pacific small island States, one of the world’s regions where the rate of adoption of that treaty is lowest. Contacts have been made with partners potentially interested in contributing to an exercise aimed at promoting participation in the Convention by building related legal capacity so as to provide Pacific small island States with a legal tool fundamental for their closer integration in the regional and global economy.

61. Significant work relating to international sale of goods, and, in particular, the promotion of the adoption and uniform interpretation of the United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG) has been carried out directly with stakeholders. The topic was regularly featured at promotional events, such as the workshop on “UNCITRAL texts in Australia: Arbitration, Electronic Commerce, Sale of Goods” co-organized with the Commercial Law Group of the Faculty of Law, Monash University (Melbourne, Australia, 7 February 2013), and the conference “From Global to Local” organized by the Arbitrators’ and Mediators’ Institute of New Zealand (AMINZ) (Wellington, 2-4 August 2012), which similarly offered presentations on arbitration and electronic commerce as well.

62. From the legislative standpoint, the withdrawal of the declaration related to articles 11, 12 and 96 of the CISG by the People’s Republic of China is noteworthy in the framework of the global trend favouring review and, when advisable, withdrawal of existing declarations to that treaty in order to further increase the uniformity of its scope of application. The matter had been first discussed by the UNCITRAL secretariat at the international seminar on the “Interpretation and Application of the Convention on Contracts for the International Sale of Goods (CISG) with Emphasis on Litigation and Arbitration in China” held at the University of Wuhan (Wuhan, China, 13-14 October 2007) (A/CN.9/652, para. 10 (b)). Among potential new parties, progress towards the adoption of the CISG was reported by Viet Nam, following the positive conclusion of a public consultation on the matter.

63. The Regional Centre has been particularly active in the field of electronic commerce by promoting the adoption of existing texts and participating in regional fora, including those aiming at the elaboration of future regional standards. The information gathered indicates different levels of States’ awareness of and interest in electronic commerce law. For instance, several countries in East and South-East Asia have sufficiently developed national legislation in the field and are now dealing with international aspects, including by considering the adoption of the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005. On the other hand, most countries in South Asia seem to prioritize strengthening their national legislative framework, and some Central Asian States are engaged in the preliminary steps of the preparation of national legislation.

64. In this respect, it should be noted that UNCITRAL texts on electronic commerce are considered as a *de facto* standard for subregional harmonization among member States of ASEAN. Recently, a further step in that direction was made with the adoption by the Lao People’s Democratic Republic of the Law on Electronic Transactions (Law No. 20/NA of 7 December 2012, promulgated with Presidential Decree No. 025/POR of 17 January 2013). The Regional Centre has participated in the “ASEAN/UNCTAD Preparatory Workshop on the Review of E-Commerce Laws Harmonization in ASEAN” (Cebu, the Philippines, 10-11 November 2012), and contributed to the subsequent review exercise, coordinated by the ASEAN Secretariat and UNCTAD and finalized by the preparation of a study containing recommendations on further harmonization of e-commerce laws in ASEAN.

65. Additional work of the Regional Centre in the field of electronic commerce included illustrating the benefits of the adoption of UNCITRAL uniform texts in the context of an enabling legal framework for electronic single window facilities (“2012 AFACT Plenary Meeting and EDICOM”, Teheran, Islamic Republic of Iran, 21-22 November 2012); and contributing to the work carried out by ESCAP and United Nations Network of Experts for Paperless Trade in Asia and the Pacific (UN NEXt), in furtherance of ESCAP Resolution no. 68/3, and with a view to assessing the desirability and feasibility of a regional agreement on paperless trade (“Regional Expert Consultation on Connecting Asia-Pacific’s Digital Society for Building Resilience”, Colombo, 5-6 September 2012; “Expert Group Meeting on Enhancing Regional Connectivity through Trade and Investment: Towards Regional Arrangements for the Facilitation of Cross-border Paperless Trade”, Bangkok, 13-14 March 2013). Events aimed, inter alia, at promoting the United Nations Convention on the Use of Electronic Communications in International Contracts, 2005 were organized by the Regional Centre with the Hankuk University of Foreign Studies (Seoul, 20-21 September 2012) and with the University of Queensland TC Beirne School of Law (Brisbane, Australia, 5 February 2013).

66. Moreover, the Regional Centre has been active in supporting present and possible future UNCITRAL legislative-drafting work. In particular, an expert group meeting was convened to discuss the use of uniform texts in ongoing contract law reform exercises, and possible means to enhance coordination between global, regional and national legislation (Incheon, Republic of Korea, 25-26 February 2013). That expert group meeting highlighted the significant reliance on uniform law in certain East Asian contract law reform exercises, the need for increased promotional work, especially in developing countries, to fully explain the features of uniform texts and the benefits associated with their adoption, and the desirability of more closely coordinating and supporting regional efforts aimed at preparing new uniform texts. Other relevant meetings include a conference co-organized with the Hankuk University of Foreign Studies (Seoul, 20-21 September 2012) to discuss, inter alia, matters relating to the work of UNCITRAL Working Group III (Online Dispute Resolution) and Working Group IV (Electronic Commerce).

67. The Regional Centre has participated in several events aimed at disseminating information and building capacity in its host country, the Republic of Korea, such as the seminar on “Practical and Current Issues in International Sale of Goods and International Commercial Arbitration”, co-organized by the Regional Centre with the Asia Office of the International Bar Association (Seoul, 12 July 2012), the conference “Recent Trends of International Business Transactions Law in Asia” organized by Dong-A University (Busan, 8-9 November 2012) and the special lecture “UNCITRAL and the Current Challenges of Trade Law Harmonization” at the Seoul National University (Seoul, 20 November 2012).

68. The Regional Centre is staffed with one professional and one team assistant, as well as a legal expert provided by the Government of the Republic of Korea on a non-reimbursable basis. Interns are hosted at the Regional Centre on a regular basis. The project budget, fully contributed by the Government of the Republic of Korea, allows for the occasional employment of experts and consultants. Moreover, the Regional Centre has often been able to leverage on the resources of its partners, especially for contribution to the costs of travel and of meeting facilities and services.

69. The Regional Centre has been supported in a number of administrative functions critical for carrying out its mandate by ESCAP and, in particular, its Sub-Regional Office for East and North-East Asia (SRO ENEA), also located in Incheon. This assistance is offered on a provisional basis, pending conclusion of a formal arrangement between the United Nations Office of Legal Affairs and ESCAP.

70. It is expected that the future activities of the Regional Centre will generate further interest for UNCITRAL texts and additional requests for technical assistance. Such increase will call for a corresponding increase in available resources. Those resources could be made available, in particular, by further stressing the fundamental contribution of trade law reform to major international policy goals such as the rule of law and the fight against poverty, and therefore mainstreaming trade law reform exercises in existing development assistance programmes.

IV. Dissemination of information

71. A number of publications and documents prepared by UNCITRAL serve as key resources for its technical cooperation and assistance activities, particularly with respect to dissemination of information on its work and texts.

A. Website

72. The UNCITRAL website, available in the six official languages of the United Nations, provides access to full-text UNCITRAL documentation and other materials relating to the work of UNCITRAL, such as publications, treaty status information, press releases, events and news. In line with the organizational policy for document distribution, official documents are provided, when available, via linking to the United Nations Official Document System (ODS).

73. In 2012, the website received roughly 500,000 unique visitors. While the overall number of visitors increased from 2011, the biggest gains in traffic were seen on pages in languages other than English. Approximately 58 per cent of traffic was directed to pages in English, 27 per cent to pages in French and Spanish (an increase from 22 per cent in 2011), and the remaining 15 per cent to pages in Arabic, Chinese and Russian (an increase from 11 per cent in 2011). In this respect, it should be noted that, while the UNCITRAL website is among the most important electronic sources of information on international trade law in all languages, it may represent one of few available sources on this topic in some of the official languages.

74. The content of the website is updated and expanded on an ongoing basis in the framework of the activities of the UNCITRAL Law Library and therefore at no additional cost to the Secretariat. In particular, UNCITRAL official documents relating to earlier Commission sessions are continuously uploaded in the ODS and made available on the website under a project on digitization of UNCITRAL archives conducted jointly with the UNOV Documents Management Unit.

B. Library

75. Since its establishment in 1979, the UNCITRAL Law Library has been serving research needs of Secretariat staff and participants in intergovernmental meetings convened by UNCITRAL. It has also provided research assistance to staff of Permanent Missions, global staff of the United Nations, staff of other Vienna-based international organizations, external researchers and law students. In 2012, library staff responded to approximately 475 reference requests a 36 per cent increase over 2011, originating from over 45 countries.

76. The collection of the UNCITRAL Law Library focuses primarily on international trade law and currently holds over 10,000 monographs, 100 active journal titles, legal and general reference material, including non-UNCITRAL United Nations documents, documents of other international organizations; and electronic resources (restricted to in-house use only). Particular attention is given to expanding the holdings in all of the six United Nations official languages. While use of electronic resources has increased, resources on trade law from many countries are still only found in print, and circulation of print items has remained steady.

77. The UNCITRAL Law Library maintains an online public access catalogue (OPAC) jointly with the other United Nations libraries in Vienna and with the technical support of the United Nations Library in Geneva. The OPAC is available via the library page of the UNCITRAL website.

78. The UNCITRAL Law Library staff prepares for the Commission an annual "Bibliography of recent writings related to the work of UNCITRAL". The bibliography includes references to books, articles and dissertations in a variety of languages, classified according to subject (for the forty-sixth Commission session, see A/CN.9/772). Individual records of the bibliography are entered into the OPAC, and the full-text collection of all cited materials is maintained in the Library collection. Monthly updates from the date of the latest annual bibliography are available in the bibliography section of the UNCITRAL website.

79. The Library produces a consolidated bibliography of writings related to the work of UNCITRAL on the UNCITRAL website.¹⁷ The consolidated bibliography aims to compile all entries of the bibliographical reports submitted to the Commission since 1968. It currently contains over 6,500 entries, reproduced in the English and the original language versions, verified and standardized to the extent possible.

C. Publications

80. In addition to official documents, UNCITRAL traditionally maintains two series of publications, namely the texts of all instruments developed by the Commission and the UNCITRAL Yearbook. Publications are regularly provided in support of technical cooperation and assistance activities undertaken by the Secretariat, as well as by other organizations where the work of UNCITRAL is discussed, and in the context of national law reform efforts.

¹⁷ Available from www.uncitral.org/uncitral/publications/bibliography_consolidated.html.

81. The following works were published in 2012: UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective;¹⁸ a revised booklet for the 1974 Convention on the Limitation Period in the International Sale of Goods with an updated explanatory note;¹⁹ UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions;²⁰ UNCITRAL Legislative Guide on Insolvency Law, Part three: Treatment of enterprise groups in insolvency;²¹ UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition;²² UNCITRAL 2012 Digest on the Model Law on International Commercial Arbitration;²³ and the 2008 and 2009 UNCITRAL *Yearbooks*.²⁴

82. The following works were published in early 2013: Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules (as revised in 2010),²⁵ and A Guide to UNCITRAL: Basic facts about the United Nations Commission on International Trade Law.²⁶

83. In light of budget and environmental concerns, the Secretariat has continued its efforts to use electronic media as a primary method to disseminate UNCITRAL texts. Thus, print runs for all publications have been reduced and several texts published in 2012 have been published exclusively in electronic format, namely: UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective (e-book); the revised booklet for the 1974 Convention on the Limitation Period in the International Sale of Goods (e-book); UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods, 2012 Edition (CD-ROM and e-book); and the 2008 and 2009 UNCITRAL *Yearbooks* (CD-ROM and e-book).

D. Press releases

84. Press releases are being regularly issued when treaty actions relating to UNCITRAL texts take place or information is received on the adoption of an UNCITRAL model law or other relevant text. Press releases are also issued with respect to information of particular importance and direct relevance to UNCITRAL. Those press releases are provided to interested parties by e-mail and are posted on the UNCITRAL website, as well as on the website of the United Nations Information Service (UNIS) in Vienna or of the Department of Public Information, News and Media Division in New York, if applicable.

85. To improve the accuracy and timeliness of information received with respect to the adoption of UNCITRAL model laws, since such adoption does not require a

¹⁸ Available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

¹⁹ Available from www.uncitral.org/uncitral/en/uncitral_texts/sale_goods.html.

²⁰ Available from www.uncitral.org/uncitral/uncitral_texts/security.html.

²¹ Available from www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

²² Available from www.uncitral.org/uncitral/en/case_law/digests.html.

²³ Available from www.uncitral.org/uncitral/en/case_law/digests.html.

²⁴ Available from www.uncitral.org/uncitral/publications/yearbook.html.

²⁵ Available from www.uncitral.org/uncitral/en/uncitral_texts/arbitration.html.

²⁶ Available from www.uncitral.org/uncitral/en/about_us.html.

formal action with the United Nations Secretariat, and to facilitate the dissemination of related information, the Commission may wish to request Member States to advise the Secretariat when enacting legislation implementing an UNCITRAL model law.

E. General enquiries

86. The Secretariat currently addresses approximately 2,000 general enquiries per year concerning, inter alia, technical aspects and availability of UNCITRAL texts, working papers, Commission documents and related matters. Increasingly, these enquiries are answered by reference to the UNCITRAL website.

F. Briefings for Permanent Missions in Vienna

87. The Secretariat provided a briefing on UNCITRAL and its working methods at the Orientation Seminar for Members of Permanent Missions accredited to the International Organizations in Vienna organized by the United Nations Institute for Training and Research (UNITAR) at the United Nations Office at Vienna on 4 December 2012.

G. Information lectures in Vienna

88. The Secretariat provides upon request information lectures in-house on the work of UNCITRAL to visiting university students and academics, members of the bar, Government officials including judges and others interested. Since the last report, lectures have been given to visitors from, inter alia, Austria, Hungary, Ireland, Saudi Arabia, Slovenia and a visiting delegation from the American Bar Association Section of International Law.

V. Resources and funding

89. The costs of most technical cooperation and assistance activities are not covered by the regular budget. The ability of the Secretariat to implement the technical cooperation and assistance component of the UNCITRAL work programme is therefore contingent upon the availability of extrabudgetary funding.

90. The Secretariat has explored a variety of ways to increase resources for technical assistance activities, including through in-kind contributions. In particular, a number of missions have been funded, in full or in part, by the organizers. Additional potential sources of funding could be available if trade law reform activities could be mainstreamed more regularly in broader international development assistance programmes. In this respect, the Commission may wish to provide guidance on possible future steps.

A. UNCITRAL Trust Fund for symposia

91. The UNCITRAL Trust Fund for symposia supports technical cooperation and assistance activities for the members of the legal community in developing countries, funding the participation of UNCITRAL staff or other experts at seminars where UNCITRAL texts are presented for examination and possible adoption and fact-finding missions for law reform assessments in order to review existing domestic legislation and assess country needs for law reform in the commercial field.

92. During the period under review, the Government of the Republic of Korea, through its Ministry of Justice provided a contribution of \$13,878.61 for the participation of the UNCITRAL Secretariat in the APEC EoDB project (see para. 11 above). Also, a new contribution of \$20,000 was received for 2012 as well as a new pledge of \$20,000 for 2013 by the Government of Indonesia, both to whom the Commission may wish to express its appreciation.

93. At its 45th Session (New York, 25 June-6 July 2012), the Commission appealed to all States, international organizations and other interested entities to consider making contributions to the Trust Fund for UNCITRAL symposia, if possible, in the form of multi-year contributions, or as specific-purpose contributions, so as to facilitate planning and enable the Secretariat to meet the increasing requests from developing countries and countries with economies in transition for training and technical legislative assistance (A/67/17, paras. 146-148). Potential donors have also been approached on an individual basis.

94. The Commission may wish to note that, in spite of efforts by the Secretariat to solicit new donations, funds available in the Trust Fund are sufficient only for a very small number of future technical cooperation and assistance activities. Efforts to organize the requested activities at the lowest cost and with co-funding and cost sharing whenever possible are ongoing. However, once current funds are exhausted, requests for technical cooperation and assistance involving the expenditure of funds for travel or to meet other costs will have to be declined unless new donations to the Trust Fund are received or alternative sources of funds can be found.

95. The Commission may once again wish to appeal to all States, relevant United Nations Agencies and bodies, international organizations and other interested entities to make contributions to the Trust Fund, if possible in the form of multi-year contributions, so as to facilitate planning and to enable the Secretariat to meet the demand for technical cooperation and assistance activities and to develop a more sustained and sustainable technical assistance programme. The Commission may also wish to request Member States to assist the Secretariat in identifying sources of funding within their Governments.

B. UNCITRAL Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL

96. The Commission may wish to recall that, in accordance with General Assembly resolution 48/32 of 9 December 1993, the Secretary-General was requested to establish a Trust Fund to grant travel assistance to developing countries that are members of UNCITRAL. The Trust Fund so established is open to

voluntary financial contributions from States, intergovernmental organizations, regional economic integration organizations, national institutions and non-governmental organizations, as well as to natural and juridical persons.

97. In the period under review, a contribution in the amount of euro 5,000 has been made by the Government of Austria, to whom the Commission may wish to express its appreciation.

98. During 2012, the available Trust Fund resources were used to facilitate participation at the 45th session of UNCITRAL in New York in July 2012 for delegates from El Salvador, Honduras and Colombia. Due to the limited resources, cost coverage has been provided only for the air tickets for the three delegates.

99. In order to ensure participation of all Member States in the sessions of UNCITRAL and its Working Groups, the Commission may wish to reiterate its appeal to relevant bodies in the United Nations system, organizations, institutions and individuals to make voluntary contributions to the Trust Fund established to provide travel assistance to developing countries that are members of the Commission.

100. It is recalled that in its resolution 51/161 of 16 December 1996, the General Assembly decided to include the Trust Funds for UNCITRAL symposia and travel assistance in the list of funds and programmes that are dealt with at the United Nations Pledging Conference for Development Activities.

X. STATUS AND PROMOTION OF UNCITRAL LEGAL TEXTS

Note by the Secretariat on the status of conventions and model laws

(A/CN.9/773)

[Original: English]

Not reproduced. Updated information may be obtained from the UNCITRAL secretariat or found on the Internet at www.uncitral.org.

XI. COORDINATION AND COOPERATION

Note by the Secretariat on coordination activities

(A/CN.9/776)

[Original: English]

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I. Introduction

1. In resolution 34/142 of 17 December 1979, the General Assembly requested the Secretary-General to place before the United Nations Commission on International Trade Law a report on the legal activities of international organizations in the field of international trade law, together with recommendations as to the steps to be taken by the Commission to fulfil its mandate of coordinating the activities of other organizations in the field.

2. In resolution 36/32 of 13 November 1981, the General Assembly endorsed various suggestions by the Commission to implement further its coordinating role in the field of international trade law.¹ Those suggestions included presenting, in addition to a general report of activities of international organizations, reports on specific areas of activity focusing on work already under way and areas where unification work was not under way but could appropriately be undertaken.²

3. This report, prepared in response to resolution 34/142 and in accordance with UNCITRAL's mandate,³ provides information on the activities of other international organizations active in the field of international trade law in which the UNCITRAL Secretariat has participated, principally working groups, expert groups and plenary meetings. The purpose of that participation has been to ensure coordination of the related activities of the different organizations, share information and expertise and avoid duplication of work and the resultant work products.

4. The Commission may wish to note the increasing involvement of the Secretariat in initiatives of other organizations. This is a recurrent pattern in recent

¹ *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, paras. 93-101.

² *Ibid.*, para. 100.

³ See General Assembly Resolution 2205 (XXI), sect. II, para. 8.

years, consistent with the increase in the Secretariat's technical assistance activities,⁴ and which is expected to continue and even increase in future.

II. Coordination activities

A. The International Institute for the Unification of Private Law and the Hague Conference on Private International Law

International Institute for the Unification of Private Law (Unidroit)

5. The Secretariat participated in the ninety-first session of the Unidroit Governing Council (Rome, 7-9 May 2012). At the meeting, the Governing Council expressed satisfaction for the inclusion of Unidroit's request for formal endorsement of the Unidroit Principles 2010 in the agenda of the forty-fifth UNCITRAL session.

6. The Secretariat attended the first and second sessions of the Committee of governmental experts on the enforceability of close-out netting provisions (Rome, 1-5 October 2012 and 4-9 March 2013) in order to monitor developments to ensure consistency with UNCITRAL texts concerning insolvency and secured transactions. The draft text was completed at the second session and will be referred to the Unidroit Governing Council for adoption in May 2013. The final text is broadly consistent with the relevant UNCITRAL texts.

7. The Secretariat provided comments on a position paper in the area of contract law, titled "Model Clauses for Use of the Unidroit Principles of International Commercial Contracts in Transnational Contract and Dispute Resolution Practice", to the Unidroit Working Group for the preparation of Model Clauses (Rome, 11-12 February 2013).

Hague Conference on Private International Law (HCCH)

8. The Secretariat attended the Special Commission meeting of HCCH on Choice of Law in International Contracts. The outcome of the meeting was a non-binding instrument, i.e. a draft set of principles, for consideration by the Council on General Affairs and Policy in April 2013, prior to further work on the commentary by the Special Commission (The Hague, the Netherlands, 12-16 November 2012).

9. The Secretariat participated in the meeting of the HCCH Council on General Affairs and Policy (The Hague, the Netherlands, 9-11 April 2013). Among other matters, this was an opportunity for the Secretariat to congratulate the outgoing Secretary General of HCCH, Mr. Hans van Loon on his successful years in office, thanking him for the HCCH's cooperation with UNCITRAL, and to welcome his successor, Mr. Christophe Bernasconi. At the meeting, participants were briefed on HCCH ongoing matters, including the opening of its regional office in Hong Kong in December 2012, and considered the text prepared by the working group on Choice of Law in International Contracts (see paragraph 7 above). UNCITRAL will continue to participate as an observer to such working group, which is due to submit its final text with commentary to the next meeting of the Council in April 2014.

⁴ See A/CN.9/775.

Joint activities with Unidroit and HCCH

10. Unidroit hosted the annual coordination meeting with the UNCITRAL Secretariat and HCCH at which, current work of the three organizations and potential areas for cooperation were discussed (Rome, 5 June 2012). On this occasion both the Secretary of Unidroit and the Secretary of HCCH thanked the UNCITRAL Secretariat for having coordinated and sponsored the publication on the work of the three organizations in the area of secured transactions law.⁵

B. Other organizations

11. The Secretariat has undertaken other coordination activities with various international organizations. These have included provision of comments by the Secretariat on documents drafted by those organizations, as well as participation in various meetings and conferences with the purpose of briefing about the work of UNCITRAL or to provide an UNCITRAL perspective on the matters at stake.

1. General

12. The Secretariat remains actively involved in the Inter-Agency Cluster on Trade and Productive Capacity.⁶ In this context, the Secretariat was involved in the negotiation of the United Nations Development Assistance Framework (UNDAF) for Nepal. The UNDAF articulates the collective response of the United Nations system to national development priorities by coordinating the common contribution of the United Nations agencies to the needs and priorities of countries.

13. The Secretariat delivered a lecture on global and regional contract law harmonization at the conference on European Private Law at the University of Rome (Rome, 10 May 2012).

14. The Secretariat attended the General Assembly High-Level Meeting on the Rule of Law at which the chairperson of UNCITRAL delivered an official statement to Member States, non-governmental organizations and civil society representatives participating in the event (New York, United States of America, 23-24 September 2012). The Declaration adopted at the Meeting recognizes the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development and economic growth and commends the work of UNCITRAL in modernizing and harmonizing international trade law.

15. As last year, the Secretariat attended the Annual meeting of the United States State Department Advisory Council on private international law (Washington D.C., 11-12 October 2012).

16. The Secretariat participated in the European Microfinance Week 2012 organized by the European Microfinance Platform and attended by worldwide representatives from governmental and non-governmental organizations, academia

⁵ See UNCITRAL, Hague Conference and Unidroit Texts on Security Interests: Comparison and analysis of major features of international instruments relating to secured transactions at www.uncitral.org/uncitral/en/uncitral_texts/security/2011UNCITRAL_HCCH_Unidroit_texts.html; see also A/CN.9/720 and A/CN.9/749.

⁶ See A/CN.9/725.

and private sector active in the domain of microfinance (Luxembourg, 14-16 November 2012).

17. The Secretariat attended the Law, Justice and Development Week 2012, an annual event designed to address how law and justice contribute to better development outcomes through opportunity, inclusion and equity. The event brought together World Bank Group staff, senior officials from other international financial institutions, international development practitioners, government officials, lawyers, judges, scholars and representatives from civil society and was co-organized by the World Bank's Legal Vice Presidency, the International Finance Corporation and Multilateral Investment Guarantee Agency Legal Departments, and the International Center for the Settlement of Investment Disputes. The formal launch of the "Global Forum on Law, Justice and Development" also took place during the week. The Global Forum is stated to be "a permanent forum ... for the exchange of knowledge, connecting developing countries, think-tanks, regional and international organizations, international financial institutions, governments, judiciaries, the private sector and civil society organizations with relevant research and practice"⁷ (Washington D.C., 10-14 December 2012).

2. Procurement

18. In accordance with requests of the Commission and Working Group I (Procurement), the Secretariat has established links with other international organizations active in procurement reform to foster cooperation with regard to the UNCITRAL Model Law on Public Procurement (2011) and its accompanying Guide to Enactment (2012). The aims of such cooperation are to ensure that reforming Governments and organizations are informed of the policy considerations underlying those texts, so as to promote a thorough understanding and appropriate use of the Model Law, at both regional and national levels. The Secretariat is taking a regional approach to this cooperation, and activities with the multilateral development banks in several regions, focusing on good governance and anti-corruption (in which procurement reform plays a pivotal role), are envisaged.

19. To this end, the Secretariat has participated, among others, in the following activities:

(a) The World Bank's International Advisory Group on Procurement, which is advising the World Bank on a wholesale Procurement Policy review, its new Program-for-Results (PforR) financing instrument, the Bank's procurement function in the context of public financial accountability, and the need to strengthen contract management (Washington, D.C., 4-5 June 2012 and 12-13 November 2012);

(b) The Second Annual EU Public Procurement Reform Conference, organized by IBC Legal Conferences, addressing the UNCITRAL reforms in public procurement and areas of harmony and discord between them and EU proposals. The Secretariat delivered a presentation at this event (Brussels, 20 September 2012);

(c) The seminar on Procurement and Trade, organized by the International Chamber of Commerce (ICC), addressing the EU proposals for a regulation on the

⁷ Law, Justice and Development Week 2012, Concept Note, available at: http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1340728175970/23321647/LJDWEEK_2012_Concept_Note.docx.

access of third party suppliers and contractors to the EU public procurement market, which concern the principles of international participation in public procurement under the UNCITRAL Model Law on that topic (Paris, 7 November 2012). The Secretariat delivered a presentation at this event;

(d) The 5th session of the UNECE Team of Specialists, at which the Secretariat presented possible future work of UNCITRAL in public-private partnerships, with a view to ensuring appropriate coordination among the donor community in this regard (Geneva, Switzerland, 5-6 February 2013);

(e) The OECD's Meeting of Leading Practitioners on Public Procurement and ongoing work on key issues in updating the OECD Recommendation on Enhancing integrity in public procurement, the aim of which is to provide guidance to decision makers on how to use procurement as a strategic function of governments (Paris, 11-12 February 2013). The Secretariat delivered a presentation at this event; and

(f) The meeting of the heads of procurement of the multilateral development banks,⁸ at which the Secretariat presented possible future work of UNCITRAL in public-private partnerships, with a view to ensuring appropriate coordination among the donor community in this regard (Paris, 14 March 2013).

3. Dispute settlement

20. The Secretariat participated in the following activities:

(a) Consultative work in relation to the UNCTAD Pink Series publication on transparency in international investment agreements, entitled "Transparency 2012", in order to ensure that a consistent approach is promoted by UNCTAD and UNCITRAL in the field of transparency in treaty-based investor-State arbitration; and

(b) Consultative and coordination work with the Unidroit Working Group on the use of Unidroit Principles in arbitration clauses.

21. The Secretariat also organized a meeting with representatives of arbitral institutions in relation to the establishment of a registry on transparency under the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration (Vienna, 3 December 2012).⁹

4. Electronic commerce

22. The Secretariat has been particularly active in coordinating with international and regional organizations involved in the formulation of legal standards in the field of electronic commerce to ensure their compatibility with UNCITRAL texts and principles.

⁸ The following Banks were represented: the World Bank, the African Development Bank, the Asian Development Bank, the European Bank for Reconstruction and Development, the European Investment Bank, the InterAmerican Development Bank and the Islamic Development Bank.

⁹ See A/CN.9/WG.II/WP.177.

23. Activities¹⁰ included the following:

(a) Coordination with the European Commission on its draft regulation on electronic identification and trust services for electronic transactions in the internal market (Brussels, 5 September 2012);

(b) Coordination with the United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) on the revision of recommendation 14 on authentication of trade documents and preparation of recommendation 36 on single windows interoperability (Vienna, 17-21 September 2012);

(c) Participation in the 13th plenary meeting of the Asia Pacific Council for Trade Facilitation and Electronic Business (AFACT) (Teheran, 21-22 November 2012);

(d) Participation in the meeting organized by the American Bar Association (ABA) Identity Management Legal Task Force (London, 10-11 December 2012); and

(e) Participation in the United Nations Office on Drugs and Crime (UNODC) core group of experts on identity-related crime (Vienna, 16-18 January 2013).

5. Security interests

24. Coordination with relevant organizations has been pursued to ensure that States are offered comprehensive and consistent guidance in the area of secured transactions law.

25. Specific activities of the Secretariat included:

(a) Coordination with Unidroit to ensure that the text on netting being prepared by Unidroit does not overlap or conflict with the security interests texts prepared by UNCITRAL (see also para. 6 above);

(b) Coordination with the European Commission to ensure that a coordinated approach is followed with respect to the law applicable to third-party effects of assignments of receivables; and

(c) Coordination with the World Bank to prepare joint UNCITRAL-World Bank Principles on Secured Transactions.

6. Insolvency

26. The Secretariat participated in the third session of the World Bank's Working Group for the Treatment of the Insolvency of natural persons (Washington D.C., 13-14 December 2012). The Working Group was established under the auspices of the World Bank's Insolvency Law Task Force to identify the policies and general principles that underlie the diverse legal systems that have evolved for effectively managing the risks of consumer insolvency and individual over-indebtedness in the modern context and prepare a report to provide guidance on the characteristics of an effective insolvency regime for natural persons and the opportunities and challenges

¹⁰ Coordination activities in the area of electronic commerce carried out by the UNCITRAL Regional Centre for Asia and the Pacific are listed in A/CN.9/775.

encountered in the development of such a regime. The report was finalized and adopted at this session.

7. Commercial fraud

27. Further to the request of the Commission (A/63/17, para. 347 and A/64/17, para. 354) in relation to work on commercial fraud, the Secretariat has continued to participate in the work of UNODC on economic crime and identity fraud. In particular, the Secretariat has participated in UNODC's core group of experts on identity-related crime, which was formed to bring together on a regular basis representatives from Governments, private sector entities, international and regional organizations and academia to pool experience, develop strategies, facilitate further research and agree on practical action against identity-related crime. The most recent meeting of the core group of experts, the sixth such meeting, took place in Vienna from 16-18 January 2013 (see also para. 23, lett. e), above).

Part Three

ANNEXES

I. SUMMARY RECORDS OF THE MEETINGS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration

Summary record of the 958th meeting, held at the Vienna International Centre, Vienna, on Monday,
8 July 2013, at 10 a.m.

[A/CN.9/SR.958]

Temporary Chairperson: Mr. Sorieul (Secretary of the Commission)

Chairperson: Mr. Schöll (Switzerland)

Later: Mr. Moollan (Chairperson of Working Group II) (Mauritius)

The meeting was called to order at 10.15 a.m.

Opening of the session

1. **Mr. Sorieul** (Secretary of the Commission) opened the forty-sixth session of the United Nations Commission on International Trade Law.

Election of officers

2. **Mr. Sorieul** (Secretary of the Commission) said that it was the turn of the Western European and Other States Group to nominate a Chairperson. The Group had informed the Commission that it wished to nominate Mr. Schoell (Switzerland) for the office.

3. *Mr. Schöll (Switzerland) was elected Chairperson by acclamation.*

4. *Mr. Schöll (Switzerland) took the Chair.*

Adoption of the agenda

5. **The Chairperson** invited the Committee to adopt the agenda.

6. **Mr. Caplan** (United States of America) said he trusted that the Commission would not take any decisions regarding the authorization of work on current projects or on proposed future projects prior to the discussion of agenda item 16.

7. **Mr. Bellenger** (France) proposed that agenda item 16 should be discussed on Monday, 22 July, rather than at the very end of the session.

8. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat had informally scheduled the

discussion of agenda item 16 for the morning of Wednesday, 24 July. However, the discussion could be brought forward if the Commission so wished.

9. **Mr. Apter** (Israel) said that the members of the various Working Groups would probably not be present for the entire session. He therefore asked whether, for instance, the members of Working Group II on arbitration and conciliation could present their views on future work informally before the end of the second week of the session.

10. **The Chairperson** said that the suggestion by the representative of Israel was consistent with the Commission's practice in recent years.

11. *The agenda was adopted.*

Consideration of issues in the area of arbitration and conciliation

(a) **Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration** (A/CN.9/760, 765, 783 and 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3)

12. **Mr. Sorieul** (Secretary of the Commission) said that it was customary for the Chairperson of Working Group II to chair the discussion on arbitration and conciliation. Mr. Moollan, the representative of Mauritius, had chaired the Working Group's proceedings for several years. He understood that the Commission would like him to continue to do so at the current session.

13. **The Chairperson** invited Mr. Moollan to take the Chair.

14. *Mr. Moollan, Chairperson of Working Group II, took the Chair.*

15. **The Chairperson** said that the Commission hoped to adopt the UNCITRAL rules on transparency by the end of the first week of the session. The drafting of the rules had been an extremely complex process and he urged the Commission to bear that in mind during the final review. Moreover, many delegations had been willing to make substantial compromises, as reflected in paragraphs 75 to 78 of the report of Working Group II on its fifty-eighth session held in February 2013 (document A/CN.9/765). He therefore trusted that the debate on matters of substance would not be reopened at the current session of the Commission.

16. He noted that the Working Group had expressed the unanimous view at its fifty-eighth session that the Commission was the best qualified institution to serve as a registry or repository of published information under the rules on transparency. The problem, however, was funding. States had been encouraged since the end of the session to fund such an initiative outside the United Nations regular budget and some had expressed their willingness, in principle, to do so. Alternatively, it would be necessary to approach first the Sixth Committee and then the Fifth Committee of the General Assembly to seek funding under the regular budget. If the Commission was unable for financial reasons to serve as the registry, two institutions had kindly accepted to do so: the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) in The Hague.

17. It would be helpful if agreement could be reached before the end of that week on the desirability of having the Commission serve as the registry. If additional States were willing to contribute the requisite funds, it might be unnecessary to apply to the General Assembly for financing under the regular budget. It would also be helpful if the Commission were to decide by the end of the week which of the two volunteer institutions should be selected to serve as a registry if all else failed.

18. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat had embarked on consultations with a view to obtaining the requisite funding. While the response to date was quite encouraging, it was still far from satisfactory. The idea of having the Commission serve as the registry under the rules on transparency had met with a broadly positive response at the United Nations secretariat in New York. If extrabudgetary financing was required, a number of options were available, but it was important to ensure that such a key service as the dissemination of published information was assured on a universal basis. Hence, logically speaking, the most rational choice would be to entrust the secretariat of the Commission with the mandate rather than subcontracting it to an outside organization. While the two organizations that had offered their services were eminently respectable, neither enjoyed the universality of a body administered by the United Nations secretariat.

19. **Ms. Kobayashi-Terada** (Japan) asked whether the two volunteer organizations had submitted specific proposals regarding the services that they were willing to provide.

20. **The Chairperson** said that both organizations had submitted proposals which would be made available to all members of the Commission.

21. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat found it difficult, also for budgetary reasons, to ensure the speedy translation of Commission documents into the six working languages. Even when documents were submitted in all six languages, the United Nations translation services were required to review them to ensure the accuracy of the translations.

22. **The Chairperson** invited the Commission to consider the draft UNCITRAL rules on transparency in treaty-based investor-State arbitration contained in document A/CN.9/873, article by article. Any agreed amendments would be incorporated in the different language versions by a drafting committee.

Draft article 1 — Scope of application

23. **The Chairperson** drew attention to the secretariat's remark in paragraph 6 of the document concerning the reordering of the paragraphs of draft article 1 according to the matters they addressed. If he heard no objection, he would take it that the reordering was acceptable to the Commission.

24. *It was so decided.*

25. **The Chairperson** said that draft article 1, paragraphs 1 and 2, reflected the compromise solution adopted by Working Group II, according to which the rules on transparency would form part of the UNCITRAL Arbitration Rules and would be applicable to treaties adopted after the rules came into force unless the parties thereto opted out. That solution was reflected in paragraph 1 of the article. Paragraph 2 created what was referred to as a "bright line", i.e. a clearly defined rule or standard, according to which the rules would apply to UNCITRAL arbitration proceedings conducted under existing treaties only if the disputing parties so agreed.

26. Working Group II had agreed at the outset that the rules on transparency should be capable of being applied in all forms of arbitration. Reference had frequently been made in that connection to the International Bar Association Rules on the Taking of Evidence in International Arbitration. At the beginning of an arbitral procedure, the tribunal and the parties frequently agreed to invoke those Rules either as applicable rules or as guidelines. As it was important to ensure that various institutions would be able to administer arbitrations under their existing rules in conjunction with the draft rules on transparency, the question arose as to whether there should be a specific reference in draft article 1 to the application of the rules in that context. Paragraph 7 of document A/CN.9/783 invited the Commission to consider whether the words in square brackets "or (ii) in treaty-based investor-State arbitrations initiated under other arbitration rules or ad hoc" should be added in the chapeau of paragraph 2. In his view, that was not the appropriate place for such a reference if the objective was to achieve balance. Paragraph 2 created the "bright line" in respect of UNCITRAL arbitration proceedings. If the text in square brackets was added to paragraph 2, the Commission would be creating a "bright line" for other institutions.

27. **Ms. Kaufmann-Kohler** (Switzerland) said that the addition of the proposed wording would have the merit of creating clarity inasmuch as all institutions would then be aware that they could apply the rules if they so wished. It would also be consistent with the Working Group's mandate to create a standard of transparency for the advancement of arbitration in all circumstances.

28. **Mr. Loh Kong Yue** (Singapore) said that clarity was also desirable because it was consistent with the principle of party autonomy, namely that the rules were applicable only where the disputing parties or the parties to a treaty agreed that they should apply.

29. **Mr. Agrawal** (India) agreed that it should be left to the contracting parties to state whether the rules on transparency should be applicable in arbitration proceedings.

30. **Mr. Apter** (Israel) expressed support for the insertion of the proposed additional phrase in paragraph 2, perhaps with some amendments, since it reflected the compromise reached in the Working Group, which was all-encompassing. If all members of the Commission agreed on the "bright line" approach, it should be made clear that it was applicable wherever parties to investor-State arbitration agreed to the rules of transparency, which had universal status.

31. **The Chairperson** said that the insertion of the new phrase would certainly imply that the "bright line" approach was universally applicable. A distinction should be drawn between the UNCITRAL Arbitration Rules and other rules when it came to the application of transparency standards. A link was created in draft article 1 between the rules on transparency and the UNCITRAL Arbitration Rules by amending article 1 of the latter text. However, there was no such link with other rules, such as the International Chamber of Commerce (ICC) Rules of Arbitration.

32. **Mr. Caplan** (United States of America) drew attention to the United States proposal in its comments on the draft rules (A/CN.9/787) concerning the addition of a new paragraph 9 to draft article 1, which would read: "These Rules are available for use in investor-State arbitrations initiated under other arbitration rules where

permitted by the relevant institution or in ad hoc proceedings.”

33. **The Chairperson** expressed reservations about the words “where permitted by the relevant institution” since that would place an onus on institutions throughout the world to state whether they were willing to apply the rules.

34. **Mr. Lavranos** (Observer for the Netherlands) said that he was in favour of maintaining the leeway provided by the phrase, since one could not be confident that the rules of all institutions were perfectly consistent with the rules on transparency.

35. **Ms. Kobayashi-Terada** (Japan) expressed support for the proposal by the Chairperson to delete the phrase.

36. **Ms. Kaufmann-Hohler** (Switzerland) said she agreed that it would be preferable to delete the phrase, since it would simply encourage additional undesirable debate on each rule.

37. **Mr. Loh Kong Yue** (Singapore) said that the wording of the proposed new paragraph was somewhat ambiguous. It should be made clear that the disputing parties or the parties to a treaty should agree to the application of the rules on transparency.

38. **Mr. Kordač** (Observer for the Czech Republic) said that the proposed paragraph did not really qualify in technical terms as a rule. It might therefore be preferable to insert it in the Commission’s decision concerning the adoption of the rules or in its recommendation on their application.

39. **The Chairperson** invited the representatives of the International Centre for Settlement of Investment Disputes and the Permanent Court of Arbitration to comment on the acceptability of the proposed paragraph if the words “where permitted by the relevant institution” were to be deleted.

40. **Ms. Kinnear** (International Centre for Settlement of Investment Disputes) said that her institution would be quite willing to apply the rules on transparency if the disputing parties so wished or if the home State and the respondent State had agreed to their application.

41. **Mr. Daly** (Permanent Court of Arbitration) said that there was nothing in the Court’s procedural

rules that would come into conflict with the draft rules on transparency in their current form. The Court would therefore have no problem in applying the rules in its arbitration proceedings.

42. **Mr. Loh Kong Yue** (Singapore) said he took it that the proposed new paragraph would not affect the principle of party autonomy.

43. **The Chairperson** said he took it that the Commission wished to adopt draft paragraph 9 proposed by the representative of the United States with the deletion of the words “where permitted by the relevant institution” and that it also wished to delete the words in square brackets in draft paragraph 2.

44. *It was so decided.*

45. **The Chairperson** drew attention to the proposal in paragraph 8 of document A/CN.9/783 to clarify in a second footnote to article 1 that a reference in the rules to a “Party to the treaty” or “State” applied equally to a regional economic integration organization.

46. **Ms. Kobayashi-Terada** (Japan) drew attention to her country’s comment in document A/CN.9/787/Add.1/Corr.1 in which it had proposed a revised version of the first footnote which ensured that the transparency rules also applied to international agreements to which Hong Kong and Macao were parties. If the second footnote were to be adopted, she proposed that a reference to “any territory authorized by a State to enter into treaties” should be added thereto.

47. **Ms. Liang Danni** (China) said that although China exercised sovereign authority over Hong Kong and Macao, the two territories were entitled, under constitutional law, to decide for themselves whether to apply the rules on transparency.

48. **Mr. Caplan** (United States of America), referring to the definition of a treaty in the Vienna Convention on the Law of Treaties, proposed wording in the first footnote such as “any agreement governed by international law concluded between or among parties to such treaties”.

49. **Mr. Brown** (European Union) said that if the proposed amendments implied the deletion of the second footnote, it should be recalled that the purpose of that footnote was to make it clear that

where the word “State” was used in the draft rules, the relevant provisions were also applicable to regional economic integration organizations and perhaps other non-State entities. He therefore felt that the second footnote should be retained.

50. **The Chairperson** suggested that the neutral wording along the lines of that proposed by the representative of the United States should be used in both footnotes. The precise wording could be submitted to the Commission after the consultation break that would shortly be announced.

51. *It was so agreed.*

52. **The Chairperson** drew attention to paragraph 9 of document A/CN.9/783 concerning subparagraph 3 (b) of draft article 1, which had been redrafted to provide some flexibility to the arbitral tribunal to adapt the rules should be circumstances of the proceedings so require. It had been suggested that the last phrase, “whilst not undermining the transparency objective of the Rules”, should be amended to read “whilst ensuring that the transparency objective of the Rules is achieved”.

53. **Mr. Spelliscy** (Canada) said that the purpose of the final phrase was to ensure that arbitral tribunals understood the extent of their powers. Canada had proposed the following wording in document A/CN.9/787/Add.1: “but only insofar as such adaptation is consistent with achieving the transparency objective of the Rules”.

54. **Mr. Caplan** (United States of America) proposed as alternative wording “whilst achieving the transparency objective of the Rules”.

55. **The Chairperson** said he took it that the Commission wished to adopt subparagraph 3 (b) as amended by the representative of the United States.

56. *It was so decided.*

57. **Mr. Caplan** (United States of America) said that the words “the home State of the investor” in subparagraph 2 (b) of draft article 1 were, in his view, somewhat inappropriate in the context of procedural rules or investment treaties. As they might give rise to jurisdictional objections, he proposed replacing “the home State of the investor and the respondent State” with “the relevant Parties”.

58. **Ms. Kaufmann-Kohler** (Switzerland) said that Working Group II had amended “the relevant Parties” for reasons that she could not now recall. She requested time to consider the matter during the consultation break.

59. *It was so agreed.*

60. **The Chairperson** invited the Commission to consider the most appropriate date for the entry into effect of the rules on transparency. The need to ensure translation into the six working languages should be taken into account. It would also be necessary to approach the Sixth Committee and the Fifth Committee of the General Assembly to ascertain whether the necessary funding could be obtained to enable UNCITRAL to serve as the repository of published information. He therefore suggested that a date in the first half of 2014 would be most appropriate.

61. **Mr. Spelliscy** (Canada) said he agreed that a date in early 2014 would be appropriate if the Commission decided to seek funding for a registry mandate. Otherwise an earlier date of entry into force might be conceivable.

62. **Mr. Apter** (Israel) proposed that, rather than fixing a date of entry into force, the Commission should envision the gradual entry into force of various provisions as soon as practicable. It could perhaps state in its recommendation on the application of the UNCITRAL rules on transparency that the rules pertaining to the registry would enter into force only after the registry was established.

63. **The Chairperson** suggested that the proposal by the representative of Israel should be discussed with the representatives of the various institutions prior to the adoption of the draft rules later that week. The situation with respect to extrabudgetary funding should also be clear at that point.

The meeting was suspended at 11.50 a.m. and resumed at 12.20 p.m.

64. **The Chairperson** said that the discussion of the footnotes to draft article 1, paragraph 1, would be deferred until the next meeting.

65. He invited the representative of Switzerland to present her proposal regarding subparagraph 2 (b).

66. **Ms. Kaufmann-Kohler** (Switzerland) proposed the following wording: “the Parties to the treaty or, in the case of a multilateral treaty, the State of the claimant and the respondent State”. A reference to “the relevant Parties” was unacceptable because it would then be unclear, for instance under the Energy Charter Treaty, whether the liable party was the European Union or the State that had taken a particular measure. A reference to the “home State of the investor” was also unacceptable because of the jurisdictional arguments to which it gave rise.

67. **The Chairperson** said he took it that the Commission wished to adopt subparagraph 2 (b) as amended by the representative of Switzerland.

68. *It was so decided.*

69. **The Chairperson** said that some members of the Commission had expressed reservations during

the consultation break regarding the amended version of subparagraph 3 (b). The decision on its adoption was therefore revoked and he invited the representative of Switzerland to submit an amendment on behalf of the members concerned.

70. **Ms. Kaufmann-Kohler** (Switzerland) proposed the following wording: “but only insofar as such adaptation is consistent with the transparency objectives of the Rules”. It was similar to that proposed by Canada, but the word “achieving” had been deleted.

71. **The Chairperson** said that the proposed amendment would be discussed at the next meeting.

The meeting rose at 12.30 p.m.

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration
(continued)

**Summary record of the 959th meeting, held at the Vienna International Centre, Vienna, on Monday,
8 July 2013, at 2 p.m.**

[A/CN.9/SR.959]

Acting Chairperson: Mr. Moollan (Chairperson of Working Group II) (Mauritius)

The meeting was called to order at 2.10 p.m.

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (continued)
(A/CN.9/760, 765, 783 and 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3)

Draft article 1 — Scope of application (continued)

1. **The Chairperson** reminded the Commission of the proposal by the representative of Switzerland to replace the phrase “whilst not undermining the transparency objective of the Rules” in draft article 1, subparagraph 3 (b), with the following phrase: “but only insofar as such adaptation is consistent with the transparency objectives of the Rules”. He noted that the representatives of Canada, France, Japan, Singapore, Thailand and the United States supported the proposed amendment. If he heard no objections, he would take it that the Commission wished to adopt the amendment.

2. *It was so decided.*

3. **Mr. Agrawal** (India) proposed, in addition, that the words “in consultation with the disputing parties” should be inserted after “the arbitral tribunal” at the beginning of the subparagraph.

4. **Ms. Kaufmann-Kohler** (Switzerland) said that it would be preferable to add those words elsewhere in the subparagraph, since it would be inappropriate to state that the arbitral tribunal, in consultation with the disputing parties, “shall have the power” to take certain measures. It would also be advisable to check whether the reference to consultation with the disputing parties was inserted in all contexts. If it was only inserted in some cases, it might send out the wrong message.

5. **The Chairperson** suggested that the secretariat should check that important point of consistency prior to the next meeting.

6. **Mr. Apter** (Israel) proposed inserting an article to the effect that where the arbitral tribunal enjoyed discretionary authority, it should invariably consult the disputing parties when applying the rules on transparency.

7. **The Chairperson** said that a decision could also be taken on that point at the next meeting.

8. The other outstanding issue to be decided with respect to draft article 1 concerned the footnotes to paragraph 1. Draft article 1 as a whole could then be adopted.

Draft article 2 — Publication of information at the commencement of arbitral proceedings

9. **The Chairperson** drew attention to a comment on draft article 2 by Japan in document A/CN.9/787/Add.1. Japan pointed out that the current draft failed to deal with a situation in which a disputing party, normally the respondent, contested the applicability of the rules on transparency. It asked whether the issue would be dealt with in guidelines for the repository.

10. **Ms. Kobayashi-Terada** (Japan) proposed either addressing the issue in the repository’s guidelines or inserting the following new paragraph in the rules: “In the event of a dispute as to whether the Rules on Transparency apply to the arbitration at issue, the repository shall make available to the public the aforementioned information after the arbitral tribunal decides that the Rules of Transparency shall apply.”

11. **The Chairperson** said that the Commission needed to take a decision of principle regarding what kind of information should be made public and

at what stage in the proceedings. It was essential to strike a balance between draft article 2 and draft article 3 concerning the publication of documents. There were two possible solutions to disputes of jurisdiction arising under draft article 2. One could either conclude that the information was so limited that it was of no great importance. So long as the registry received what purported to be a notice of arbitration stating that the rules on transparency were applicable, it could proceed with publication of that information. The alternative was to proceed as suggested in the new paragraph proposed by Japan, requiring the arbitral tribunal to take a decision on the matter. However, respondents would then be accorded a unilateral right to delay the publication of information until the tribunal was in place.

12. He asked the International Centre for Settlement of Investment Disputes (ICSID) how it proceeded in such circumstances.

13. **Ms. Kinnear** (International Centre for Settlement of Investment Disputes) said that ICSID was required to post what might be termed benchmark data, such as the names of disputing parties, on its website, but only once the case had been registered. However, a case was registered only when it was not manifestly outside the jurisdiction of ICSID. Hence a test was already built into the ICSID rules. If the case was registered, there might still be disputes regarding jurisdiction, nationality and other matters, but all the relevant information would nonetheless be posted on the website.

14. **The Chairperson** noted that there was thus a limited safety valve in the case of ICSID.

15. **Mr. Daly** (Permanent Court of Arbitration) said that the role of the Secretary-General of the Permanent Court of Arbitration in the designation of appointing authorities constituted a safety valve under the UNCITRAL regime. Most investor-State treaties did not provide for an appointing authority. If parties were unable to agree on an authority when a dispute arose, they requested the Secretary-General to designate an appointing authority. However, States might object to any such action by the Court in response to some requests by investors. They might claim that the arbitration had been improperly instituted and that there were jurisdictional issues. The Court could then conduct a *prima facie* review of the documents submitted and

decide how to proceed. Where there was no basis for jurisdiction, the case would be suspended and no tribunal would be constituted.

16. Under the current proposal regarding the rules on transparency, a limited amount of information would be published before an arbitral tribunal was constituted and where there was no *prima facie* evidence of an arbitration agreement. Some States would be likely, in his view, to object to that procedure. In a letter to the secretariat of the Commission dated 29 May 2013, the Court had warned against the potential for frivolous and abusive claims and proposed the insertion of the following text in draft article 2: “The repository may refer any question regarding the publication of information required by article 2 to the arbitral tribunal once constituted.”

17. **The Chairperson** said that the repository would presumably only take such discretionary action when it had serious doubts about the publication procedure.

18. **Ms. Kaufmann-Kohler** (Switzerland) cautioned against rendering matters unduly complicated. It had been decided in the light of a previous discussion of the issue to restrict the material that would automatically be published by the registry at the beginning of an arbitration procedure to the names of the parties, the sectors involved and the relevant treaty. Hence, no discretionary action by the registry was required. More sensitive information would be published only after the arbitral tribunal had been constituted.

19. **Ms. Kobayashi-Terada** (Japan) said that she broadly agreed with the representative of Switzerland. However, as there might be cases where parties contested the applicability of the rules on transparency, it might be helpful to produce guidelines for the registry, or to incorporate the text proposed by the representative of the Permanent Court of Arbitration in draft article 2. Her delegation’s position in that regard remained flexible.

20. **The Chairperson** suggested that the Commission’s understanding of how the registry was supposed to work, namely without exercising its discretion at the commencement of arbitral proceedings, should be recorded in the drafting

history. Any allegations that it had acted *ultra vires* could be dealt with under a waiver of liability clause. If he heard no objections, he would take it that the Commission wished to adopt draft article 2 as it stood.

21. *Article 2 was adopted.*

Draft article 3 — Publication of documents

22. **The Chairperson** drew attention to paragraph 15 of document A/CN.9/783, in which the Commission was invited to decide whether the last sentence of paragraph 2, in square brackets, should be retained in the text. The sentence in question read: “This may include, for example, making such documents available at a specified site.”

23. **Mr. Spelliscy** (Canada) said that the sentence was unnecessary in legal terms, since it merely provided an example of how documents might be made available. However, the example might offer the arbitral tribunal some guidance as to how exhibits and documents that were not covered by paragraphs 1 and 2 of the article might be made public.

24. **Ms. Escobar** (El Salvador) proposed that the sentence should be included in a footnote rather than in the text of paragraph 3.

25. **The Chairperson** said that it was not the drafting practice to insert footnotes to substantive rules. If he heard no objection, he would take it that the Commission wished to remove the square brackets and retain the sentence in paragraph 3.

26. *It was so decided.*

27. **The Chairperson** drew attention to paragraph 16 of document A/CN.9/783, in which the Commission was invited to consider whether the words “ancillary to the costs of making those documents available to the public” in paragraph 5 of draft article 3 made it sufficiently clear that third parties would not be required to cover administrative costs relating to publication, such as uploading documents to the registry website.

28. **Ms. Escobar** (El Salvador), referring to her country’s comments in document A/CN.9/787/Add.1, proposed that the following text should be inserted after “available to the public”: “such as the cost of photocopying or shipping documents, but not

administrative costs relating to publication, such as uploading documents onto the registry website”.

29. **Mr. Brown** (European Union) proposed replacing “available to the public” with “available to that person” and replacing “administrative costs relating to publication” in the version proposed by the representative of El Salvador with “administrative costs relating to making the documents available to the public”.

30. **Mr. Spelliscy** (Canada) supported the first amendment proposed by the representative of the European Union. He proposed amending the last phrase to read: “administrative costs relating to making the documents available to the public through the registry”.

31. **Mr. Brown** (European Union) said that “repository” would be preferable to “registry”.

32. **The Chairperson** suggested that the words “to that person” should be retained after “photocopying or shipping documents”.

33. **Ms. Kaufmann-Kohler** (Switzerland) proposed to simplify the text by stating “shall bear the cost of making those documents available to that person” and deleting “any administrative costs ancillary to”.

34. **Mr. Spelliscy** (Canada) said that the term “administrative costs” had been used in order to exclude costs relating, for instance, to lawyer time spent reviewing documents for redactions.

35. **Mr. Lavranos** (Observer for the Netherlands), **Mr. Möller** (Observer for Finland) and **Mr. Caplan** (United States of America) expressed support for the proposal by the representative of Switzerland, but with the retention of the word “administrative”.

36. **Mr. Jacquet** (France) expressed reservations about the implication that costs should automatically be borne by the person referred to in paragraph 5. It might be simpler and more consistent with the spirit of the text if the words “shall bear” certain costs were replaced with “shall bear only” the costs in question.

37. **The Chairperson** drew attention to the amendment proposed by the United States in document A/CN.9/787 and its comment that the

reference to paragraph 2 in paragraph 5 should be deleted.

38. **Mr. Caplan** (United States of America) said that publication by the registry pursuant to paragraph 2 was automatic. It was only in the case of paragraph 3 that the registry had discretion to grant an individual access to certain materials.

39. **The Chairperson** noted that documents were automatically communicated under paragraphs 1 and 2. Paragraph 4 indicated how that occurred, namely by means of communication by the arbitral tribunal through the repository. The repository would then publish the documents, presumably on its website. Paragraph 3 fell into a different category, since it referred to discretionary action by the arbitral tribunal, including whether and how the material should be made available. The tribunal might decide to do so through the repository or, for instance, at a specified site. At all events, he felt that the reference to paragraph 2 should be deleted from paragraph 5.

40. He read out the text of paragraph 5, as amended: "A person, who is not a disputing party, granted access to documents under paragraph 3, shall bear any administrative costs of making those documents available to that person, such as the cost of photocopying or shipping documents to that person, but not administrative costs relating to making the documents available to the public through the repository."

41. **Mr. Apter** (Israel) said that the meaning of the first reference to "administrative costs" was unclear. If a third party wished to have access to such documents, it should normally bear the costs of having the documents made available, even though they were not specifically administrative. However, investors were sometimes small companies and the imposition of additional costs might cause problems. If the word "administrative" were to be deleted, the arbitral tribunal would have more room for manoeuvre. He therefore supported the wording proposed by the representative of Switzerland.

42. **The Chairperson** said that the deletion of the word "administrative" would constitute a substantive amendment. There had been a great deal of in-depth discussion of the matter.

43. **Mr. Loh Kong Yue** (Singapore) expressed concern about the cost implications of publication of

such documents. For example, in the case of *Cargill, Incorporated v. United Mexican States*, the parties had taken 17 months to agree on the redaction of the final arbitral award. Singapore took the view that the rules on transparency must strike a balance between different interests: those of States, investors and civil society. He understood from informal consultations with practitioners that the rules could increase arbitration costs relating to legal advice on redaction by 20 to 50 per cent.

44. **The Chairperson** said that the same point had been made by several delegations during previous discussions. That was why it had been decided to include in draft article 3, paragraphs 1 and 2, an automatic rule of publication for a narrow class of documents and to deal in paragraph 3 with wider publication of exhibits in respect of which the potential for disruption of the proceedings was greater. It had also been decided that the arbitral tribunal should be permitted to exercise its discretion in that regard. Moreover, draft article 1, paragraph 4, required the tribunal to balance the interests of the public and the disputing parties and to guarantee the right to fair resolution of the dispute.

45. **Mr. Loh Kong Yue** (Singapore) requested members of the Commission who had experience in arbitration proceedings to comment on the volume of documents that might fall within the scope of paragraph 2.

46. **The Chairperson** said that in relatively substantial arbitration proceedings the average volume of documents would run to a few hundred pages. A typical witness statement was 40 to 50 pages long and a detailed expert report could be 50 to 100 pages long. There would be five or six of each in a typical memorial. As exhibits could be extremely voluminous, the arbitral tribunal should be in a position to exercise its discretion as to whether and how they should be made available, especially if their publication would entail a major delay in the proceedings.

47. If he heard no objections, he would take it that the Commission wished to adopt draft article 3, as amended.

48. *Article 3 was adopted.*

Draft article 4 — Submission by a third person

49. **The Chairperson** invited comments on draft article 4.

50. **Mr. Caplan** (United States of America) proposed that the words “as may be” after the words “page limits” in the chapeau of paragraph 2 should be deleted. They implied that the arbitral tribunal could not set page limits until after the first procedural order.

51. The United States also had reservations concerning the reference to funding of “around 20 per cent” at the end of subparagraph 2 (c). With a view to indicating that the reference to such a percentage was merely illustrative, it proposed the following alternative wording: “by the third person under this article (e.g. funding around 20 per cent of its overall operations annually)”.

52. **The Chairperson** suggested that the word “such” in the chapeau of paragraph 2 should also be deleted. The amended phrase would then read: “and complies with any page limits set by the arbitral tribunal”.

53. *It was so agreed.*

54. **The Chairperson** said that, if he heard no objections, he would take it that the Commission also supported the second amendment proposed by the representative of the United States.

55. *It was so agreed.*

56. *Article 4, as amended, was adopted.*

The meeting was suspended at 3.25 p.m. and resumed at 3.55 p.m.

57. **The Chairperson** invited the Commission to resume its consideration of the footnotes to draft article 1.

58. **Mr. Caplan** (United States of America) proposed replacing the words “any agreement concluded between or among States or regional economic integration organizations, including free trade agreements” with “any treaty, including those referred to as free trade agreements”.

59. He further proposed the following amended version of the second footnote: “For the purpose of the Rules on Transparency, any reference to a ‘Party

to the treaty’ or a ‘State’ includes, for example, a regional economic integration organization where it is a Party to the treaty.”

60. **Mr. Brown** (European Union) said that his delegation required time to confirm that the new wording was acceptable.

61. **Ms. Pólit** (Ecuador), referring to the first footnote, said that it was unclear whether the word “treaty”, although it was a generic term, covered all types of agreements and conventions.

62. **The Chairperson** proposed rewording the first footnote to read: “For the purpose of the Rules on Transparency, a ‘treaty providing for the protection of investments or investors’ shall be understood broadly as encompassing any bilateral or multilateral treaty that contains provisions on the protection of investments or investors and a right for investors to resort to arbitration against Parties to the treaty, including those commonly referred to as free trade agreements, economic integration agreements, trade and investment framework or cooperation agreements, and bilateral investment treaties.”

63. **Ms. Pólit** (Ecuador) said that the footnote referred to a treaty providing for the protection of investments or investors. She enquired about the situation of countries that were recipients of investments.

64. **The Chairperson** said that the purpose of the footnote was merely to specify the scope of the rules. The representative of Ecuador had raised a valid substantive issue that should be addressed by the relevant tribunal.

65. **Ms. Kaufmann-Kohler** (Switzerland), noting that the term “treaty” was defined in draft article 1, paragraph 1, as a treaty providing for the protection of investments or investors, emphasized the importance of using the term consistently throughout the rules.

66. **The Chairperson** said that if he heard no objection, he would take it that the Commission wished to adopt the first and second footnotes, as amended.

67. *It was so agreed.*

Draft article 5 — Submission by a non-disputing Party to the treaty

68. **The Chairperson** drew attention to paragraph 20 of document A/CN.9/783, which stated that the Working Group had agreed that the arbitral tribunal should accept submissions on treaty interpretation by a non-disputing Party to the treaty, provided that such submissions would not disrupt or unduly burden the arbitral proceedings or unfairly prejudice any disputing party.

69. **Mr. Spelliscy** (Canada), referring to the use of the word “accept” in draft article 5, paragraphs 1 and 2, noted that the word “allow” was used in a similar context in article 4. His delegation proposed using the same term in draft article 5 to ensure consistency.

70. *It was so agreed.*

71. **Mr. Lee Jae Min** (Republic of Korea), noting that the words “any submission” were used in draft article 5, paragraphs 4 and 5, whereas the words “the submission” were used in article 4, paragraphs 5 and 6, proposed that the words “any submission” should be used in both articles.

72. *It was so agreed.*

73. **Mr. Caplan** (United States of America) proposed replacing the phrase “In exercising its discretion to allow such submissions” in the second sentence of paragraph 2 of draft article 5 with “In determining whether to allow such submissions” in order to ensure consistency with the wording of article 4, paragraph 3.

74. **The Chairperson** suggested that it would be preferable to align the wording of article 4 with draft article 5, since it would then be clear in both cases that the provisions of article 1, paragraph 4, were being invoked.

75. **Mr. Magraw** (Center for International Environmental Law) said that the words “In determining whether to allow” had been used in article 4 because paragraph 3 of that article listed several specific criteria that were not contained in article 1. He therefore considered that the original wording should be maintained.

76. **Mr. Kordač** (Observer for the Czech Republic) expressed support for the maintenance of the original wording of article 4.

77. **Mr. Caplan** (United States of America) requested that a decision on the matter should be deferred until the next meeting.

78. *It was so agreed.*

79. **Mr. Loh Kong Yue** (Singapore) said that although certain safeguards were built into draft article 5, his delegation considered that the wording failed to achieve the desired balance. In particular, if non-disputing Parties to a treaty were allowed to intervene on issues other than treaty interpretation, a State might be required to respond not only to claims brought by investors but also to the exercise of diplomatic protection.

80. **Ms. Esnarriaga Arantes Barbosa** (Brazil), **Ms. Le Duc Hanh** (Observer for Viet Nam) and **Mr. Yuprasert** (Thailand) expressed support for the comment made by the representative of Singapore.

81. **Ms. Pólit** (Ecuador) also expressed support for the comment made by the representative of Singapore. She added that draft article 5 failed to guarantee the desired balance between investors and State recipients of investments.

82. **Mr. Hirsch** (Argentina), expressing support for the comment made by the representative of Singapore, requested further time to consider that aspect of draft article 5.

83. *It was so agreed.*

Draft article 6 — Hearings

84. **The Chairperson** drew attention to the comment in paragraph 22 of document A/CN.9/783 that the Working Group had expressed formal and unanimous support for the revised compromise proposal, which included draft article 6.

85. **Mr. Lebedev** (Russian Federation) noted that, according to draft article 6, paragraph 1, hearings for the presentation of evidence or for oral argument would be public, subject to the provisions of paragraphs 2 and 3. The question arose, however, whether hearings could be closed where both disputing parties so agreed. He wished to have

confirmation that the draft article, as currently worded, did not preclude that possibility.

86. **The Chairperson** said that the possibility had been discussed at length and dismissed as part of the compromise solution. In that connection, he drew attention to article 1, subparagraph 3 (a), which stated that the disputing parties could not derogate from the rules, by agreement or otherwise, unless permitted to do so by the treaty.

87. **Mr. Lebedev** (Russian Federation) requested that, to avoid ambiguity, that understanding should be reflected in the Commission's report.

88. *It was so agreed.*

89. *Article 6 was adopted.*

The meeting rose at 4.55 p.m

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration
(continued)

Summary record of the 960th meeting, held at the Vienna International Centre, Vienna, on Tuesday, 9 July 2013, at 9.30 a.m.

[A/CN.9/SR.960]

Acting Chairperson: Mr. Moollan (Chairperson of Working Group II) (Mauritius)

The meeting was called to order at 9.50 a.m.

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (continued)
(A/CN.9/760, 765, 783 and 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3)

Draft article 1 — Scope of application (continued)

1. **The Chairperson** noted that there had been a proposal to insert the words “in consultation with the disputing parties” in draft article 1, paragraph 3 (b). The secretariat had confirmed that, as a matter of principle, the phrase had been included in the draft rules on transparency wherever it was deemed to be appropriate. He therefore suggested that it should be inserted after the words “the particular circumstances of the case”.

2. *It was so decided.*

3. **The Chairperson** said that the Drafting Group had suggested that the amended wording of the last phrase of paragraph 3 (b) should be modified slightly to read: “and is consistent with the transparency objectives of the Rules”.

4. *It was so decided.*

5. **The Chairperson**, referring to draft article 1, paragraph 9, and responding to a comment by the secretariat, suggested that the words “arbitrations initiated under other arbitration rules” should be amended to read “arbitrations initiated under rules other than the UNCITRAL Arbitration Rules”.

6. *It was so decided.*

7. **The Chairperson** noted that a subtitle should be inserted before paragraph 9.

8. **Ms. Kaufmann-Kohler** (Switzerland) proposed “*Application in non-UNCITRAL arbitrations*”.

9. *It was so decided.*

10. **The Chairperson** noted that the delegation of Switzerland also wished to propose an amendment to the first footnote to paragraph 1.

11. **Mr. Schöll** (Switzerland) proposed that the words “providing for the protection of investments or investors” should be deleted both in paragraph 1 and in the first footnote to the paragraph because a reference to such protection was already contained further down in footnote 1.

12. **Mr. Apter** (Israel) emphasized the importance of stating clearly within the rules themselves rather than in a footnote that the term “treaty” denoted any treaty providing for the protection of investments or investors.

13. **The Chairperson** expressed support for that view. The secretariat had suggested that the phrase in question should only be deleted from the footnote and that the asterisk should be placed after “(treaty)” in paragraph 1.

14. *It was so decided.*

15. *Article 1, as amended, was adopted.*

*Article 4 — Submission by a third person;
draft article 5 — Submission by a non-disputing
Party to the treaty (continued)*

16. **The Chairperson**, referring to the discussion at the previous meeting as to whether consistent language should be used in article 4, paragraph 3, which contained the phrase “In determining whether

to allow such a submission”, and draft article 5, paragraph 2, which contained the phrase “In exercising its discretion to accept such submissions”, said that the difference in wording was deliberate, since the reference in the former case was not to the general exercise of discretion by the arbitral tribunal. He therefore suggested that the wording of article 4, paragraph 3, should remain unchanged.

17. *It was so decided.*

18. **The Chairperson** further suggested that the wording of draft article 5, paragraph 2, should remain unchanged but that the Commission’s report should note that concern had repeatedly been expressed during the discussions of Working Group II and the Commission that the provision could potentially open the door to diplomatic protection and state explicitly that that was not its intention. The Commission might also invite arbitral tribunals called upon to exercise their discretion under draft article 5, paragraph 2, to bear that in mind. He deferred further discussion of the matter until the next meeting.

Draft article 7 — Exceptions to transparency

19. **The Chairperson** said that draft article 7 had been included in the revised compromise proposal for which Working Group II had expressed formal and unanimous support.

20. He invited comments on the drafting matters set forth in paragraph 25 of document A/CN.9/783.

21. **Mr. Spelliscy** (Canada) said he understood that the words “or to non-disputing Parties” had been inserted in paragraph 5 in the interests of consistency with earlier paragraphs. He would actually prefer to delete those words from paragraphs 1 and 3 because no distinction had been made in earlier articles between the public and the non-disputing Parties to a treaty.

22. **The Chairperson** said that the distinction had been made because articles 4 and 5 dealt separately with non-disputing Parties to a treaty and third persons. However, he agreed that in articles 2 and 3 the term “the public” encompassed non-disputing Parties. That could be made clear in the Commission’s report.

23. **Mr. Apter** (Israel) expressed support for the proposal by the representative of Canada and

emphasized the need to state clearly, perhaps in a footnote, that the term “the public” encompassed non-disputing Parties.

24. **The Chairperson** suggested that a footnote should be inserted the first time that the term “the public” was used in order to make it clear that the term covered both “third persons” and “non-disputing Parties”.

25. **Mr. Brown** (European Union) said that there was a requirement in the treaty practice applicable in some countries for the provision of information to a non-disputing Party to a treaty. The insertion of the proposed footnote might prove confusing in such situations.

26. **The Chairperson** said that the failure to include an explanatory footnote in the rules might also prove confusing.

27. **Ms. Pólit** (Ecuador) said that a distinction should be made in legal terms between the term “the public”, which designated any person, and a “third person” or *amicus curiae*, which designated a person who had a specific interest in a case before the arbitral tribunal.

28. **The Chairperson** drew attention to article 4, paragraph 1, which used the term “third person” to refer to a whole category of persons who might have such an interest. A limited number of persons within that category might have a significant interest and hence qualify as an *amicus curiae*. In addition, non-disputing Parties to a treaty were covered by draft article 5.

29. **Mr. Kordač** (Observer for the Czech Republic) said that the issue raised by the representative of the European Union was addressed in article 1, paragraph 7, which dealt with conflicts between the rules on transparency and the applicable arbitration rules.

30. His delegation considered that the scope of the term “the public” should be clarified in a footnote to the rules rather than in the Commission’s report.

31. **Mr. Lavranos** (Observer for the Netherlands), **Mr. Möller** (Observer for Finland) and **Mr. Popkov** (Belarus) said that the references to the public and non-disputing Parties in draft article 7 as it stood were sufficiently clear and should not be amended.

32. **The Chairperson** said that, according to the secretariat, the Commission's practice was to deal with such matters in the report rather than inserting a footnote in the text under discussion.

33. **Mr. Apter** (Israel) said that there was a consensus on the substantive point that the term "the public" encompassed non-disputing Parties and third persons. However, the inconsistency of the wording used in the different articles could give rise to a range of interpretation issues. As there were two footnotes to article 1, he failed to see why it was not possible to insert an additional footnote to clarify such an important point.

34. **Mr. Räftegård** (Observer for Sweden) said that a footnote stating that the term "the public" encompassed non-disputing States Parties might give readers the impression that non-States parties were not covered by the term.

35. **The Chairperson** said that, if he heard no objection, he would take it that Commission agreed to clarify all aspects of the issue in its report.

36. *It was so decided.*

37. **Mr. Kordač** (Observer for the Czech Republic) said that some entities that had been permitted pursuant to article 4 to file submissions as third persons might claim that they were now participants in the proceedings and should have access to all documents. He wondered whether the rights of such entities under the rules were crystal clear.

38. **The Chairperson** said that, in his view, there was no ambiguity in the rules regarding their rights.

39. **Mr. Cachapuz de Medeiros** (Brazil) expressed reservations regarding the provisions in article 7 for exceptions to transparency for what was termed "confidential information". Brazil had enacted a law in which the category of confidential information had been abolished.

40. **The Chairperson** pointed out that the article concerned reservations regarding both confidential and protected information.

41. **Mr. Lee Jae Min** (Republic of Korea) noted that the phrase "in consultation with the disputing parties" was used in paragraph 3 and had also just been inserted in article 1, paragraph 3 (b). Elsewhere, however, including in the last sentence

of draft article 7, paragraph 3, the wording "after consultation with the disputing parties" was used. Yet another version was used in paragraph 7: "after consultation with the disputing parties where practicable".

42. **The Chairperson** said that the words "in consultation" should be amended to read "after consultation" in all cases. The addition of the words "where practicable" in paragraph 7 was deliberate in order to cover the rare circumstance in which the arbitral tribunal, on its own initiative, took measures to restrain or delay the publication of information.

43. **Mr. Agrawal** (India) proposed amending the phrase "which it considers to be contrary to its essential security interests" in draft article 7, paragraph 5, to read "which it considers to be contrary to its public interest or its essential security interests". The term "public interest" was widely used and well understood in India and many other jurisdictions, while the term "essential security interests" was narrower in scope.

44. **The Chairperson** said that paragraph 5 had been discussed at great length. The proposed amendment was substantive and he noted that the Commission was unwilling to reopen the debate.

45. **Mr. Klippstein** (Germany) proposed moving the sentence at the end of paragraph 3 concerning the determination by the arbitral tribunal as to whether information was confidential or protected to the beginning of the paragraph. The tribunal should make the determination before deciding on how to prevent the relevant information from being made available to the public or to non-disputing Parties.

46. **Ms. Perales Viscasillas** (Spain) and **Mr. Brown** (European Union) expressed support for the proposal.

47. **Mr. Jacquet** (France) said that the chapeau of paragraph 3 presupposed that there was no disagreement as to whether certain information was confidential or protected. The purpose of the final sentence, on the other hand, was to address a specific problem, namely where the disputing parties disagreed on whether the information was confidential or protected. His delegation would therefore prefer to leave the paragraph unchanged.

48. **The Chairperson** noted that the members of the Commission, including the representative of Germany, were convinced by that explanation.

49. If he heard no objection, he would take it that the Commission wished to adopt draft article 7, as amended.

50. *Article 7 was adopted.*

The meeting was suspended at 10.50 a.m. and resumed at 11.10 a.m.

Draft amendment to article 1 of the UNCITRAL Arbitration Rules

51. **The Chairperson** said that the scope of application of the rules on transparency set forth in article 1 required an amendment to article 1 of the UNCITRAL Arbitration Rules in order to forge a link with the rules on transparency. The proposed wording of a new paragraph 4 to be added to article 1 of the UNCITRAL Arbitration Rules was contained in paragraph 29 of document A/CN.9/783.

52. The first issue to be discussed was whether the rules of transparency should be included as an appendix to the UNCITRAL Arbitration Rules. As the Commission had agreed that there was a link between the two sets of rules, but only for future treaties, it seemed reasonable that when the 2014 version of the UNCITRAL Arbitration Rules was issued, it should be accompanied, for the benefit of users, by the rules on transparency in the form of an appendix or in some other form. The form that was adopted should not, as a matter of principle, discourage the use of the rules of transparency in other contexts, for instance in conjunction with other institutional rules, in existing proceedings under the UNCITRAL Arbitration Rules or under future proceedings under existing treaties. In his view, the rules on transparency should be made available in the same document as the 2014 UNCITRAL Arbitration Rules but should not be referred to as an appendix. The rules on transparency should also be published separately.

53. **Mr. Cachapuz de Medeiros** (Brazil) said that the rules on transparency should be a stand-alone instrument and should not form part of the UNCITRAL Arbitration Rules.

54. **Mr. Popkov** (Belarus) said that he had no objection to the amendment to article 1 of the UNCITRAL Arbitration Rules and the inclusion of the rules on transparency in the same document as the 2014 Arbitration Rules. However, he agreed with the representative of Brazil that the rules on transparency should be a stand-alone instrument.

55. **Ms. Liang Danni** (China), **Ms. Szymanska** (Observer for Poland) and **Mr. Apter** (Israel) said that they also supported the proposal by the representative of Brazil.

56. **Ms. Kobayashi-Terada** (Japan) asked whether the two sets of rules would be available both together and separately on the website of the repository.

57. **The Chairperson** proposed that there should be a hyperlink in article 1, paragraph 4, of the UNCITRAL Arbitration Rules that would take the reader to the rules on transparency.

58. **Mr. Lebedev** (Russian Federation) said that, in his view, the current wording failed to clarify the status of the rules on transparency, which was certainly that of a stand-alone instrument. There was still a certain amount of ambiguity, especially since the rules on transparency would be published in conjunction with the UNCITRAL Arbitration Rules. He asked whether the 2010 UNCITRAL Arbitration Rules would remain in existence or whether they would be replaced by the 2013 version.

59. **The Chairperson** said that the status of the rules on transparency was set out unambiguously in article 1, particularly in the phrase “unless the Parties to the treaty have agreed otherwise”. It followed that an amendment to article 1 of the UNCITRAL Arbitration Rules was required. He drew attention in that connection to the compromise solution referred to in paragraphs 79 and 80 of the report of Working Group II (A/CN.9/765).

60. With regard to the status of the 2010 UNCITRAL Arbitration Rules, he drew attention to paragraph 31 of the report on the settlement of commercial disputes (A/CN.9/783), which stated that: “A reference to the UNCITRAL Arbitration Rules as adopted in 1976, or as revised in 2010, in a treaty concluded after the coming into force of the rules on transparency would have the effect of

precluding the application of the rules on transparency.”

61. **Mr. Lebedev** (Russian Federation) said that the documents cited by the Chairperson were a Working Group report and a note by the secretariat. Referring to paragraph 34 of document A/CN.9/783, he said that the Commission was now required to take a formal decision as to whether the rules on transparency would be a stand-alone instrument. His delegation was still unconvinced of the clarity of their status, but if other delegations had no doubts about the matter, it would join in the consensus.

62. **Ms. Kaufmann-Kohler** (Switzerland) expressed support for the points made by the Chairperson. As the rules on transparency were clearly a stand-alone instrument, it was preferable, as a matter of good faith and to avoid giving a false impression, not to include them as an appendix.

63. **Ms. Perales Viscasillas** (Spain) emphasized the importance of ensuring that the visual format of the publication containing the rules on transparency did not create confusion among users and the general public. Although the rules on transparency were

stand-alone rules, they should obviously be referred to in the UNCITRAL Arbitration Rules. The fact that the latter Rules were applied for the most part in commercial disputes, whereas the rules on transparency would be applied in investment-related disputes, should be highlighted.

64. **Mr. Sorieul** (Secretary of the Commission) said that it was also important to emphasize the autonomy of the UNCITRAL Arbitration Rules and to avoid what might be termed “contamination” by the rules on transparency.

65. **Mr. Jacquet** (France) said that the rules on transparency served a dual purpose. Their use in UNCITRAL arbitration contexts was reflected in article 1, which regulated their scope in relation to the UNCITRAL Arbitration Rules. As stand-alone rules, they were used as a matter of choice by parties to a dispute outside the context of the UNCITRAL Arbitration Rules. It was important to highlight that distinction and to avoid using terminology that was inconsistent with that aim.

66. **The Chairperson** said he took it that the Commission wished to instruct the secretariat to

publish the rules of transparency both in conjunction with the UNCITRAL Arbitration Rules and as a stand-alone document accessible to the general public.

67. *It was so decided.*

68. **Mr. Agrawal** (India) expressed reservations about the use of the word “include” in the phrase “these Rules include the UNCITRAL Rules on Transparency” in proposed new article 1, paragraph 4, of the UNCITRAL Arbitration Rules, even though it was clear from article 1 of the rules on transparency that an opt-out provision was applicable. He proposed as alternative wording: “the UNCITRAL Rules on Transparency shall supplement the UNCITRAL Arbitration Rules”.

69. **Mr. Apter** (Israel) proposed that the words in square brackets “as amended from time to time” after “the UNCITRAL Rules on Transparency” in draft paragraph 4 should be deleted. He also proposed that when the rules on transparency were published, the date should be added to the title, for example UNCITRAL Rules on Transparency 2013, since an amended version might be adopted in due course.

70. **The Chairperson**, referring to the new title adopted when the 1996 Model Law on Electronic Commerce with Guide to Enactment was republished, suggested that the phrase “with revised article 1, paragraph 4, as adopted in 2014” should be added to the title of the UNCITRAL Arbitration Rules.

71. **Ms. Kaufmann-Kohler** (Switzerland) proposed that the title of the rules on transparency should read: “UNCITRAL Rules on Transparency for Treaty-based Investor-State Arbitration”.

72. **The Chairperson** said that he would give the Commission time to reflect on the question of the titles.

73. He invited comments on the proposal to delete the words “as amended from time to time” in square brackets after “the UNCITRAL Rules on Transparency”.

74. **Mr. Lavranos** (Observer for the Netherlands) proposed replacing them with “in effect on the date of commencement of the arbitration”.

75. **Mr. Lawalata** (Indonesia) enquired about the implications for treaties of the wording proposed by the representative of the Netherlands.

76. **The Chairperson** said that if the parties to a treaty concluded in 2016, for example, decided to apply the 2014 UNCITRAL Arbitration Rules incorporating the wording “in effect on the date of commencement of the arbitration” and the rules on transparency were amended in 2020, a dispute initiated in 2025 would entail the application of the amended version of the rules. Similar principles were currently applicable to most arbitration agreements.

77. **Ms. Kaufmann-Kohler** (Switzerland) said that the 2010 UNCITRAL Arbitration Rules were based on the presumption that they would be applicable at the time of commencement of arbitration proceedings. She understood that the wording proposed by the representative of the Netherlands did not entail such a presumption.

78. **Mr. Lavranos** (Observer for the Netherlands) said that it would perhaps be advisable to include a transitional provision that would be applicable to all arbitrations that did not fall under the regime established by article 1, paragraph 4, of the new version of the UNCITRAL Arbitration Rules. The transitional provision might be based on article 1, paragraph 2, of the 2010 Arbitration Rules.

79. **The Chairperson** suggested that such a provision might be included in article 1 of the rules on transparency.

80. **Ms. Rennie** (United Kingdom) requested that a decision on the matter should be deferred until the next meeting.

81. **The Chairperson** drew attention to paragraph 36 of document A/CN.9/783, in which the Commission was requested to consider whether a footnote mirroring the first footnote to article 1 of the rules on transparency should be included as a footnote to article 1, paragraph 4, of the UNCITRAL Arbitration Rules.

82. If he heard no expression of support, he would take it that the Commission wished to reject the suggestion.

83. *It was so decided.*

The meeting rose at 12.25 p.m.

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration
(continued)

Summary record of the 961st meeting, held at the Vienna International Centre, Vienna, on Tuesday, 9 July 2013, at 2 p.m.

[A/CN.9/SR.961]

Acting Chairperson: Mr. Moollan (Chairperson of Working Group II) (Mauritius)

Later: Vice-Chairperson: Mr. Moollan (Vice-Chairperson) (Mauritius)

The meeting was called to order at 2.20 p.m.

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (continued)

(A/CN.9/760, 765, 783 and 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3)

Draft article 5 — Submission by a non-disputing Party to the treaty (continued)

1. **The Chairperson** said that some members of the Commission supported adopting draft article 5, paragraph 2, as it stood, while clarifying in the report that the wording was not intended to permit the exercise of diplomatic protection. Other members wished either to address that point in the paragraph itself or else to delete the paragraph altogether.

2. It had been proposed, as a compromise solution, to insert a comma at the end of the second sentence and to add the following words: “and the need to avoid submissions by a non-disputing Party which would support the claim of the investor in a manner which would be tantamount to diplomatic protection”.

3. **Mr. Brown** (European Union) said that the current version of paragraph 2 referred to article 4, paragraph 3, which listed factors that the arbitral tribunal should take into account when deciding whether to accept a submission. He asked whether the diplomatic protection factor mentioned in the amended version was an additional factor to be taken into account.

4. **The Chairperson** said that it was an additional but quite separate factor.

5. **Mr. Caplan** (United States of America) and **Mr. Galindo** (Ecuador) asked for time to consider the proposal.

6. **The Chairperson** said that a decision could be taken after the consultation break.

Draft amendment to article 1 of the UNCITRAL Arbitration Rules (continued)

7. **The Chairperson** reminded the Commission of the two alternative proposals to amend proposed new article 1, paragraph 4, of the UNCITRAL Arbitration Rules. The first was to remove the square brackets from around the words “as amended from time to time”. The second was to replace those words by “in effect on the date of commencement of the arbitration”.

8. Some delegations had asked whether the two proposed amendments would entail substantive differences. In his view, they would not. The second proposed amendment merely reflected the wording used in article 1, paragraph 2, of the 2010 UNCITRAL Arbitration Rules and made it clear that when UNCITRAL amended the rules on transparency, the amended version would be applicable to arbitrations.

9. Other delegations had drawn attention to policy concerns. It might be difficult for States to accept the rules on transparency as initially worded and even more difficult to accept the possibility of being required to apply amended versions.

10. **Ms. Kobayashi-Terada** (Japan), noting that article 1, paragraph 2, added the phrase “unless the parties have agreed to apply a particular version of the Rules” to the phrase “in effect on the date of commencement of the arbitration”, asked whether

the same wording would be added in article 1, paragraph 4.

11. **The Chairperson** said that the same wording could be used if the Commission so decided.

12. **Mr. Apter** (Israel) said that if the words “as amended from time to time” were to be maintained, it would deter States from applying the rules on transparency and encourage them to opt out of future treaties.

13. **Ms. Rennie** (United Kingdom) said that her delegation shared the concern that vague wording such as “as amended from time to time” might deter States from using the rules on transparency.

14. **Mr. Loh Kong Yue** (Singapore) expressed support for the points made by the previous two speakers.

15. **Mr. Jacquet** (France) said that when the rules on transparency were amended, the new version would almost certainly contain a provision specifying the conditions of application, which might be inconsistent with the words “as amended from time to time”. Hence, the inclusion of those words served no purpose and might even be counterproductive. He proposed as a solution the insertion of the word “applicable” before “UNCITRAL Rules on Transparency”.

16. **Ms. Kaufmann-Kohler** (Switzerland) suggested the following wording as an alternative solution: “the UNCITRAL Rules on Transparency in force in 2014, unless the parties have agreed to apply a later version of the Rules”.

17. **The Chairperson** cautioned against overcomplicating the issue under discussion. Nothing would prevent a party from stating in its treaty that the latest version of the rules on transparency would be applicable. He suggested that the Commission should omit all evolutive wording, as in the case of the 1976 version of the UNCITRAL Arbitration Rules.

18. If he heard no objection, he would take it that the Commission agreed to that suggestion.

19. *It was so decided.*

20. **The Chairperson** reminded the Commission of the proposal made at the previous meeting to adopt the following title: “UNCITRAL Rules on

Transparency in Treaty-based Investor-State Arbitration”.

21. The following title had also been proposed: “UNCITRAL Arbitration Rules (with revised article 1, paragraph 4, as adopted in 2014)”.

22. **Ms. Perales Viscasillas** (Spain) proposed replacing “revised” in the latter title with “new”, since paragraph 4 was being added to article 1.

23. *It was so decided.*

24. **Mr. Spelliscy** (Canada) proposed that “2014” should be replaced with “2013”, since new article 1, paragraph 4, would presumably enter into force before the end of the year.

25. *It was so decided.*

26. *Article 1 of the UNCITRAL Arbitration Rules, as amended, was adopted.*

The meeting was suspended at 2.50 p.m. and resumed at 4.05 p.m.

Draft article 5 — Submission by a non-disputing Party to the treaty (continued)

27. **The Chairperson**, referring to the consultations that had taken place during the break, said that draft article 5, paragraph 2, as currently worded, already mentioned the factors referred to in article 4, paragraph 3, that should be taken into account by the arbitral tribunal. Those factors included whether a submission could offer a perspective, particular knowledge or insight that was different from that of the disputing parties. That provision, in the view of a number of delegation, would in itself prevent a non-disputing Party from making a submission that would be tantamount to diplomatic protection under draft article 5. Other delegations disagreed and wished to include an explicit reference to diplomatic protection in the draft article. It had been pointed out, however, that the inclusion of such a reference would imply that the issue was not covered by article 4, paragraph 3.

28. It was proposed that the following new sentence should be added at the end of draft article 5, paragraph 2: “For the avoidance of doubt, in exercising its discretion to allow such submissions, the arbitral tribunal shall take into consideration the need to avoid submissions by a non-disputing Party

which would support the claim of the investor in a manner tantamount to diplomatic protection.” The report

would record that a number of delegations felt that the addition of that sentence was unnecessary, since its content was already covered by article 4, paragraph 3 (b).

29. **Mr. Popkov** (Belarus) said that it would be difficult for arbitral tribunals to interpret what was meant by “tantamount to diplomatic protection”. It should be explained that the main concern was to avoid a situation in which a non-disputing Party, seeking to advance an investor’s interests by improper means, abused the right to make a submission by making it clear that diplomatic protection was not applicable to the subject matter of the rules on transparency, given, inter alia, the definition of the nationality of legal persons in the context of diplomatic protection by the International Law Commission.

30. **The Chairperson** said that wording such as “tantamount to the espousal of the investor’s claim by the non-disputing Party” had previously been considered. The idea that the Commission was trying to encapsulate was that of the exercise of diplomatic protection through the back door, in other words a situation in which a State acted in support of an investor.

31. **Mr. Lee Jae Min** (Republic of Korea) asked whether a non-disputing Party would not be permitted to express any view that supported the aims of an investor, even if it did not amount to diplomatic protection.

32. **The Chairperson** said that most State submissions would have the effect of supporting one or the other party. Hence it would not be reasonable to stipulate that all such submissions were inadmissible. It was for the arbitral tribunal to evaluate the type of support that was being offered.

33. **Mr. Lee Jae Min** (Republic of Korea), referring to draft article 5, paragraph 1, said that submissions on issues of treaty interpretation from a non-disputing Party could also be unduly supportive of a party.

34. **The Chairperson** said that the home State of a disputing party would frequently submit its own interpretation of a treaty. It could therefore be useful

to hear a counterbalancing view, but such submissions fell into a different category.

35. He deferred the discussion of draft article 5, paragraph 2, until the next meeting.

Election of officers (*continued*)

36. **Ms. Kagwanja** (Kenya), speaking on behalf of the African Group, proposed that Mr. Moollan (Mauritius) should be elected Vice-Chairperson of the Commission.

37. *Mr. Moollan was elected Vice-Chairperson of the Commission by acclamation.*

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (*continued*)

(A/CN.9/760, 765, 783 and 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3)

Article 3 — Publication of documents (*continued*)

38. **The Chairperson** said that a Drafting Group document (A/CN.9/XLVI/CRP.2) containing the amended version of article 3, paragraph 5, had just been issued. He suspended the meeting to give members time to decide whether it was acceptable.

The meeting was suspended at 4.25 p.m. and resumed at 4.35 p.m.

39. **The Chairperson** asked whether article 3, paragraph 5, as currently worded was acceptable: “A person, who is not a disputing party, granted access to documents under paragraph 3, shall bear any administrative costs of making those documents available to that person, such as the cost of photocopying or shipping documents to that person, but not the administrative costs of making the documents available to the public through the repository.”

40. **Ms. Rennie** (United Kingdom) proposed the following alternative wording: “A person granted access to documents under paragraph 3 shall bear any administrative costs of making those documents available to that person, such as the cost of photocopying or shipping documents to that person,

but not the costs of making the documents available to the public through the repository.”

41. **The Chairperson** said that the words “who is not a disputing party” were unnecessary inasmuch as a person granted access to documents under paragraph 3 was obviously not a disputing party.

42. **Mr. Brown** (European Union) proposed deleting the words “to that person” after “shipping documents”.

43. **Mr. Castello** (United States of America) said that if “to that person” were deleted, it might imply

that the cost of photocopying or shipping to the repository should be borne by the person granted access to documents.

44. **The Chairperson** said he took it that the Commission endorsed the edited version of article 3, paragraph 5, proposed by the representative of the United Kingdom.

45. *It was so decided.*

The meeting rose at 4.45 p.m.

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration
(continued)

Summary record of the 962nd meeting, held at the Vienna International Centre, Vienna, on Wednesday, 10 July 2013, at 9.30 a.m.

[A/CN.9/SR.962]

Chairperson: Mr. Moollan (Vice-Chairperson) (Mauritius)

The meeting was called to order at 9.50 a.m.

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (continued)
(A/CN.9/760, 765, 783, 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3, and 793)

Draft article 8 — Repository of published information

1. **The Chairperson** proposed that the Commission should proceed on the assumption that the rules on transparency would enter into force on 1 April 2014. That would give UNCITRAL sufficient time to seek extrabudgetary funding. He further proposed that the secretariat should be given a mandate to approach the Fifth Committee and the Sixth Committee of the General Assembly if necessary. As no decision by the General Assembly could be expected before late December 2013, the date of entry into force of the rules that he had just suggested would also be appropriate under those circumstances.

2. The following wording had been proposed for draft article 8 of the rules on transparency. “The repository of published information under the Rules on Transparency shall be the Secretary-General of the United Nations through the UNCITRAL secretariat or an institution named by UNCITRAL.”

3. The Commission was privileged to have received offers of assistance from two highly reputable institutions with an extremely heavy workload: the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA). Both institutions had offered to undertake the functions of a repository

and they had also confirmed that as soon as UNCITRAL informed them that it was in a position to act as the repository, they would transfer those functions at no cost to the Commission. He hoped that the Commission could reach a consensus on the institution to be designated.

4. **Mr. Spelliscy** (Canada) asked whether an earlier date than 1 April 2014 could be set for the entry into force of the rules, since the Commission was already preparing to designate a back-up registry institution.

5. **Ms. Rennie** (United Kingdom) asked whether the Commission intended to request additional funding for the UNCITRAL secretariat under the regular budget from the Fifth and Sixth Committees of the General Assembly.

6. **The Chairperson** said he understood that some members of the Commission felt that the funding should be provided on a cost-neutral basis.

7. If he heard no objections, he would take it that the Commission wished to approve the proposal to mandate the secretariat to approach the Fifth and Sixth Committees of the General Assembly.

8. *It was so decided.*

9. **Ms. Escobar** (El Salvador) proposed inserting the word “temporarily” before “named by UNCITRAL”.

10. **The Chairperson** said that the Commission could not take a decision on such matters in advance, since there was a very slight possibility that UNCITRAL would be unable to obtain either regular budget or extrabudgetary funding.

11. He took it that the Commission wished to adopt the amended version of draft article 8 of the rules on transparency.

12. *Article 8, as amended, was adopted.*

13. **The Chairperson** said that he had suggested 1 April 2014 as the date of entry into force of the rules because the chances of obtaining funding under the regular budget or the requisite extrabudgetary funding would thus be maximized. There should also be a repository in place by that date.

14. If he heard no objection, he would take it that the Commission agreed on 1 April 2014 as the date of entry into force of the rules on transparency.

15. *It was so decided.*

16. **The Chairperson** invited the representative of the Permanent Court of Arbitration to take the floor.

17. **Mr. Daly** (Permanent Court of Arbitration) said that the Court understood that budgetary constraints were impeding UNCITRAL for the time being from assuming the role of a repository. With regard to the decision on which institution to designate in the meantime, both options were attractive in view of the significant experience of the two institutions. The PCA had concluded a cooperation agreement with ICSID in 1968 and had been cooperating closely with the Centre ever since.

18. The PCA was an intergovernmental organization founded in 1899 pursuant to the Hague Convention for the Pacific Settlement of International Disputes, which was revised in 1907. The 1899 and 1907 founding instruments specified that the Court should be available at all times and to all States, even those that had not signed one of its founding instruments, and that the International Bureau of the PCA was to serve as the record office for tribunals and to maintain an archive of its cases.

19. The work of the PCA was closely linked to arbitration proceedings under the UNCITRAL Arbitration Rules. Its role under the 1976 and 2010 versions of the Rules consisted in designating appointing authorities where the parties were unable to agree on such an authority. It had dealt with over 500 such requests to date. The PCA was also frequently asked to provide administrative services in proceedings under the UNCITRAL and other rules, for instance by managing a deposit, maintaining an archive or organizing hearings in different parts of the world. It was currently

administering 78 arbitrations, of which 7 were inter-State arbitrations, 50 were investor-State arbitrations under the UNCITRAL Arbitration Rules, and 21 were contract claims. In most of the 50 cases under the UNCITRAL Arbitration Rules, it performed an archiving function. It was administering an estimated two thirds of all known investor-State disputes. The PCA also held the largest archive of documents in investor-State arbitration under the UNCITRAL Arbitration Rules.

20. While there had been limited transparency in the cases administered to date, a slight trend towards greater transparency was discernible and the adoption of the rules on transparency would doubtless support that trend. The PCA was therefore developing a new database and a search engine that could be adapted to serve any needs identified by UNCITRAL for the repository.

21. The establishment and maintenance of the repository would be at no cost to Member States of the United Nations or PCA member States. The PCA would charge no fee as repository in cases requiring the publication of fewer than 50 documents. In cases requiring the publication of 50 or more documents, it would charge a flat rate of €750, which was the same fee as that charged for designating an appointing authority under the UNCITRAL Arbitration Rules. Published information would be searchable and available to third parties at no cost. Where copies of published documents were requested, the PCA would charge the requesting party for photocopying and postage.

22. The PCA was fully available to cooperate with UNCITRAL, if requested to do so, on any matters relating to the repository function. It had a long history of cooperation with the United Nations. In 2009, for instance, the Secretary-General of the United Nations had stated that he looked forward to strengthening the partnership between the PCA and the United Nations in its efforts to advance the peaceful settlement of disputes in accordance with international law and to build a safer and better world for all. While the Secretary-General was referring in particular to the work of the PCA in armed conflict resolution, the members of the Commission would doubtless agree that investor-State arbitration could also be quite acrimonious.

23. **Ms. Kinnear** (International Centre for Settlement of Investment Disputes) said she agreed with the comments by the representative of the PCA about the close relationship between the two institutions.

24. ICSID was a member of the World Bank Group, which was a United Nations specialized agency. It had 149 member States, which paid no membership fees and virtually all of which were Member States of the United Nations. If ICSID were to act as a repository, States would not be charged any direct or indirect fees.

25. ICSID had been created for the purpose of engaging in investment arbitration and had administered over 70 per cent of all known investment arbitration cases. ICSID administered such cases under any rules requested by the parties. While most of the 435 cases administered to date had been ICSID investment cases, it had also administered 36 UNCITRAL cases and five purely ad hoc cases. It was also designated appointing authority for numerous treaties and could be asked to serve as appointing authority under article 6 of the UNCITRAL Arbitration Rules. In addition, it acted as the nominee of consolidation tribunals under a number of treaties.

26. She welcomed the Commission's decision under article 1 of the rules on transparency that the rules would apply not only to UNCITRAL cases but would also serve as a template for transparency in the future. As the rules would therefore be increasingly used in cases administered by ICSID, it seemed logical to designate ICSID as the repository for an interim period. ICSID was so far the only institution that incorporated transparency in its rules and day-to-day practice. States would be able to benefit from that lengthy track record.

27. During the last fiscal year, ICSID had published details of more than 1,400 awards, procedural steps and other case-related documents. It had been publishing such information on its website since 1998 and had offered basic, advanced and full text search capacity in respect of documents in English, French and Spanish since 2007. It was able to take advantage of the high technology standards of the World Bank, which provided information security, and the requisite staffing systems were already in place. If ICSID were to act

as the repository, users could conduct a search of the whole of ICSID case law and the case law published by the repository under the rules on transparency. The rules would thus become truly effective and universal.

28. The ICSID proposal was highly cost-effective, since no funding was required from States and no costs would be borne by the UNCITRAL secretariat. The fact that the disputing parties would be charged a minimal one-time fee of between \$1,500 and \$2,000 would help to weed out more frivolous claims.

29. With regard to capacity, ICSID would offer all the features specified by Working Group II. It also continuously updated its website.

30. ICSID would operate the repository on a completely separate basis from its administration of cases. Hence, States and disputing parties could make their submissions to the arbitral tribunals and have the article 7 exceptions to transparency applied before anything was published by the repository.

31. Lastly, ICSID could start operating as a repository within two or three months. She emphasized, however, that, throughout the discussions of the rules on transparency, ICSID had supported the view that UNCITRAL itself was the ideal repository. She confirmed that as soon as UNCITRAL had acquired the necessary funding, ICSID would transfer all relevant publications and continue to offer its technological assistance if necessary.

32. **Mr. Sorieul** (Secretary of the Commission) emphasized that the UNCITRAL secretariat was not competing for the role of repository. As it was not an arbitral institution, it was entirely neutral in that regard. However, it was sensitive to the fact that, when the rules on transparency were adopted, it would be necessary to render them attractive to States that were neither members of the PCA nor of ICSID and that were not necessarily users of the UNCITRAL Arbitration Rules. In that context, the Secretariat of the United Nations had assured the UNCITRAL secretariat of its support for the promotion of the public service of transparency.

33. With regard to the basic problem of funding, the system established by UNCITRAL could either be free of charge or impose fees. If the disputing

parties were required to bear the costs, the corresponding funds would not be used to meet the operating costs of a repository run by UNCITRAL. They would be paid into the United Nations regular budget and would be deducted from the contributions payable to the Organization by Member States.

34. He believed that it would be possible, within the next few months, to set up the small team in the secretariat that would be required to run the repository. Steps had already been taken to update the website and to facilitate access to UNCITRAL case law.

35. The question had been raised whether UNCTRAL was included in the list of official development assistance organizations compiled by the Organisation for Economic Co-operation and Development (OECD). He could reply unambiguously that it was, but it was included as the United Nations because UNCITRAL had no separate legal personality. He trusted that the Commission would confirm that the aim of the rules on transparency and of the repository was to promote economic development and welfare, inasmuch as transparency was a key value of good governance and the rule of law.

36. **The Chairperson** said he took it that the Commission endorsed that view.

37. *It was so agreed.*

38. **Mr. Cachapuz de Medeiros** (Brazil) said that ICSID had been created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. As Brazil had not ratified that Convention, it did not recognize the jurisdiction of ICSID and was therefore opposed to its designation as the repository.

39. **Mr. Spelliscy** (Canada) said that, in his view, ratification of the ICSID Convention should not be a relevant factor when it came to deciding which institution should be designated as the repository.

40. He requested information from the PCA regarding search capabilities on its website, which was an important requirement for functionality.

41. **Mr. Daly** (Permanent Court of Arbitration) said that the new PCA database would include a simple key word search and a number of advanced

search options, which would make it possible to identify cases or documents by the following factors: the pending or concluded status of the arbitration, the treaty under which the claim was brought, the subject matter, the arbitration rules used, the administering institution, the arbitrators, the parties involved, counsel for the parties, the language in which the proceedings were conducted, the economic sector, the type of document, the duration of the proceedings, the year in which the proceedings commenced or the year in which the award was issued or the proceedings were terminated. The search results would be filtered to display either a list of cases or specific documents meeting certain criteria. The database would be publicly available to all users without registration or a log-in requirement. The more advanced option would permit users to save searches and to be notified by e-mail whenever new documents on a particular matter or of relevance to a prior search became available.

42. **Ms. Perales Viscasillas** (Spain) said that Spain was a State party both to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States and to the Hague Convention for the Pacific Settlement of International Disputes. She believed that, in technical terms, both ICSID and the PCA were perfectly well qualified to perform the functions of repository. The only factor that seemed to tilt the balance in favour of the PCA was its close link with proceedings under the UNCITRAL Arbitration Rules. The Commission had opted in 1976 to assign the institutional role of designating an appointing authority under the Rules to the Secretary-General of the PCA and had enhanced the Court's administrative role in support of parties and arbitrators acting under the UNCITRAL Arbitration Rules in 2010. The options envisaged under investment treaties included, on the one hand, ICSID institutional arbitration and, on the other, ad hoc UNCITRAL arbitration. Assignment of the role of repository to ICSID in respect of ad hoc proceedings might, in her delegation's view, create confusion. The two types of arbitration should be kept separate to avoid any ambiguity or misunderstanding. Spain therefore considered that the PCA should be designated as repository.

43. **Ms. Polit** (Ecuador) said that a number of countries in Latin America and the Caribbean, for instance member States of the Bolivarian Alliance for the Peoples of Our America (ALBA) and the Union of South American Nations (UNASUR), had opposed the manner in which arbitration proceedings were conducted by ICSID. Her delegation therefore supported the proposal to designate the PCA as repository.

44. **Mr. Lebedev** (Russian Federation) said that, given the apparent consensus that UNCITRAL was the most appropriate repository, it was essential to obtain the financial resources to enable it to perform that function as speedily as possible. Any Commission decision submitted to the United Nations General Assembly should underscore that objective. The Commission was required to make a choice, in the meantime, between two highly reputable international institutions. He recalled that in 1976, when the UNCITRAL Arbitration Rules were being drafted, the Commission had been greatly relieved when agreement had finally been reached on securing PCA support for their implementation. As the PCA had provided invaluable services over the years, the Russian Federation was in favour of designating it as repository until such time as funds were available to transfer that role to UNCITRAL. Obviously, the PCA should remain in close contact with the UNCITRAL secretariat in performing the functions assigned to it.

45. **The Chairperson** said he took it that the Commission agreed that the report should emphasize the consensus within the Commission that the UNCITRAL secretariat should perform the function of repository and that an alternative repository was being designated solely with a view to ensuring temporary back-up if absolutely necessary.

46. *It was so agreed.*

47. **The Chairperson** said that the report would also note that whichever institution was designated should remain in close contact and cooperate fully with the UNCITRAL secretariat.

48. **Ms. Kobayashi-Terada** (Japan) said that the question of membership of the two candidate

institutions was, in her view, irrelevant in the current context.

49. In view of ICSID's experience in the area of transparency in investment arbitration proceedings and the useful search engines that it had developed for the purpose, her delegation was inclined to support the designation of ICSID as repository.

50. **Mr. Macdonald** (United Kingdom) said that the United Kingdom would not endorse any statement in the report that indicated potential support by the Commission for the use of regular budget resources to fund the repository.

51. **Mr. Yuprasert** (Thailand) expressed support for the designation of the PCA because of the slightly lower fees that would be charged to parties to a dispute.

52. **Mr. Schöll** (Switzerland) said that his delegation had a slight preference for the designation of ICSID as the temporary repository for three reasons: the ICSID database had full-text search capabilities in respect of both UNCITRAL and ICSID case law; ICSID had acquired considerable expertise from handling 70 per cent of known investment cases; and ICSID also had experience in the field of transparency in investment arbitration proceedings.

53. **Mr. Agrawal** (India) expressed a preference for the designation of the PCA as repository.

54. **Mr. Apter** (Israel) said that whichever institution was designated as repository should not only cooperate with the UNCITRAL secretariat. The Commission should recommend that the two institutions should also cooperate with each other in the interests of best practice in the area of transparency.

55. The choice of institution should not be based on political but on technical considerations. As ICSID currently had greater experience in dealing with transparency-related issues, the Commission should take advantage of that expertise in designating a temporary repository.

56. **The Chairperson** said he took it that the Commission wished to recommend that all three institutions, UNCITRAL, ICSID and the PCA, should cooperate on matters relating to transparency,

which was becoming a very important aspect of investment arbitration.

57. *It was so agreed.*

58. **Mr. Räftegård** (Observer for Sweden) said that ensuring easy access to material for the general public, for instance by enabling people to undertake searches through both UNCITRAL and ICSID case law documents, was an important point. His delegation therefore expressed a slight preference for the designation of ICSID as the temporary repository.

59. **Mr. Hirsch** (Argentina) and **Ms. Laborte-Cuevas** (Philippines) expressed support for the designation of the PCA as the temporary repository.

60. **Mr. Lee Jae Min** (Republic of Korea) said that since the Commission was entering uncharted territory, prior experience was of great importance. The availability of an advanced search function was a further advantage. His delegation was therefore inclined to support ICSID as the repository.

61. **Mr. Snijders** (Observer for the Netherlands) expressed support for the designation of the PCA as repository because of the role assigned to it under the 1976 and 2010 versions of the UNCITRAL Arbitration Rules.

62. **Mr. Möller** (Observer for Finland) said that both institutions were perfectly capable of performing the functions of repository and his delegation would go along with the majority decision.

63. **Mr. Ghaniei** (Islamic Republic of Iran) asked exactly how much funding was required to enable UNCITRAL to perform the functions of repository. He also wished to know whether the funding process could be speeded up by introducing mandatory fees to be paid by the parties to a dispute and by creating a voluntary fund in addition to requesting resources under the United Nations regular budget.

64. If it was necessary to designate a temporary repository, his delegation would opt for the PCA.

65. **The Chairperson** drew attention to document A/CN.9/791, paragraphs 5 to 10, which contained the estimated resource requirements. According to paragraph 8, the total programme budget for the repository in the first biennium, exclusive of any

13 per cent project support cost, would be \$343,800, and in subsequent biennia \$493,600. Charges to the disputing parties would not be of any assistance to UNCITRAL since the proceeds would be paid into the general United Nations budget.

66. **Mr. Sorieul** (Secretary of the Commission) said that voluntary contributions would be collected through the existing UNCITRAL Trust Fund. A sub-account could be established so that the funds were earmarked for the functioning of the repository.

67. **Mr. Popkov** (Belarus) said that, while his delegation recognized the outstanding technical capabilities of ICSID, it supported the designation of the PCA as repository in view of the experience it had accumulated over several decades in the arbitration of disputes, including investment disputes, involving States.

68. **Ms. Cheng** (Singapore) said that the PCA seemed to be the preferable choice because it was already handling a great majority of investment arbitrations under the UNCITRAL Arbitration Rules and because ICSID administered cases under its own rules.

The meeting was suspended at 11.25 a.m. and resumed at 11.35 a.m.

69. **The Chairperson** said that it would be noted in the report that some delegations had expressed the view that any solution within the United Nations system should be budget-neutral.

70. **Ms. Rennie** (United Kingdom) said that her delegation, for technical and pragmatic reasons, had decided to support the designation of the PCA as the repository.

71. **Mr. Möller** (Observer for Finland) said that, on reflection, his delegation had also decided to opt for the designation of the PCA.

72. **Mr. Jacquet** (France) said that it seemed preferable under the current circumstances to designate the PCA as the repository on account of its flexibility.

73. **Mr. Jana Linetzky** (Observer for Chile) stressed the urgency of obtaining the resources that would enable UNCITRAL to perform the functions of repository. His delegation did not wish to express

a preference for either of the two institutions that had volunteered to perform those functions.

74. **Mr. Sorieul** (Secretary of the Commission) warmly thanked the States, including Chile, that had taken action to secure the extrabudgetary resources that would enable UNCITRAL to operate as repository. Considerable progress had been made in that regard during the past few days.

75. **Mr. Kordač** (Czech Republic) expressed support for the designation of the PCA as repository because of the lower fees that would be charged to disputing parties and the traditionally close links between the PCA and UNCITRAL.

76. **Mr. Stoimenov** (Bulgaria) expressed support for the designation of the PCA for similar reasons and also because it planned to provide a repository database in all six United Nations working languages.

77. **Mr. Sikirić** (Croatia) said that the submission to the Fifth and Sixth Committees of the General Assembly should stress that the Commission's work was of crucial importance for the rule of law at both the national and international levels and that the legislative standards elaborated by UNCITRAL promoted sustainable development.

78. He expressed support for the designation of the PCA as the repository.

79. **The Chairperson** said he took it that the Commission supported the proposal by the representative of Croatia concerning the submission to the Fifth and Sixth Committees.

80. *It was so agreed.*

81. **Mr. Kilppstein** (Germany) said that his delegation did not wish to express a preference regarding the institution that should act as repository.

82. However, noting that ICSID had listed four points regarding the rules on transparency in the letter that it had circulated to delegations, he asked whether those points were preconditions for its temporary performance of the functions of repository. He referred in particular to the requirement that a waiver of responsibility clause should be added to the rules. Moreover, ICSID headquarters was based in Washington and there was currently a certain amount of unease concerning the

transmission of sensitive information to the United States without reliable provision for data protection. He therefore asked whether ICSID operated a data protection regime that met European standards.

83. **Ms. Kinnear** (International Centre for Settlement of Investment Disputes) said that the four points were not preconditions for the performance by ICSID of the functions of repository. They were issues that ought eventually to be addressed, perhaps in guidelines, irrespective of which body acted as repository.

84. ICSID benefited from the highly effective data security wall erected by the World Bank Group.

85. **Ms. Le Duc Hanh** (Observer for Viet Nam) expressed a preference for the PCA because of its experience in dealing not only with investment disputes but also with disputes in other areas, its expertise in database management and its flexibility.

86. **Ms. Escobar** (El Salvador) also expressed a preference for the PCA as repository.

87. She urged the members of the Commission to alert delegations from their countries to the Fifth and Sixth Committees of the General Assembly to the importance of ensuring that UNCITRAL was in a position to serve as repository in due course.

88. **The Chairperson** expressed support for that recommendation.

89. **Mr. Bittner** (Austria) expressed a preference for the PCA as repository.

90. **The Chairperson** noted that a clear majority of members had expressed a preference for the PCA as the temporary repository.

91. *It was so decided.*

92. **The Chairperson** emphasized that the decision just taken reflected a fallback position. He reiterated the Commission's gratitude to both institutions for their offers of support.

93. **Mr. Schneider** (Switzerland) proposed that the secretariat should submit a report to the Commission at its next session in 2014 on the status of the establishment and functioning of the repository.

94. *It was so decided.*

Draft article 5 — Submission by a non-disputing Party to the treaty (continued)

95. **The Chairperson** invited the secretariat to present a proposed amendment to the wording of draft article 5, paragraph 2.

96. **Ms. Montineri** (Secretariat) noted that two amendments had already been proposed by delegations. One was to add the following words at the end of the paragraph: “and the need to avoid submissions by a non-disputing Party which would support the claim of the investor in a manner which would be tantamount to diplomatic protection”. The second proposal was to add the following sentence at the end of the paragraph: “For the avoidance of doubt, in exercising its discretion to allow such submissions, the arbitral tribunal shall take into consideration the need to avoid submissions by a non-disputing Party which would support the claim of the investor in a manner tantamount to diplomatic protection.”

97. The secretariat had attempted to combine the two proposals. It suggested that the following phrase should be inserted at the end of paragraph 2: “and, for the avoidance of doubt, the need to avoid submissions by a non-disputing Party which would support the claim of the investor in a manner which would be tantamount to diplomatic protection”.

98. **Ms. Kaufmann-Kohler** (Switzerland) proposed replacing “for the avoidance of doubt” with “for greater certainty”. She expressed support for a previous proposal by the representative of Canada to delete the words “by a non-disputing party” and she further proposed replacing “in a manner which would be tantamount to” with “in a manner tantamount to”.

99. *It was so agreed.*

100. **Mr. Cachapuz de Medeiros** (Brazil) proposed replacing “in a manner tantamount to” with “in a manner which could be interpreted as”.

101. **Mr. Caplan** (United States of America) said that he opposed that amendment because interpretation was an unduly subjective standard.

102. He referred to the discussion at an earlier meeting concerning the use in article 4, paragraph 3,

of the phrase “In determining whether to allow such a submission” and in draft article 5, paragraph 2, of the phrase “In exercising its discretion to accept such submissions”. As the reference in the later phrase to the exercise of discretion and hence to article 1, paragraph 4, might complicate the review process, he proposed that it be replaced with the wording used in article 4, paragraph 3.

103. **Mr. Jacquet** (France) expressed support for that proposal.

104. **Mr. Kordač** (Observer for the Czech Republic) said he understood that the factors mentioned in article 1, paragraph 4, should be taken into account by the arbitral tribunal whenever it took decisions that required the exercise of its discretion, even in cases where the word “discretion” was not expressly mentioned.

105. **Mr. Caplan** (United States of America) drew attention in that connection to paragraph 40 of the report of Working Group II (A/CN.9/760) concerning article 4 (at that time article 5).

106. **The Chairperson** said that the Working Group had agreed that the relevant factors in article 4, paragraph 3, were those set forth in paragraph 3 and not those listed in article 1, paragraph 4. By amending draft article 5, paragraph 2, the Commission would be applying the same principle.

107. **Mr. Caplan** (United States of America) said that he was not suggesting that an arbitral tribunal was precluded from considering the factors in article 1, paragraph 4.

108. **Mr. Kordač** (Observer for the Czech Republic) expressed the view that the word “discretion” should be mentioned in the relevant paragraphs to make that point clear. It should also be used, for example, in article 3, paragraph 3, in connection with the words “the arbitral tribunal may decide”.

109. **The Chairperson** said he understood that the factors listed in article 1, paragraph 4, were of relevance whenever an arbitral tribunal exercised its discretion, regardless of whether the word discretion was used in the rule in question. He deferred further discussion of the matter until the next meeting.

The meeting rose at 12.30 p.m.

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration
(continued)

Summary record of the 963rd meeting, held at the Vienna International Centre, Vienna, on Wednesday, 10 July 2013, at 2 p.m.

[A/CN.9/SR.963]

Chairperson: Mr. Moollan (Vice-Chairperson) (Mauritius)

The meeting was called to order at 2.30 p.m.

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (continued)
(A/CN.9/760, 765, 783, 787 and Add.1, Add.1/Corr.1, Add.2 and Add.3, and 793)

Draft article 5 — Submission by a non-disputing Party to the treaty (continued)

1. **The Chairperson** invited the Commission to resume its discussion of whether the factors listed in article 1, paragraph 4, of the rules on transparency were of relevance whenever an arbitral tribunal exercised its discretion. The only remaining reference to discretion in the rules was contained in draft article 5, paragraph 2. Following informal consultations, it was proposed to replace the words “In exercising its discretion to accept such submissions” in that paragraph with “In determining whether to allow such submissions”, which was similar to the wording used in article 4, paragraph 3. The report would reflect the discussion of the matter that had taken place at the previous meeting, referring, *inter alia*, to the passage from the report of Working Group II that had been cited (A/CN.9/760, para. 40). It would state that the Commission had agreed that article 1, paragraph 4, would be applicable whenever a tribunal was called upon to exercise its discretion.

2. If he heard no objection, he would take it that the Commission concurred with that proposal.

3. *Article 5, as amended, was adopted.*

4. *The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, as amended, were adopted.*

(b) Consideration of instruments on the applicability of the UNCITRAL rules on transparency to the settlement of disputes arising under existing investment treaties
(A/CN.9/765 and 784)

5. **The Chairperson** drew attention to document A/CN.9/784 concerning the applicability of the UNCITRAL Rules on Transparency to the settlement of disputes arising under existing investment treaties, which was a key issue since there were more than 2,000 existing bilateral investment treaties.

6. The compromise reached was that the Rules on Transparency would be applicable to arbitration under the UNCITRAL Arbitration Rules under future treaties unless the parties to the treaty agreed otherwise. Working Group II had also reached an understanding that parties who wished to apply the Rules on Transparency under existing treaties would be able to do so by various means, including a convention. Such a convention would be open for ratification by States, but they would not be obliged to do so. If both the home State and the investor State had ratified the convention prior to the referral of a dispute for arbitration, it would be assumed that the relevant bilateral investment treaty had been amended. The offer of UNCITRAL arbitration would thus become an offer of transparent arbitration. If, on the other hand, only the home State had ratified the convention, it could not unilaterally amend the treaty. However, the investor State could agree to an UNCITRAL arbitration on transparent terms.

7. The Commission was now required to decide whether Working Group II should be mandated to prepare such a convention.

8. **Ms. Kobayashi-Terada** (Japan) said that she had understood that the Rules on Transparency would be applicable only where both States had ratified the convention.

9. **The Chairperson** said that the matter was still under discussion. The Working Group had considered whether it would be possible under public international law to provide in the convention for the possibility of a unilateral offer by the home State that would have the effect of amending the bilateral investment treaty or for a declaration by the home State that it had made such an offer.

10. **Mr. Spelliscy** (Canada) said that it was vitally important to give Working Group II a mandate to develop a convention that would allow the Rules on Transparency to be applied to the huge number of existing investment treaties.

11. **Mr. Agrawal** (India) said that draft article 3 of the proposed convention was inconsistent with article 1, paragraph 2, of the Rules on Transparency. In his view, an amendment to a bilateral treaty or a joint declaration by the parties to the treaty was the best method of ensuring that the Rules were applied in arbitration proceedings under existing treaties.

12. **The Chairperson** said that he was unable to detect any such inconsistency inasmuch as article 1, paragraph 2 (b), of the Rules on Transparency provided for the possibility of the parties to a treaty agreeing to their application after a certain date. In any case, such issues would be discussed by Working Group II if it were given the requisite mandate.

13. **Mr. Brown** (European Union) said that the proposed convention had aroused a great deal of interest in the European Union. It was still under discussion and a number of drafting and other issues would be raised in due course.

14. **Mr. Caplan** (United States of America) expressed strong support for the development of the proposed convention.

15. **The Chairperson** said that the idea was to create an opt-in instrument, which would not impose any constraint on States that felt unable for the time being to espouse the Rules on Transparency. He was aware of the concern among some States that once a convention existed, pressure would be brought to

bear on them to ratify it. He suggested that it be recorded in the report that no value judgement would be attached by the Commission to whether a State ratified the convention.

16. **Mr. Schöll** (Switzerland) said that the drafting of a multilateral instrument that would render the Rules on Transparency applicable to existing treaties was the logical next step to be taken for those who wished to demonstrate a credible commitment to transparency in investment arbitration. Switzerland would welcome a convention that covered not only UNCITRAL arbitrations but also arbitral proceedings being held under the rules of specific institutions. Noting that certain States had large portfolios of bilateral investment treaties, he said that such States should not be precluded from applying the Rules on Transparency in an efficient manner to their entire portfolio if they so wished. He agreed, on the other hand, that they should not be compelled to do so if they considered that the time was not yet ripe.

17. Switzerland was ready not only for discussions but also for formal negotiations on the proposed convention. He asked whether such negotiations could be held within the Commission rather than in Working Group II so that a text could be forwarded more speedily to the General Assembly for formal adoption.

18. **The Chairperson** said that he had been intending to put that question to the Commission in due course.

19. **Mr. Loh Kong Yue** (Singapore) said that Singapore was reluctant to support a convention. His delegation had already drawn attention to the issue of costs. Working Group II had not resolved how requests for documents would be affected after an arbitral tribunal had discharged its functions, a point that had also been highlighted by the International Centre for Settlement of Investment Disputes (ICSID) in its letter to the secretariat.

20. The balance struck in article 1 of the Rules on Transparency was highly sensitive and the compromise thus achieved was not perfect. A convention might actually upset the balance, and States with reservations concerning the compromise should not be required to endorse it. A balanced approach should be adopted until such time as there

was greater clarity regarding the operation of the Rules on Transparency and their cost implications.

21. **The Chairperson** said that States with concerns such as those mentioned by the representative of Singapore could simply decide not to ratify the convention. He reiterated the fact that no value judgement would be passed in such cases.

22. The idea of drafting a convention had been part and parcel of the discussions from the outset. Article 1, paragraph 2, had been drafted specifically with a view to enabling both disputing parties and high contracting parties, if they so wished, to amend their bilateral investment treaties in order to make the Rules on Transparency applicable. States with large portfolios of treaties would need either to hold discussions with a large number of counterparts or simply to ratify a single instrument.

23. **Ms. Escobar** (El Salvador) said that the drafting of a convention was a complex issue and would create delays, also in terms of the time that would be required in her country's Parliament to complete the ratification procedure. Her delegation was not opposed to the convention but felt that a deadline should be set so that States could start to apply the Rules on Transparency as soon as possible.

24. She proposed that the Commission should take up the question of the recommendation urging parties to investment treaties to apply the Rules on Transparency to existing treaties.

25. **Mr. Klippstein** (Germany) said that his delegation could support a carefully worded mandate concerning the convention. However, he proposed that a reference to a recommendation or to model clauses should be added as an alternative for States that were not fully convinced of the benefits of the convention.

26. **The Chairperson** suggested that the Commission should consider the proposed recommendation contained in document A/CN.9/784 and consider whether a reference thereto should be included in the decision it adopted at its next meeting.

27. **Mr. Apter** (Israel) said he took it that the recommendation had been amended in the light of the compromise solution. If not, further discussion might be necessary.

28. His delegation had no objection to the assignment of a mandate to Working Group II to draft a convention. However, as the Rules on Transparency had just been adopted, he proposed that the convention should be discussed at the February 2014 session rather than at the September 2013 session so that States had time to conduct consultations. Clearly, the ultimate aim was to convince as many States as possible to ratify the convention.

29. **Mr. Jacquet** (France) said that, according to article 1, paragraph 2 (b), of the Rules on Transparency, the Rules would be applicable only when the parties had agreed to their application. The proposed convention was just one means of expressing States' intention to apply the Rules to the settlement of disputes that arose under treaties concluded prior to their entry into force. His delegation therefore supported the proposal to give Working Group II a mandate to draft such a convention.

30. Delegations that did not support the application of the Rules to the settlement of disputes arising under existing investment treaties should either remain indifferent because they had nothing to fear, or else keep an open mind and perhaps allow themselves to be persuaded in due course of the value of the convention.

31. **Mr. Li Wenzhu** (China) said that the proposal to draft a convention was, in his delegation's view, a premature step. Although the Chairperson had stated that no value judgement would be passed against a State that did not ratify the convention, pressure would nonetheless be brought to bear on the State concerned. Moreover, as the membership of UNCITRAL was limited, the universality of the convention might be compromised.

32. **Mr. Lee Jae Min** (Republic of Korea) said that his delegation considered it important to mandate Working Group II to draft a convention. However, the Rules on Transparency had just been adopted and some time was required to assess their implementation in practice. The experience thus acquired could be of assistance in drafting the convention. Moreover, as States that wished to apply the Rules to existing bilateral investment treaties were not precluded from doing so, there was no need for undue haste in drafting the convention.

33. **The Chairperson** said that the convention would simply amend bilateral investment treaties. Experience in implementing the Rules on Transparency might influence a State's decision on whether to ratify it, but he failed to see what impact it could have on the drafting process.

34. **Mr. Lee Jae Min** (Republic of Korea) said that the existence of a convention could change the dynamics of negotiating or interpreting bilateral investment treaties.

35. **The Chairperson** said he understood the fear of a number of delegations that, once a convention existed, pressure would be brought to bear on States to accede to it. The most productive way of finding a solution that would accommodate all concerned was to send out a clear message in the report that would allay those fears.

36. **Ms. Kobayashi-Terada** (Japan) said that her delegation would be willing to support a consensual decision on giving a mandate to Working Group II to draft a convention. However, as it was unsure whether the adoption of such a convention constituted the most efficient and cost-effective approach, it wished to keep options open for other initiatives, such as the adoption of a recommendation urging parties to investment treaties to apply the Rules.

37. **Mr. Lebedev** (Russian Federation), noting that the basic aim was to ensure the widespread and expeditious implementation of the Rules on Transparency, drew attention to the comment on draft article 1 of the proposed convention contained in paragraph 6 of document A/CN.9/784, which stated that the convention would apply only where the home State of the investor and the respondent State were parties thereto. Thus, if the respondent State had ratified the convention and the investor State had not ratified it, the goal of promoting the speedy application of the Rules on Transparency would not be achieved.

38. He believed that the adoption of the draft recommendation contained in document A/CN.9/784 as a separate initiative or in combination with the draft models of joint or unilateral interpretative declarations might prove more effective in that regard. It would perhaps be unwise to adopt a convention before some experience had been gained

in the practical implementation of the Rules. The draft text could be amended in the light of such experience.

39. **The Chairperson** said he agreed that the different methods proposed in document A/CN.9/784 were not mutually exclusive. A decision would be taken shortly on the draft recommendation and no practical action was necessary on the draft models of joint or unilateral interpretative declarations.

40. **Mr. Möller** (Observer for Finland) pointed out that a recommendation would have a far more limited impact than a convention. As he also believed that any delay in the drafting of a convention would simply complicate matters, he was in favour of mandating Working Group II to proceed with the drafting process at its September 2013 session.

41. **Ms. Laborte-Cuevas** (Philippines) expressed reservations about the wisdom of drafting a convention so soon after the adoption of the Rules on Transparency. Her delegation proposed that the drafting process should be postponed until February or September 2014.

42. **The Chairperson** noted that there was a clear majority in favour of drafting a convention but that concerns had been expressed by a number of States. He suggested that an effort should be made to narrow the gap in delegations' views during a consultation break.

43. **Mr. Loh Kong Yue** (Singapore) contested the Chairperson's statement that there was a clear majority in favour of drafting a convention.

44. **The Chairperson** said that the representative of Singapore was entitled to that view. However, he was convinced that if one looked at the bigger picture, a compromise could be reached that protected the interests of all parties.

The meeting was suspended at 3.35 p.m. and resumed at 4.35 p.m.

45. **The Chairperson** said that a mandate to be given by the Commission to Working Group II had been drafted. He understood that it had secured provisional support from most of the States that had expressed concern about the convention. He invited the Commission to take note of the draft, which would be discussed at the next meeting:

“The Commission gives the mandate to the Working Group to draft a convention on the application of the Rules on Transparency in Treaty-based Investor-State Arbitration to existing treaties, taking into account that the aim of the convention is to give those States that wish to make the Rules on Transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States will use the mechanism offered by the convention.”

46. If the mandate was given in those terms, he was convinced that compromises could be reached during the drafting process on issues such as the wording of the preamble, the number of ratifications required for the convention to enter into force and the scope of reservations. He emphasized that no work had yet been undertaken on the draft convention that was currently before the Commission (A/CN.9/784). It was simply a proposal from the secretariat.

47. He invited the Commission to consider the draft recommendation contained in paragraph 20 of document A/CN.9/784. It was proposed that the operative paragraphs would be inserted in the Commission decision adopting the Rules on Transparency, which would then be incorporated in a General Assembly resolution.

48. **Mr. Apter** (Israel) proposed inserting the words “States should examine the feasibility of applying” or, alternatively, “States should consider applying” after “higher degree of transparency,” in paragraph 1 and deleting the words “be applied”.

49. **Mr. Magraw** (Center for International Environmental Law) expressed opposition to the proposed amendment. The Commission had directed Working Group II to ensure transparency in

investor-State arbitrations, most of which would arise under existing treaties. If the proposed amendment were to be adopted, the Commission might be perceived to be backtracking.

50. **Ms. Montineri** (Secretariat) said that the aim of the recommendation was to promote the application of the Rules on Transparency. However, States were free to take whatever decision they saw fit. She had reservations about including the wording proposed by the representative of Israel in a Commission decision that would subsequently become a General Assembly resolution.

51. **Mr. Caplan** (United States of America) said that his delegation would prefer to retain the text of paragraph 1 as it stood.

52. **Mr. Loh Kong Yue** (Singapore) expressed support for the proposal by the representative of Israel which, in his view, was not inconsistent with the Commission’s instructions to Working Group II.

53. **Mr. Apter** (Israel) said that his delegation would not insist on its proposed amendment if it failed to secure sufficient support. However, it proposed that the recommendation should highlight the compromise reached in article 1, paragraph 2, of the Rules on Transparency.

54. **Ms. Kaufmann-Kohler** (Switzerland) proposed replacing the words “date of adoption” in paragraph 1 with “date of coming into effect”, which were the words used in article 1, paragraph 2 (b), of the Rules.

55. *It was so agreed.*

56. *Paragraph 1 of the recommendation, as amended, was adopted.*

The meeting rose at 5.05 p.m.30 p.m.

Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (*continued*)

Summary record of the 964th meeting, held at the Vienna International Centre, Vienna, on Thursday, 11 July 2013, at 9.30 a.m.

[A/CN.9/SR.964]

Chairperson: Mr. Moollan (Vice-Chairperson) (Mauritius)

The meeting was called to order at 10.20 a.m.

Consideration of issues in the area of arbitration and conciliation

(b) Consideration of instruments on the applicability of the UNCITRAL rules on transparency to the settlement of disputes arising under existing investment treaties
(A/CN.9/765 and 784)

1. **The Chairperson** drew attention to the following text of a mandate by the Commission to Working Group II that had been proposed at the previous meeting:

“The Commission gives the mandate to the Working Group to draft a convention on the application of the Rules on Transparency in Treaty-based Investor-State Arbitration to existing treaties, taking into account that the aim of the convention is to give those States that wish to make the Rules on Transparency applicable to their existing treaties an efficient mechanism to do so, without creating any expectation that other States will use the mechanism offered by the convention.”

2. **Mr. Galindo** (Ecuador) proposed the following alternative text, which had been drafted in consultation with other delegations:

“The Commission gives the mandate to the Working Group to draft a convention to facilitate the application of the Rules on Transparency while taking into account the concerns by some States as regards possible difficulties of immediate application of the Rules to existing treaties.”

3. **Mr. Spelliscy** (Canada) said that his delegation was unable to support that proposal since it reflected the position of only one group of States, whereas the

text proposed at the previous meeting reflected the views of both sides.

4. **Mr. Jacquet** (France) said that the amended text was unbalanced inasmuch as it focused on the possible risks entailed by a convention intended to give States that wished to make the Rules on Transparency applicable to their existing treaties an efficient mechanism to do so.

5. **Mr. Brown** (European Union), **Mr. Caplan** (United States of America) and **Mr. Schöll** (Switzerland) aligned themselves with the comments made by the representatives of Canada and France.

6. **Ms. Liang Danni** (China) said that Working Group II should take account of the concerns expressed by some States regarding the immediate application of the Rules to existing treaties.

7. **The Chairperson** said that the report would note that the text proposed by the representative of Ecuador had obtained the support of a number of delegations.

8. **Mr. Apter** (Israel) stressed the importance of ensuring that Working Group II bore in mind the definition of its mandate that had been proposed at the previous meeting.

9. **Mr. Loh Kong Yue** (Singapore) said that his delegation was prepared to support the text proposed at the previous meeting.

10. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to adopt the text of the mandate to Working Group II that had been proposed at the previous meeting.

11. *It was so decided.*

(a) **Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration** (*continued*)

(A/CN.9/XLVI/CRP.1/Add.1 and 2;

A/CN.9/XLVI/CRP.2/Add.1;

A/CN.9/XLVI/CRP.3)

12. **The Chairperson** invited the Commission to comment on the section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.1.

13. **Mr. Apter** (Israel) proposed that the final sentence in paragraph 9, which did not reflect the discussion in the Commission, should be deleted. The sentence read: "It was agreed that that distinction need not apply in relation to other arbitration rules or in ad hoc proceedings."

14. **The Chairperson** proposed amending the sentence to read: "It was agreed that different considerations applied with respect to other arbitration rules or in ad hoc proceedings."

15. *It was so decided.*

16. **Mr. Caplan** (United States of America) proposed amending "under other sets of arbitration rules or ad hoc" in the last sentence of paragraph 10 to read: "under other sets of arbitration rules or in ad hoc proceedings".

17. *It was so decided.*

18. **Mr. Brown** (European Union) proposed replacing the phrase "where liability might attach to different treaty Parties, and that a relevant Party would consequently not necessarily be limited to the home State of the investor" in paragraph 13 with the following text: "where identifying the 'relevant Party' might be difficult, and where the criterion of 'respondent State' would be more straightforward to operate. It was consequently decided to retain the term 'respondent State'."

19. *It was so decided.*

20. **Mr. Caplan** (United States of America) proposed replacing the phrase "that the rules should always require such consultation by the arbitral tribunal" in paragraph 21 with "that where such consultation by the tribunal was intended, the rules should expressly so state".

21. *It was so decided.*

22. **Mr. Caplan** (United States of America) said that paragraph 29 was intended to indicate how the repository should act in the event of a disagreement regarding transparency procedures. He therefore proposed adding the following sentence: "Any disagreement between disputing parties would then be resolved by the arbitral tribunal before further documents were sent to the repository."

23. *It was so decided.*

24. **Mr. Loh Kong Yue** (Singapore) proposed inserting the words "requiring redaction" after "documentations" and replacing "an investment arbitration" with "arbitration proceedings".

25. *It was so decided.*

26. *Document A/CN.9/XLVI/CRP.1/Add.1, as amended, was adopted.*

27. **The Chairperson** invited comments on document A/CN.9/XLVI/CRP.1/Add.2.

28. **Mr. Popkov** (Belarus) proposed expanding paragraph 14 by adding the following text: "as the procedure of diplomatic protection and submissions of non-disputing Parties to the treaty are of a different legal nature. The concern can relate not to the exercise of diplomatic protection on the basis of article 5 but to the possible use of these provisions to protect in an improper and persistent manner the right of an investor under the treaty."

29. **The Chairperson** suggested that a simpler solution might be to reword paragraph 14 to read: "It was clarified that article 5 was not meant to be used in a way which would be tantamount to diplomatic protection." As he did not recall any discussion of the protection of investors in an improper and persistent manner, he felt that the new sentence proposed by the representative of Belarus could not be included in the report. He suggested as an alternative: "One delegation highlighted the fact that diplomatic protection was a different concept that could not be applied under article 5 and that there was a risk that such provisions could be used to protect in an improper and persistent manner the right of an investor under the treaty." He invited the Commission to consider wording along those lines during the consultation break.

30. *It was so agreed.*

31. **Mr. Caplan** (United States of America) drew attention to the phrase in paragraph 19 which read “it was clarified that the principle set forth in paragraph (1) was that hearings should be public”. He proposed replacing the words “hearings should be public” with “hearings are public”.

32. *It was so decided.*

33. **Mr. Apter** (Israel), referring to paragraph 31, asked whether the year of adoption of the Rules on Transparency should be included in the official title.

34. **Ms. Montineri** (Secretariat) said that the date would be included when the Rules were published on the UNCITRAL website. However, it was not the normal practice to include it in the official title, especially since the Rules would be adopted before they actually entered into effect.

35. **Mr. Loh Kong Yue** (Singapore) proposed inserting the following sentence before the second sentence of paragraph 32: “The Commission noted that the form of the rules on transparency would not affect the scope of their applicability under article 1.” The next sentence would then begin with the words “The Commission further noted that”.

36. *It was so decided.*

37. **The Chairperson** noted that paragraph 14 was the only paragraph of document A/CN.9/XLVI/CRP.1/Add.2 that had not yet been approved.

38. He invited comments on document A/CN.9/XLVI/CRP.2/Add.1, which contained the amended version of the Rules on Transparency.

39. **Mr. Klippstein** (Germany) proposed replacing “In investor-State arbitrations” initiated under the UNCITRAL Arbitration Rules in article 1, paragraph 2, with “In investor-State arbitration”.

40. **Mr. Caplan** (United States of America) proposed as alternative wording “In an investor-State arbitration”.

41. **The Chairperson** suggested that the original wording should be maintained because it confirmed that the subsequent provisions were applicable to all arbitrations.

42. *It was so agreed.*

43. **Mr. Caplan** (United States of America), referring to the amendment to article 1, paragraph 4, of the UNCITRAL Arbitration Rules, said that the reference in brackets to the shorter version of the title of the Rules on Transparency was unnecessary if those Rules were mentioned only once.

44. **The Chairperson** noted that document A/CN.9/XLVI/CRP.2/Add.1 had been approved apart from article 5, paragraph 2, and article 8, which would be discussed later.

45. He invited comments on document A/CN.9/XLVI/CRP.3, which contained the Commission’s draft decision concerning the adoption of the Rules on Transparency. An additional paragraph would be added later concerning the recommendation on the application of the Rules to the settlement of disputes arising under existing investment treaties.

46. **Mr. Brown** (European Union) proposed inserting words such as “and other entities” or “and regional economic integration organizations” after “Recommends that all States” and “invites States” in paragraph 4.

47. **Ms. Kobayashi-Terada** (Japan) proposed replacing the word “States” in both cases with “parties to international investment treaties”.

48. **Ms. Montineri** (Secretariat) said that the decision as a whole was addressed to Member States of the United Nations. However, the invitation in the second part of the final paragraph was basically addressed to the high contracting parties to treaties.

49. **The Chairperson** said he took it that the Commission wished to amend “invites States” in paragraph 4 to read “invites parties to international investment treaties”.

50. *It was so decided.*

51. **Mr. Caplan** (United States of America) proposed deleting the comma after “UNCITRAL Arbitration Rules” in paragraph 1 and the indefinite article before “new article 1” in paragraph 3.

52. *It was so decided.*

The meeting was suspended at 11.30 a.m. and resumed at 12.05 p.m.

53. **Mr. Schneider** (Switzerland) proposed the following amendment to the opening words of paragraph 4 of the decision, which reflected the wording used in respect of the UNCITRAL Arbitration Rules: “Recommends the use of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration”.

54. *It was so decided.*

55. **The Chairperson** invited the Commission to resume its consideration of paragraph 14 of document A/CN.9/XLVI/CRP.1/Add.2. The following wording had been proposed: “In relation to paragraph 2, it was clarified that that paragraph was not meant to allow submissions which would support the claim of the investor in a manner tantamount to diplomatic protection. One delegation said that the word ‘tantamount’ might not give arbitral tribunals sufficient guidance.”

56. **Mr. Schneider** (Switzerland) proposed adding that the Commission did not share that view.

57. **The Chairperson** proposed adding the following sentence: “This view was not shared.”

58. If he heard no objection, he would take it that the Commission wished to adopt paragraph 14 and document A/CN.9/XLVI/CRP.1/Add.2 as a whole, as amended.

59. *It was so decided.*

Future work in the field of settlement of commercial disputes (A/CN.9/785)

60. **The Chairperson** drew attention to document A/CN.9/785 concerning future work. As no decision would be taken on the matter until the end of the session, the object at that stage was to agree on priorities. He took it that high priority would be given to the revision of the UNCITRAL Notes on Organizing Arbitral Proceedings.

61. At a round table with arbitration practitioners organized jointly by the secretariat and the International Arbitration Institute, Paris, in April 2012, the question had been raised whether UNCITRAL should consider suspending its rule-making activities for the time being unless it could identify an area in which new rules would really be of use to the arbitral community. UNCITRAL had produced an impressive array of

standards, but resources could perhaps be better spent at that stage on capacity-building in order to ensure that the standards were properly applied. That view had been shared by quite a large number of participants in the round table.

62. **Ms. Kaufmann-Kohler** (Switzerland) drew attention to an issue which aroused a great deal of concern in investment arbitration circles. As most treaties allowed not only the company that was the vehicle of an investment but also its shareholders, including indirect shareholders, to bring investment arbitration proceedings for damage suffered, several concurrent proceedings could be brought for the same economic damage with, in some cases, overlapping claims. Another related issue was that contract arbitration proceedings involving claims of compensation could be brought concurrently with investment arbitration proceedings for the same economic damage. There was as yet no system that could be utilized to restore order in such cases. A conference on the issue, to which both academics and practitioners would be invited, was scheduled for November 2013. In her view, the time was not yet ripe for an exercise in rule-making.

63. Another complex issue that should be addressed at the multilateral level was that of parallel proceedings in commercial civil arbitration involving State courts and arbitral tribunals. Clear rules existed under most international civil procedure regimes, such as the Brussels Regulation. In view of the relevance of article II of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards in that context, it might be desirable to consider drafting a protocol to the Convention at some time in the future.

64. **The Chairperson** asked whether the work by the International Law Association on the doctrine of *lis pendens* was helpful in that regard.

65. **Ms. Kaufmann-Kohler** (Switzerland) said that it could serve as a valuable starting point for any UNCITRAL discussion of the matter.

66. **Ms. Montineri** (Secretariat), referring to article 8 of the UNCITRAL Model Law on International Commercial Arbitration concerning arbitration agreements and substantive claims before

a court, said that the Digest of Case Law relating to the Model Law highlighted divergent approaches.

67. **The Chairperson** wondered whether UNCITRAL could take steps to promote a uniform interpretation of article 8 of the Model Law. The question arose whether a court, when deciding whether to stay arbitral proceedings, should undertake a full review or merely a prima facie review of the validity of an arbitration agreement.

68. **Mr. Schöll** (Switzerland) said that there should be a clear indication, before work was assigned to Working Group II, that no other institutional forum was already active in the area and better placed to undertake the work. The Commission should certainly remain active on the topic of parallel proceedings in commercial arbitration. However, he felt that it was too soon to take up the question of interpretation of article 8 of the Model Law or to draft a protocol to the New York Convention.

69. As the secretariat had accumulated a great deal of expertise in the area of arbitration, his delegation would not object if the task of updating the Notes on Organizing Arbitration Proceedings were to be assigned to the secretariat, which would then submit a draft text directly to the Commission.

70. **Ms. Monineri** (Secretariat) said that the secretariat would prefer to have Working Group II

devote a session to the updating of the Notes, since input on current arbitration practices was required from as many States as possible.

71. **Mr. Jacquet** (France) said that his delegation did not share the scepticism that had been expressed by the representative of Switzerland concerning the question of parallel proceedings. He did not see why Working Group II should not take up the subject and develop a number of guidelines on dealing with the practical difficulties to which such proceedings frequently gave rise.

72. His delegation would be less enthusiastic, however, when it came to questions such as the “competence-competence” principle or the power of an arbitral tribunal to determine its own jurisdiction. The Working Group should not become involved in dealing with questions of comparative law. It should deal exclusively with normative matters.

73. **The Chairperson** asked whether the Commission agreed that the first topic to be addressed after completion of the task of developing a convention on transparency should be the updating of the Notes on Organizing Arbitration Proceedings.

74. *It was so decided.*

The meeting rose at 12.30 p.m.

Summary record of the 965th meeting, held at the Vienna International Centre, Vienna, on Thursday, 11 July 2013, at 2 p.m.

[A/CN.9/SR.965]

Chairperson: Mr. Moollan (Vice-Chairperson) (Mauritius)

The meeting was called to order at 2.15 p.m.

Consideration of issues in the area of arbitration and conciliation

(c) Preparation of a guide on the 1958 New York Convention (A/CN.9/786)

1. **The Chairperson** invited the secretariat to introduce agenda item 4 (c).
2. **Ms. Montineri** (Secretariat) said that the Commission had decided at its forty-first session in 2008, on the basis of a report by the secretariat on the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), to request the secretariat to study the feasibility of preparing a guide on the New York Convention. The secretariat's report, which had taken into account comments by 108 States parties to the Convention, had drawn attention to both legislative and judicial problems encountered in implementing the Convention. Some of the problems stemmed from divergent interpretations of the provisions and others from lack of awareness of the Convention. After studying the matter over a two-year period, the secretariat had opted for an open approach involving the compilation of as much information as possible on decisions taken under the Convention in a great variety of jurisdictions throughout the world. The information thus compiled with the assistance of Professor Bermann of Columbia University School of Law and Professor Gaillard of the Paris Institute of Political Studies had been published on the Internet. It served as the basis for the development of a soft-law guide on the New York Convention. She urged States that had not yet participated in the project to become involved, since the aim was to take advantage of the widest possible range of contributors. It was hoped to complete the guide before the end of 2013 and to publish it in due course.
3. Document A/CN.9/786 contained an excerpt from the guide concerning article VII of the New York Convention. It listed the different interpretations to which the article had given rise. While the guide respected the different approaches adopted, it highlighted the approach that it deemed to be preferable in the light of the drafting history of the Convention.
4. **Ms. Banifatemi** (International Arbitration Institute) commented on the website (www.newyorkconvention1958.org) that had been established to make available the information compiled in preparing the guide. The website was displayed on a screen in the conference room. One section contained the guide to the New York Convention from article I to article VII, which was the article addressed in document A/CN.9/786. The remaining articles would be dealt with by the end of 2013. The drafting history (*travaux préparatoires*) was shown for each article, followed by an analysis. Links were provided to case law and documents that were freely accessible on the Internet. A total of 22 jurisdictions and more than 1,000 cases were now covered, including 900 original language decisions. Over 100 decisions had been translated. The full guide would be available in all six working languages of the United Nations.
5. There was a powerful search tool on the website. Searches could be conducted by jurisdiction for the 22 jurisdictions and for the Organization for the Harmonization of Business Law in Africa (OHADA). The information could be filtered by type of court, language and provision of the Convention. The data was continuously updated.
6. Very helpful assistance had been provided by both individual and institutional contributors, who were listed on the website. It was hoped that additional jurisdictions would be covered in due course by that means.
7. **Mr. Gaillard** (International Arbitration Institute) joined the previous speaker in expressing

gratitude to all contributors who facilitated the process of keeping track of case law and assessing whether consensus existed on certain points. Where consensus did not exist, the trends were described as objectively as possible and an attempt was made to indicate which approach was most consistent with the spirit of the New York Convention. In general, the approach to implementation was relatively harmonious and there were very few instances of marked divergence from the underlying principles.

8. **Mr. Bermann** (International Arbitration Institute) said that the guide was a work in progress along many vectors. The number of jurisdictions covered and the number of operations performed had increased. Clearly, as the number of contributors grew, the task of coordination became more difficult. It was necessary to identify different lines of interpretation, indicating which position was most in conformity with the spirit and purpose of the New York Convention. It was a project of which UNCITRAL could, in his view, be quite proud.

9. **The Chairperson** expressed warm appreciation on behalf of the Commission to all those who had been involved in developing the guide and the website. Clearly, opinions were expressed in work of that kind regarding case law in different jurisdictions. He suggested that it should be clarified in the report that such opinions did not reflect a consensus within the Commission.

10. **Mr. Caplan** (United States of America) enquired about the status of the guide if it were to be published as a United Nations document. If the publication were to be authorized by the Commission, it could presumably provide input if necessary.

11. **Ms. Montineri** (Secretariat) said that the guide could be circulated to the members of the Commission prior to publication.

12. **Mr. Sorieul** (Secretary of the Commission) referred by way of example to the UNCITRAL Legal Guide on Electronic Funds Transfers, which was the product of research by the secretariat in cooperation with a number of expert groups. Such publications did not require the same type of Commission endorsement as standard-setting documents. The Commission could authorize the publication of the guide by the secretariat.

Alternatively, it might wish to review the text before granting its approval.

13. **Mr. Schöll** (Switzerland) proposed that the guide should be submitted on completion to the Commission so that its status could be established. Approval of the text by the Commission would enhance its legitimacy.

14. **The Chairperson** expressed doubts about the status of the guide notwithstanding its excellent quality. For instance, the provisions of article VII of the New York Convention were highly controversial. The authors were providing a valuable service to the arbitral community but, as had been noted, they occasionally expressed personal opinions. He therefore had serious reservations about the advisability of seeking the Commission's authorization for the guide.

15. **Ms. Montineri** (Secretariat) said that the purpose of the guide was not to express opinions but to present the case law and current trends without making value judgements. As it was important to produce a document that was universally acceptable, the secretariat would appreciate any comments that would assist it in achieving that aim in the months ahead.

16. **The Chairperson** said that he did not wish to imply that the authors lacked objectivity. However, it was not possible to analyse whether certain trends were consistent with the spirit of the New York Convention without passing judgement.

17. **Ms. Kaufmann-Kohler** (Switzerland) said that it would be odd if the authors of the guide, who were highly reputed academics, were precluded from expressing their opinions. As States naturally held different views based on divergent case law, they could scarcely be expected to express approval of contrary doctrinal views. She suggested that the Commission should request the secretariat to look into the matter together with the authors and submit a proposal regarding the procedure to be followed.

18. **Ms. Viscasillas Perales** (Spain) said that her delegation shared some of the doubts expressed by previous speakers. She had been involved in the updating of the Digest of Case Law on the Convention on Contracts for the International Sales of Goods, which had also required the preservation of a neutral stance. The Digest had been adopted by

the Commission. She wondered why the official CLOUT database, which contained case law on UNCITRAL texts, had not been used for the guide.

19. **Mr. Sorieul** (Secretary of the Commission) said that the question as to whether the Commission could approve documents containing doctrinal opinions had been discussed on a number of occasions in connection, for example, with the Digest of Case Law mentioned by the representative of Spain, the UNCITRAL Legal Guide on Electronic Funds Transfers, and other guides and digests. The secretariat had been mandated by the Commission in 2008 to disseminate information on the judicial interpretation of the New York Convention.

20. There were various options available. The guide could be published on the sole responsibility of the secretariat. Alternatively, the Commission could take note of the publication without commenting on its content. A third option would involve the circulation of the completed guide to Governments with a view to obtaining comments that would be considered by the Commission at a future session. It would then be more difficult for the Commission to dissociate itself from the content of the guide.

21. **The Chairperson** said that the second option might be preferable. The Commission could take note of the guide and encourage its use without passing judgement on its content.

22. **Ms. Rennie** (United Kingdom) expressed concern that the publication of a guide containing the authors' opinions as an UNCITRAL document would imply some form of endorsement of the content. She proposed deferring a decision on the procedure to be adopted until the guide had been completed.

23. **Mr. Caplan** (United States of America) supported the proposal by the representative of the United Kingdom.

24. **Mr. Kordač** (Observer for the Czech Republic) suggested that the authors should clarify which parts of the guide reflected their personal views. Their analysis could then be published separately as a digest of case law.

Future work in the field of settlement of commercial disputes (*continued*) (A/CN.9/785)

25. **The Chairperson** invited further comments regarding future work.

26. **Mr. Lebedev** (Russian Federation) said that he agreed with speakers at the previous meeting who had stressed the importance of the topic of concurrent proceedings in the field of investment arbitration, which should be included in the agenda of Working Group II. He also supported the proposal to revise the UNCITRAL Notes on Organizing Arbitral Proceedings.

27. In addition, priority should be given to the topic of arbitrability, since a large number of *sui generis* problems arose in that context. Lastly, he advocated the inclusion in the agenda of Working Group II of the question of mass claim arbitration. A comparative approach to that topic could prove very helpful.

28. **Mr. Kordač** (Observer for the Czech Republic) said that the issue of concurrent proceedings was of great importance. He was unable to share the view of the representative of Switzerland that the time was not yet ripe for an exercise in rule-making. He supported the proposal to update the UNCITRAL Notes on Organizing Arbitral Proceedings.

29. While arbitrability was an important issue, his delegation felt that the Commission was not in a position to exert a major impact in that area because of existing differences in public policies.

30. **The Chairperson** reminded the Commission that it had agreed at the previous meeting that the first topic to be addressed after completion of the task of developing a convention on transparency should be the updating of the Notes on Organizing Arbitration Proceedings.

31. **Mr. Apter** (Israel) said that while the issue of concurrent proceedings was of great interest, his delegation considered that it was of relevance only to a relatively small number of States. The criteria for choosing topics should be their relevance to States and the arbitral community and, as noted by the representative of the Czech Republic, the likelihood of the Commission's work having a practical impact.

32. **The Chairperson** said that concurrent proceedings could relate to almost every aspect of arbitration. There was the question of concurrent proceedings in investment arbitration. Another issue was the application of the *lis pendens* principle to arbitral tribunals, which could arise in commercial arbitrations. A third issue was concurrent court proceedings and arbitral proceedings as well as the interpretation of article 8 of the UNCITRAL Model Law on International Commercial Arbitration. For instance, the misapplication of the test for suspending court proceedings in favour of arbitration proceedings had caused many problems in the developing world.

33. **Mr. Popkov** (Belarus) said that Working Group II should continue to address questions relating to the settlement of commercial disputes with a view to promoting the development of sound practice in that area.

34. As States would greatly appreciate guidance concerning parallel proceedings in investment arbitration, he asked whether the secretariat could look into the possibility of developing guidelines on the subject in conjunction with other forums.

35. **Ms. Wilhelmsen** (Denmark) said that a clear framework should be devised for the work assigned to Working Group II. Her delegation considered that priority should be given to work on concurrent proceedings and the *lis pendens* principle. The Working Group could discuss, for instance, which law was applicable to the validity of arbitration agreements, since there was as yet no uniform rule applicable to the pre-award stage. The matter should perhaps be approached from the standpoint of articles II and III of the New York Convention.

The meeting was suspended at 3.30 p.m. and resumed at 4.15 p.m.

Consideration of issues in the area of arbitration and conciliation

(a) Finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration (continued) (A/CN.9/XLVI/CRP.1/Add.3 and Add.4)

36. **The Chairperson** invited comments on the section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.3.

37. **Mr. Spelliscy** (Canada) said that the last sentence of paragraph 2, which referred to paragraph 40 of document A/CN.9/760, conveyed the wrong message since it implied that the Commission was endorsing the content of that paragraph. He proposed that the sentence should be deleted and that the penultimate sentence should be amended to read: "The Commission recalled paragraph 40 of document A/CN.9/760, but agreed that when a tribunal was called upon in the rules to exercise its discretion as a matter of fact, the criteria in article 1(4) were plainly brought into application." The following words might be added at the end of that sentence if they secured the necessary support: "regardless of whether the rules used the term 'discretion'".

38. **The Chairperson** proposed the following amendment to the opening words: "The Commission reviewed paragraph 40".

39. *Paragraph 2, as amended, was adopted.*

40. **Mr. Spelliscy** (Canada) proposed that the words "Two delegations" in the second sentence of paragraph 7 should be replaced with "Several delegations".

41. *Paragraph 7, as amended, was adopted.*

42. **Ms. Pólit** (Ecuador) proposed adding the following phrase after "(the ICSID Convention)" in paragraph 18 "and by other delegations, such as those of Ecuador, the Bolivarian Republic of Venezuela and the Plurinational State of Bolivia, that they denounced ICSID."

43. **The Chairperson** said that it was not the Commission's practice to record the names of States in the report. He therefore proposed inserting instead the following phrase: "and that other countries had denounced the ICSID Convention". The sentence would then continue: "and that those countries thus felt more comfortable supporting the temporary option of the designation of the PCA".

44. *Paragraph 18, as amended, was adopted.*

45. **Mr. Popkov** (Belarus) proposed amending the second sentence of paragraph 21 to read: "It was also said that the PCA handled a variety of cases involving States, including inter-State disputes under treaties and contract disputes between States

and private parties, making it a desirable choice for some delegations.”

46. **Mr. Daly** (Permanent Court of Arbitration) proposed amending the first sentence of paragraph 21 to read: “Other delegations considered that the role of the PCA Secretary-General as designator of appointing authorities in the UNCITRAL Arbitration Rules provided for a more natural link with UNCITRAL.” He further proposed amending the text in brackets in the last sentence of the paragraph to read: “free for the publication of up to 50 documents, and a flat fee of 750 euro for the publication of greater than 50 documents”.

47. *Paragraph 21, as amended, was adopted.*

48. **Mr. Kordač** (Czech Republic) proposed that the phrase “recorded consensus that the PCA should be the institution it would designate to undertake the role of repository” should be worded in a more positive manner.

49. **Mr. Spelliscy** (Canada) proposed “recorded consensus that the PCA be designated to undertake the role of repository”.

50. *Paragraph 22, as amended, was adopted.*

51. **Mr. Schneider** (Switzerland) proposed adding the following phrase at the end of paragraph 23: “and if by that time the Registry is not established by UNCITRAL, the decision be reconsidered”.

52. **The Chairperson** said that the amendment seemed to imply that the difficult exercise of designating an institution to undertake the role of repository might need to be repeated.

53. **Ms. Pólit** (Ecuador) opposed the amendment proposed by the representative of Switzerland.

54. **Ms. Le Duc Hanh** (Observer for Viet Nam), supported by **Ms. Escobar** (Ecuador), noted that some delegations had expressed concern that the temporary solution might become permanent. It had therefore been decided to make provision for a review of the situation.

55. **The Chairperson** proposed amending paragraph 32 to read: “Concerns were raised that any temporary solution of having the PCA acting as registry should not become a permanent one, and the Commission therefore requested that, at its next session, in 2014, the Secretariat should report on the

status of the establishment and functioning of the Transparency Registry.”

56. *Paragraph 22, as amended, was adopted.*

57. **Mr. Loh Kong Yue** (Singapore) said that his delegation wished to introduce the following new paragraph after paragraph 24: “A view was expressed that the mandate of the Working Group was to explore options to make the rules on transparency applicable to existing investment treaties, but that it did not prejudice the outcome in favour of a recommendation.”

58. *It was agreed to insert the new paragraph after paragraph 24.*

59. **Mr. Lebedev** (Russian Federation) said that the last phrase in paragraph 26, “a recommendation promoting the use of the rules on transparency was not the appropriate vehicle for qualifying their use”, should either be clarified or deleted.

60. **The Chairperson** suggested that the whole of the second sentence should be replaced with the following sentence: “That request did not receive support.”

61. *Paragraph 26, as amended, was adopted.*

62. **Mr. Lee Jae Min** (Republic of Korea) proposed replacing the word “treaty” at the end of paragraph 28 with “convention”.

63. **Mr. Loh Kong Yue** (Singapore) proposed replacing the words “Support was expressed for” at the beginning of paragraph 28 with “Several delegations expressed support for”. He further proposed amending the last sentence to read: “It was emphasized that there would not be any expectation or value judgement on any State that chose not to sign or ratify such a convention.”

64. **The Chairperson** said that there was a reference to “any value judgement” in paragraph 34.

65. **Mr. Loh Kong Yue** (Singapore) said that in that case the words “obligation on” in the original version of the sentence should simply be replaced with “expectation for”.

66. *Paragraph 28, as amended, was adopted.*

67. **Mr. Caplan** (United States of America), noting that while paragraphs 28 to 31 reflected expressions of support for the preparation of a convention,

paragraph 32 reported certain reservations, proposed that the paragraph should begin with the words “In reply, it was noted that” instead of “Moreover, it was recognized that”.

68. *Paragraph 32, as amended, was adopted.*

69. **Mr. Loh Kong Yue** (Singapore) proposed inserting a new paragraph after paragraph 32 that would read: “A view was expressed that, while delegations have acknowledged the importance of transparency, it has also to be recognized that the compromise achieved by the rules is not a perfect one and that a convention will have the effect of upsetting the delicate balance struck in article 1 of the rules.”

70. **The Chairperson** suggested that the words “it has also to be recognized that” should be deleted since they might be interpreted as reflecting an agreement. The sentence would then read: “A view was expressed that, while delegations had acknowledged the importance of transparency, the compromise achieved by the rules was not a perfect one and a convention would have the effect of upsetting the delicate balance struck in article 1 of the rules.” As paragraph 29 dealt with the compromise, he proposed that the new sentence should be inserted there rather than after paragraph 32.

71. *It was so decided.*

72. **The Chairperson** said that paragraph 35 should be deleted since its content would be replaced by the first three paragraphs of the section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.4, which would be read out shortly by the secretariat.

73. In the meantime, he proposed inserting a new paragraph 35, which would read: “For the record, it was noted that the draft text of a convention, placed before the Commission in paragraph 5 of document A/CN.9/784, was a proposal by the secretariat which had not yet been the subject of any discussion by the Working Group.”

74. *It was so decided.*

75. **Ms. Salasky** (Secretariat) read out the first three paragraphs of document A/CN.9/XLVI/CRP.1/Add.4.

76. **The Chairperson** said he took it that those paragraphs were acceptable to the Commission.

77. *It was so agreed.*

78. *The draft report on the finalization and adoption of UNCITRAL rules on transparency in treaty-based investor-State arbitration, as a whole, as amended, was adopted.*

Future work in the field of settlement of commercial disputes (continued) (A/CN.9/785)

79. **The Chairperson** suggested that the Commission might request the secretariat, resources permitting, to look further into the question of concurrent proceedings and to report to the Commission in 2014 on how the question could be addressed.

80. In response to a query by **Mr. Caplan** (United States of America), **the Chairperson** confirmed that no decision would be taken on the matter until the final week of the current session.

Consideration of issues in the area of arbitration and conciliation

(c) Preparation of a guide on the 1958 New York Convention (continued) (A/CN.9/786)

81. **The Chairperson** said that the Commission might wish to defer a decision on the status of the guide on the 1958 New York Convention until the next session of the Commission when the complete guide would be available for consideration. With a view to allaying existing concerns, a caveat should be attached to any version of the guide published in the meantime to the effect that its status had not yet been determined by UNCITRAL. At the 2014 session, the secretariat would submit a recommendation to the Commission regarding the status of the guide and the form in which it should be published.

82. **Mr. Caplan** (United States of America) said that the question as to whether it would be published by the United Nations should be addressed.

83. **Mr. Sorieul** (Secretary of the Commission) said that the chapters that were completed before the next session would be published as notes by the secretariat so that they could be studied by members of the Commission. Any reservations they expressed

would be faithfully reflected in the documents and on the website.

84. **Mr. Apter** (Israel) said that some time might be required for in-depth consideration of the content of the remaining chapters. The Commission might perhaps consider making an abridged version available to ensure that all States had the opportunity to conduct a proper analysis of the guide.

85. **The Chairperson** said that all such concerns would be taken into account by the secretariat. If he heard no objection, he would take it that the Commission wished to defer a decision on the New York Convention until the next session.

86. *It was so decided.*

The meeting rose at 5.05 p.m.

Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry

Summary record of the 966th meeting, held at the Vienna International Centre, Vienna, on Friday, 12 July 2013, at 9.30 a.m.

[A/CN.9/SR.966]

Chairperson: Mr. Schöll (Switzerland)

Later: Mr. Labardini Flores (Vice-Chairperson) (Mexico)

The meeting was called to order at 9.45 a.m.

Consideration of issues in the area of arbitration and conciliation

(d) International commercial arbitration moot competitions (A/CN.9/786)

1. **The Chairperson** invited the secretariat to introduce agenda item 4 (d).
2. **Ms. Salasky** (Secretariat) said that the Association for the Organization and Promotion of the Willem C. Vis International Commercial Arbitration Moot had held the Twentieth Moot in Vienna from 22 to 28 March 2013. As in previous years, the Moot had been co-sponsored by the Commission. A total of 291 teams from law schools in 66 countries had participated. The oral arguments phase of the Twenty-first Willem C. Vis International Commercial Arbitration Moot would be held in Vienna from 11 to 17 April 2014.
3. The Commission had also co-sponsored the Tenth Willem C. Vis (East) International Commercial Arbitration Moot, which had been held from 11 to 17 March 2013. The winning team was from the University of Canberra.
4. **Ms. Montineri** (Secretariat) said that the moot competitions provided excellent opportunities for students throughout the world to acquire experience in the area of arbitration. The Commission had co-sponsored the Fifth International Commercial Arbitration Competition, organized by the Carlos III University of Madrid, from 15 to 20 April 2013. The Sixth Madrid Moot would be held from 21 to 25 April 2014.
5. **Mr. Lebedev** (Russian Federation) emphasized the value of the moot competitions co-sponsored by UNCITRAL as a means of promoting outreach to

the student community throughout the world and generating awareness of the Commission's work among young jurists. He had been tracking the careers of some Russian students who had taken part in the competitions and had noted that their dissertations tended to focus on UNCITRAL issues. He proposed that the winners of moot competitions should be invited to attend UNCITRAL sessions.

6. **Mr. Adensamer** (Austria) expressed support for the proposal to invite winners to attend some of the meetings held during UNCITRAL sessions. Meetings at which particularly important topics were to be discussed should be selected.

7. **The Chairperson** said he took it that the Commission wished to emphasize in its report the important role played by moot competitions in familiarizing students with the work of UNCITRAL. He invited the secretariat to comment on the proposal to invite winners to attend UNCITRAL sessions.

8. **Mr. Sorieul** (Secretary of the Commission) said that while the secretariat was unable to allocate a great deal of resources to UNCITRAL sponsorship of the moot competitions, it was seeking to forge closer links with the competition organizing teams in Vienna and elsewhere. It would therefore look into the possibility of acting on the proposal just made by the representatives of the Russian Federation and Austria.

Election of officers (continued)

9. **Mr. Cabrera** (Mexico) speaking on behalf of the Latin American and Caribbean States, proposed that Mr. Labardini Flores (Mexico) be elected Vice-Chairperson of the Commission.

10. **Ms. Escobar** (El Salvador), **Mr. Dennis** (United States of America) and **Mr. Castellano** (Italy) seconded the proposal.

11. *Mr. Labardini Flores (Mexico) was elected Vice-Chairperson of the Commission by acclamation.*

12. **The Chairperson** invited Mr. Labardini Flores to chair the discussion concerning item 5 of the agenda.

13. *Mr. Labardini Flores (Mexico) took the Chair.*

Consideration of issues in the area of security interests

(a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (A/CN.9/WG.VI/WP.54 and Add.1-4; A/CN.9/781 and Add.1 and 2; A/CN.9/764 and 767; A/CN.9/XLVI/CRP.4)

14. **The Chairperson** invited the secretariat to introduce the documents relating to agenda item 5 (a).

15. **Mr. Bazinas** (Secretariat) said that the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (the draft Registry Guide) was contained in a number of documents produced for Working Group VI (Security Interests) as well as several Commission documents. As the Working Group had adopted the draft Registry Guide in April 2013, it had not been possible to produce a complete revised version in time for the current session of the Commission. The Working Group documents before the Commission (A/CN.9/WG.VI/WP.54 and Add.1-4) therefore contained the commentary to the draft Registry Guide. Commission document A/CN.9/781 presented a summary of all amendments to the Guide adopted by the Working Group. Addendum 1 to document A/CN.9/781 contained the draft Registry Guide recommendations and addendum 2 contained examples of registry forms. The reports of Working Group VI were contained in documents A/CN.9/764 and 767. Lastly, document A/CN.9/XLVI/CRP.4 contained a draft decision concerning the adoption of the Registry Guide.

16. **The Chairperson** invited comments on document A/CN.9/WG.VI/WP.54, which contained the draft preface and introduction to the draft Registry Guide.

17. *The preface was adopted.*

18. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that the International Civil Aviation Organization had recently adopted a fifth edition of the Regulations and Procedures for the International Registry. He therefore proposed that the reference to the Regulations and Procedures in subparagraph 4 (g) should be updated.

19. *It was so decided.*

20. **Mr. Bazinas** (Secretariat) said that paragraphs 8 to 16 of document A/CN.9/WG.VI/WP.54 concerning terminology and interpretation should be read in conjunction with paragraphs 3 to 9 of document A/CN.9/781, which drew attention to changes that had been adopted by the Working Group. The terminology was presented in document A/CN.9/781/Add.1, which contained, in addition, two notes to the Commission concerning issues that had come to light after the adoption of the text by the Working Group. They concerned the terms “amendment” and “registrant”. He assured the Commission that the secretariat would make any editorial changes that were necessary to ensure consistency in the use of terminology.

21. **Mr. Henning** (United States of America), referring to the definition of the term “grantor” as “the person identified in the notice as the grantor” in paragraph 11 of the Working Paper document and in paragraph (e) of document A/CN.9/781/Add.1, proposed adding the words “in the designated field” after the word “identified”. He proposed a similar amendment to the definition of a “secured creditor” in the two documents, which currently read: “‘Secured creditor’ means the person identified in the notice as the secured creditor.”

22. *It was so decided.*

23. **Mr. Henning** (United States of America) requested clarification as to how the new definition of the “registrant”, namely the person who submitted the prescribed registry notice form to the registry, would work in the context of paper registration where the person who transmitted the notice form to the registry was a courier or other mail service provider and hence was clearly not the registrant. It could perhaps be pointed out that a delivery agent was not covered by the term.

24. **The Chairperson** proposed that the commentary should explain that a courier or other mail service provider used by the registrant to transmit a paper notice would not be considered as a registrant.

25. *It was so decided.*

26. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed a simplification of the definition of the term “address” by combining options (i) and (ii) relating to a physical address, namely a street address or a post office box number.

27. *It was so decided.*

28. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed that option (iv), “an address that would be effective for communicating information”, should be deleted, since it was somewhat confusing and the commentary failed to explain what was designated.

29. **Mr. Castellano** (Italy) proposed that the reference to an address that would be effective for communicating information should be explained in the commentary.

30. **Ms. Walsh** (Canada) expressed support for the proposal by the representative of Italy. The best approach would be one that permitted flexibility. She considered that option (iv) could be deleted if the secretariat were to explain in the commentary that an enacting State was free to permit registrants to opt for various types of addresses.

31. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that the commentary could provide examples of other types of address that would be effective for communicating information. The registry form should be designed in such a way as to allow registrants to choose a particular type of address.

32. **The Chairperson** said he took it that the Commission wished to delete option (iv) and provide the proposed explanation for enacting States in the commentary.

33. *It was so decided.*

34. **Mr. Dubovec** (National Law Center for Inter-American Trade), referring to the definition of “regulation”, proposed replacing the words “the body of rules implemented by the enacting State”

with “the body of rules adopted by the enacting State”.

35. *It was so decided.*

36. **The Chairperson** invited comments from the Commission on the remaining sections of document A/CN.9/WG.VI/WP.54, beginning with paragraph 17.

37. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed deleting the words “that indicates the grantor’s intent to create a security right” in subparagraph 23 (c) because that aspect of the agreement was already covered in subparagraph 23 (b).

38. *It was so decided.*

39. **Mr. Dubovec** (National Law Center for Inter-American Trade) noted that the second sentence of paragraph 28 stated that registration was the only method of achieving third-party effectiveness for all types of encumbered assets. He drew attention to recommendation 50 of the Legislative Guide on Secured Transactions, according to which an independent undertaking could be made effective against third parties only by the secured creditor obtaining control with respect to the right to receive the proceeds under the independent undertaking. He proposed that the second sentence should be amended to refer to that recommendation and to indicate that registration of a notice was the method of achieving third-party effectiveness for all types of encumbered assets “except with respect to a security right in a right to receive the proceeds under an independent undertaking”.

40. *It was so decided.*

41. *The section of the introduction to the draft Registry Guide contained in document A/CN.9/WG.VI/WP.54, as amended, was adopted.*

42. **The Chairperson** invited comments on the remainder of the draft introduction contained in document A/CN.9/WG.VI/WP.54/Add.1.

43. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that the discussion referred to in paragraph 18 concerning coordination with specialized movable property registries was important, but only if security rights in specified

assets, such as railway rolling stock or aircraft objects, fell within the scope of the secured transactions law. If those assets were excluded from the law and a specialized registry existed for the respective security rights, there was no need for coordination.

44. **The Chairperson** said he took it that the Commission agreed to revise the section to clarify that point.

45. *It was so decided.*

46. *The remainder of the introduction to the draft Registry Guide, as amended, was adopted.*

47. **The Chairperson** invited comments on chapter I of the draft Registry Guide concerning the establishment and functions of the security rights registry contained in document A/CN.9/WG.VI/WP.54/Add.1 and on recommendations 1 to 3 contained in document A/CN.9/781/Add.1.

48. *Chapter I and recommendations 1 to 3 were adopted.*

49. **The Chairperson** invited comments on chapter II concerning access to the services of the registry contained in document A/CN.9/WG.VI/WP.54/Add.1 and on recommendations 4 to 10 contained in document A/CN.9/781/Add.1.

50. **Mr. Henning** (United States of America) proposed inserting the word “applicable” before “form” in recommendation 6, subparagraph (a) (i), because the registry would prescribe several different forms of notice for different purposes.

51. *It was so decided.*

52. **Mr. Bazinas** (Secretariat) drew attention to the note attached to recommendation 7, subparagraph (c). The Commission was invited to consider adding the following words at the beginning of the subparagraph: “Except as provided in recommendations 8, subparagraph (a), and 10, subparagraph (a).” The reason for the proposed addition was to explain that scrutiny was conducted by the registry, in accordance with recommendations 8 and 10, solely to ensure that some legible information was entered into a notice. Alternatively, the matter could be explained in the commentary.

53. **Ms. Walsh** (Canada) expressed support for the amendment proposed by the secretariat.

54. *Recommendation 7, as amended, was adopted.*

55. **Mr. Henning** (United States of America) proposed amending recommendation 8, subparagraph (a), to read: “The registry rejects the registration of a notice if information is not entered in each required designated field or if the information entered is not legible.”

56. *It was so decided.*

57. *Chapter II and recommendations 4 to 10, as amended, were adopted.*

The meeting was suspended at 11.10 a.m. and resumed at 11.45 a.m.

58. **The Chairperson** invited comments on chapter III concerning registration contained in document A/CN.9/WG.VI/WP.54/Add.2 and on recommendations 11 to 22 contained in document A/CN.9/781/Add.1.

59. **Mr. Dubovec** (National Law Center for Inter-American Trade), referring to paragraph 44 of document A/CN.9/WG.VI/WP.54/Add.2, said that a registrant could submit a notice with an attachment. He proposed that it should be made clear that the attachment thus became part of the notice and should be removed from the public registry record together with the notice itself when the notice expired.

60. *It was so decided.*

61. **Mr. Henning** (United States of America) said that recommendation 11 (a) closely resembled recommendation 70 of the *Legislative Guide on Secured Transactions*. It was not a regulation addressed to the registry or registrant but merely specified the legal impact of certain events. Working Group VI had correctly decided that it should be included in the draft Registry Guide so that the registrar and users would understand the relevant legal impact. However, it might be helpful if the commentary drew attention to the resemblance to recommendation 70 so that similar wording was used in the secured transactions law and the registry guide of an enacting State.

62. **Mr. Boettcher** (Germany) and **Mr. Dache** (Kenya) expressed support for the proposal by the representative of the United States.

63. **Mr. Bazinas** (Secretariat) drew attention to paragraph 32 of document A/CN.9/781 concerning amendments to the draft Registry Guide adopted by the Working Group, which was applicable to the point raised by the representatives of the United States, Germany and Kenya. The paragraph stated, inter alia, that wording along the following lines could be added where necessary: “Typically, this rule would be included in the secured transactions law of the enacting State. However, depending on its particular legislative method and drafting conventions, an enacting State may decide to place it or reiterate it in the regulation.”

64. **Ms. Walsh** (Canada) said that there were a number of locations in which that caveat should be inserted by the secretariat.

65. *It was so agreed.*

66. **The Chairperson** noted that the Commission was asked to consider whether recommendation 12 concerning a registration number should be moved closer to, or made part of, recommendation 16 on the indexing of information because the assignment of a registration number by the registry related to the indexing of information in the registry record.

67. **Mr. Bazinas** (Secretariat) noted that if recommendation 12 were to be incorporated in recommendation 16, the heading “Registration number” would be deleted.

68. **Ms. Walsh** (Canada) and **Mr. Castellano** (Italy) expressed support for the proposal to move recommendation 12 closer to recommendation 16.

69. **Mr. Weise** (American Bar Association) said that recommendation 12 might be perceived to be of relevance only to searchers if it were incorporated in recommendation 16, whereas the relevance of the registration number in the event of an amendment was highlighted in recommendation 30.

70. **Ms. Walsh** (Canada) proposed amending the title of recommendation 16 to read: “Registration number and indexing or other organization of information in the registry record”. Recommendation 16 was not solely an instruction to searchers; it was an instruction to the registry.

71. **The Chairperson** proposed inserting the words “For the purposes of recommendations 16, 18, 30, 32 and 34 at the beginning of recommendation 12, keeping it as a separate recommendation 15 and placing it right before recommendation 16. The secretariat could draft the final wording.

72. *It was so decided.*

73. **Mr. Dubovec** (National Law Center for Inter-American Trade), referring to recommendation 13, proposed that the wording of subparagraph (c) of option A should be aligned with the wording of the corresponding subparagraphs of option B and option C. It would then read: “In the case of an extension, the new period starts when the current period expires.”

74. **Mr. Bazinas** (Secretariat) drew the Commission’s attention to the note following recommendation 13, which raised an issue that might require some changes to option C. That option currently seemed to apply to each amendment notice. As a result, when the new period started on expiry of the current period and more than one amendment extending the period of effectiveness was registered, there would actually be no difference between options B and C. With a view to achieving the aim of option C, which was to set a maximum time limit, the new period could start: (a) when the amendment notice was registered with the maximum limit applicable to that amendment notice; or (b) when the current period expired as long as all the notices together would not exceed the maximum limit.

75. **The Chairperson** proposed the following wording for option C, subparagraph (c): “In the case of an extension, the new period could start: (a) when the amendment notice was registered with the maximum limit applicable to that amendment notice; or (b) when the current period expired as long as all the notices together would not exceed the maximum limit.”

76. **Mr. Dache** (Kenya) expressed support for the proposal.

77. **Ms. Walsh** (Canada) said she understood that the proposed text consisted of two alternatives rather than two cumulative approaches. The Commission would perhaps need to choose which of the two was more appropriate.

78. **Mr. Bazinas** (Secretariat) said that in the case of (a), each amendment notice would not exceed the

maximum limit, while in the case of (b), all amendment notices together would not exceed the maximum limit.

79. **Ms. Walsh** (Canada) said that the approach adopted in the case of (a) would not really further the policy reflected in option C, subparagraph (c). Her delegation therefore supported the approach adopted in the case of (b).

80. **Mr. Weise** (American Bar Association) said that some transactions continued for a very long time. If the cumulative effect of all the amendments was subject to an absolute limit, such a limit would be imposed on transactions that should be extendable for sound business reasons without any abuse of the registration system. Hence the goal of option C was that any particular registration was subject to a time limit, but that there was no aggregate limit, since option C would then be even more restrictive than option A.

81. **Mr. Castellano** (Italy) said he concurred with the comment on the (a) approach by the representative of Canada and with the point made by the representative of the American Bar Association

regarding the undesirability of imposing a maximum limit in certain circumstances. The policy intention underlying option C was different from that underlying option B. A loophole would arise where multiple amendments, each for a period of 20 years, were filed simultaneously. He suggested wording to the effect that multiple amendments entailing 20-year extensions were not acceptable.

82. **Mr. Bazinas** (Secretariat) said that three possibilities had now been envisaged. The first option pursuant to (a) would permit an unlimited number of 20-year amendment notices, an outcome that was inconsistent with the aim of option C. A second option consisted in permitting just one amendment for 20 years, which would mean that the initial 20-year notice would be followed by just one further 20-year amendment. The option envisaged in (b) was that all amendment notices together following expiry of the period should not exceed 20 years.

83. **The Chairperson** said that the Commission would continue its discussion of the matter at the next meeting.

The meeting rose at 12.30 p.m.

Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)

Summary record of the 967th meeting, held at the Vienna International Centre, Vienna, on Friday, 12 July 2013, at 2 p.m.

[A/CN.9/SR.967]

Chairperson: Mr. Labardini Flores (Vice-Chairperson) (Mexico)

The meeting was called to order at 2.15 p.m.

Consideration of issues in the area of security interests

(a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry

(A/CN.9/WG.VI/ WP.54 and Add.1-4; A/CN.9/781 and Add.1 and 2; A/CN.9/764 and 767; A/CN.9/XLVI/CRP.4) (*continued*)

1. **The Chairperson** invited the Commission to resume its discussion of chapter III concerning registration (A/CN.9/WG.VI/ WP.54/Add.2) of the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (draft Registry Guide) and on recommendations 13 to 22 (A/CN.9/781/Add.1).
2. A number of comments and proposals had been made regarding recommendation 13 concerning the period of effectiveness of the registration of a notice.
3. **Ms. Walsh** (Canada) said that the wording of option C should be adjusted to ensure that the registration of an initial notice would be effective for the period of time indicated by the registrant but would not exceed a certain maximum period at any given time. Subparagraph (c) of option C should therefore provide that in the event of an extension, the registration of an amendment specifying a new period of time subject to the maximum limit would take effect as soon as the amendment was registered.
4. **Mr. Dennis** (United States of America) said that two issues were being discussed simultaneously. One concerned the most appropriate wording of options A, B and C. The second concerned the substance of option C. Some delegations had held consultations since the previous meeting and produced what might be agreed wording for option A. However, there were still some different

assumptions regarding the purpose of option C. For example, in option A the State fixed the period of time, which might be five years. If the current wording of option A was applied, a second five-year period could be added at any time during the first five years. Thus, if a second five-year period were to be added in the second year, the total period would be extended to 10 years. However, such action could be taken only once. His delegation had assumed that option C worked in a similar fashion, but with the party deciding on the relevant period of time and the period of the extension, provided that it did not exceed the maximum limit. Thus, if the statutory maximum period was 20 years, a secured creditor could register a notice for 20 years and introduce a 20-year extension at any time during that period. It had been suggested during the consultations that such an extension could be introduced only once, which would solve the problem of overlapping with option B. As other delegations interpreted option C somewhat differently, the Commission should first make clear whether the intention was that parties could introduce an extension up to the option C maximum in the same manner as in option A or whether the maximum time available at any one time could not exceed the stated time period.

5. **Mr. Weise** (American Bar Association) said that option C was designed to prevent potential abuse by precluding multiple extensions during a particular time period and not to provide for an aggregate maximum of all periods.

6. **Mr. Bazinas** (Secretariat) said that the *Legislative Guide on Secured Transactions (Secured Transactions Guide)* provided only for options A and B. Option C was the product of the discussions of Working Group VI. Several delegations had suggested that an amendment or notice should not be effective for an indefinite period of time and that the record should be cleared at some stage. That was

the purpose of the maximum limit. However, there were two possibilities. The limit could be the aggregate period, for example 20 years regardless of the number of amendments introduced, or a maximum limit could be applied to each amendment notice. If the Commission considered that the maximum limit should apply to each amendment notice, the text in the note to recommendation 13 would be applicable: “the new period could start when the amendment notice was registered with the maximum limit applicable to that amendment notice”. If the Commission was unable to support that solution, it might be helpful to request a group of members to put forward an alternative proposal.

7. **The Chairperson** invited a group of interested members to meet informally and submit a proposal to the Commission.

8. He invited comments on recommendations 14 to 22.

9. **Mr. Dennis** (United States of America) proposed amending recommendation 14 to read: “The regulation should provide that a notice may be registered before or after the creation of a security right or the conclusion of a security agreement.” The word “the” had been changed to “a” before “security right” and “security agreement” because a single notice could suffice for many security rights and agreements.

10. *Recommendation 14, as amended, was adopted.*

11. *Recommendations 15 to 17 were adopted.*

12. **Mr. Bazinas** (Secretariat) drew attention to the note concerning recommendation 18 entitled “Copy of registered notice”. The Commission might wish to amend subparagraph (b) (ii) to make it clear that if the secured creditor did not know the grantor’s current address, the secured creditor should be entitled to use the grantor’s “last known” or “reasonably available” address.

13. **Mr. Dubovec** (National Law Center for Inter-American Trade) expressed support for that amendment. He proposed inserting an additional provision requiring the secured creditor to send a copy of the cancellation notice to each grantor. The proposed revised wording regarding the grantor’s address should also be added thereto.

14. **Mr. Weise** (American Bar Association) proposed amending the phrase at the end of the recommendation to read “at a current address of the grantor known to the secured creditor”, since the grantor might have more than one address.

15. **Mr. Dennis** (United States of America) said that if a grantor had many addresses, some of which had changed, the secured creditor might not know which was the appropriate destination for a notice. A mandatory rule requiring a secured creditor who knew that a grantor’s address had changed to send an amendment notice to the current address of the grantor might therefore prove problematic for the secured creditor. On the other hand, it might prove risky for the grantor if the secured creditor were permitted to send the notice to any address.

16. **Mr. Weise** (American Bar Association) said he assumed that the reference at the end of the recommendation to a change in the grantor’s address referred only to the address set forth in the registered notice. That should perhaps be made clear in the text.

17. **Mr. Dennis** (United States of America) proposed that the point should be dealt with in the commentary because there were many different possibilities. For example, if an enterprise with a single headquarters opened a second office and transferred many of its top management there, it might be difficult for the secured creditor to assess whether a change of address had occurred.

18. **Mr. Castellano** (Italy) said that his delegation was quite satisfied that an optimum balance had been struck in the recommendation as currently worded. It could not possibly deal with the enormous number of possible scenarios, which should be dealt with instead in the commentary.

19. **The Chairperson** said he took it that the Commission wished to add the words “or a cancellation notice” after “an amendment notice” in subparagraph (b) (ii) and to replace the reference to the grantor’s “current address” in the final phrase of that subparagraph with a reference to the grantor’s “last known address” or “reasonably available address”. Further clarifications regarding the question of changes in the grantor’s address would be provided in the commentary.

20. *Recommendation 18, as amended, was adopted.*

21. *Recommendations 19 to 21 were adopted.*

22. **Ms. Escobar** (El Salvador) requested clarification of the requirement in subparagraph (b) of recommendation 22: “The registry determines and publicizes the character set to be used.”

23. **The Chairperson** said that “character set” referred to the use, for example, of the Cyrillic, Latin or some other alphabet.

24. **Mr. Weise** (American Bar Association) said that the registry might, in addition, specify certain characters within a country’s character set that should or should not be used. The rule in subparagraph (a) of the recommendation concerning the language or languages in which the information in a notice must be expressed was couched in mandatory terms. He wondered whether similar wording should be used in subparagraph (b) concerning the character set.

25. **Mr. Boettcher** (Germany) pointed out that subparagraph (a) was addressed to the party who filed the notice, while subparagraph (b) was addressed to the registry.

26. **Mr. Weise** (American Bar Association) said that, in his view, subparagraph (b) was addressed to the registrant, in which case it would be appropriate to make its mandatory nature clear.

27. **Mr. Bazinas** (Secretariat) said that subparagraph (b) should be interpreted to mean that the registry was entitled to determine and publish the character set to be used. The registrant was then required to use that character set. The words “to be used” at the end of the subparagraph could therefore be replaced with “that must be used by registrants”. Alternatively, the subparagraph could be amended to read: “The information in a notice must be expressed in the character set determined and published by the registry.”

28. **Mr. Boettcher** (Germany) expressed a preference for the second option.

29. *Recommendation 22, as amended, was adopted.*

30. *Chapter III of the draft Registry Guide, as amended, was adopted.*

31. **The Chairperson** invited comments on chapter IV concerning registration of initial notices contained in document A/CN.9/WG.VI/WP.54/Add.2

and Add.3, on the corresponding paragraphs of document A/CN.9/781 and on recommendations 23 to 29 contained in document A/CN.9/781/Add.1.

32. **Mr. Dubovec** (National Law Center for Inter-American Trade), referring to the last sentence of paragraph 55 in document A/CN.9/WG.VI/WP.54/Add.2, said that search forms did not contain a slot for the grantor’s address and there was in any case no need to include it. He therefore proposed that the words “as well as the form of search request” should be deleted.

33. *It was so decided.*

34. **Mr. Bazinas** (Secretariat), referring to recommendation 23 in document A/CN.9/781/Add.1, said that it might not be necessary to retain the phrase “either in the same notice or in separate notices” at the end of subparagraph (b). A registrant was in any case entitled to enter the required information for more than one grantor or secured creditor in the designated field in one or multiple notices. That point could be made in the commentary.

35. **Mr. Dennis** (United States of America) expressed support for that proposal.

36. With regard to the use of the terms “grantor” and “secured creditor” in recommendations 23 to 27, he pointed out that the *Secured Transactions Guide* defined “grantor” as the party that created a security right and “secured creditor” as the party to whom the security right was granted. The draft Registry Guide, on the other hand, defined “grantor” as the person identified in the notice as the grantor and “secured creditor” as the person identified in the notice as the secured creditor. Grantor and secured creditor were used in recommendations 23 to 27 in the sense in which the terms were defined in the *Secured Transactions Guide*. Recommendation 23, for example, required the identifier of the grantor to be presented in a particular way. That could only make sense if it referred to the party that created the security right. However, the references in recommendations 23 to 27 were to the actual grantor. Recommendation 24, subparagraph (a), stated that the grantor identifier was the name of the grantor. The right name to enter in the form was thus the name of the party that had created the security right. He suggested that the commentary should explain

that references to the grantor or secured creditor in those recommendations were to the actual grantor or secured creditor.

37. **Mr. Bazinas** (Secretariat) said that the registry should not be required to ascertain whether the grantor mentioned in the notice was the actual grantor, and the notice should not be invalidated if it mentioned a party other than the actual grantor. As far as the registry record was concerned, it should not be an issue whether the notice referred to the actual grantor or to another party. That was why the terms “grantor” and “secured creditor” had been defined simply by reference to the party identified in the notice itself. He agreed with the representative of the United States that it would be helpful to explain that approach in the commentary.

38. **Mr. Dennis** (United States of America) said he agreed that recommendations 23 and 24 were not directions to the registry but to the registrant. Recommendation 24 indicated the correct form of the name of a grantor who was a natural person. If the name was misspelt, for example, the question arose whether the security right granted by a grantor could be rendered effective against third parties. Recommendation 27 provided rules regarding the name to be entered for the secured creditor, but the draft Registry Guide did not define “secured creditor” as the party to whom the security right was granted. Although the intention of the group of recommendations was clear to the Commission, namely the correct procedure for entering the name of the grantor or secured creditor in the form, the terminology was used in accordance with the definitions in the *Secured Transactions Guide*.

39. **Mr. Bazinas** (Secretariat) suggested replacing the term “grantor” in the recommendations with a reference to the person creating the security interest and the term “secured creditor” with a reference to the person in whose favour the security interest was created. Alternatively, if the recommendations were left unchanged, it could be explained in the commentary that the references in question denoted the actual grantor and the actual secured creditor.

40. **Mr. Dennis** (United States of America) drew attention to paragraph 8 of document A/CN.9/WG.VI/WP.54, which stated that the terminology and interpretation section of the *Secured Transactions Guide* was also applicable to

the draft Registry Guide, except to the extent modified in the terminology and interpretation section of the draft Guide. He proposed highlighting in that section that the *Secured Transactions Guide* definitions of “grantor” and “secured creditor” were used in recommendations 23 to 27.

41. **Ms. Walsh** (Canada) pointed out that the use of the terms “grantor” and “secured creditor” in the commentary generally reflected their use in the *Secured Transactions Guide*, although the terms were also used in some cases to designate “the person identified in the notice”. She proposed that the foregoing phrase in the definition of “grantor” and “secured creditor” in the draft Registry Guide should be amended to read “the person identified or to be identified in the notice”. Following that amendment, the phrase “if the grantor is a natural person” at the beginning of recommendation 24, for example, would be interpreted to mean “if the person to be identified in the notice as the grantor is a natural person”. If the terminology and interpretation section of the draft Registry Guide was also applicable to the commentary, it would be necessary to state that the terms “grantor” and “secured creditor” should be taken to mean either, depending on the context, the person creating a security right or to whom a security right was granted, or the person identified or to be identified in the notice.

42. **Mr. Bazinas** (Secretariat) said that the fact that the terminology was reproduced with the recommendations might give the impression that it was applicable only to the recommendations. However, it was also applicable to the commentary. On the other hand, the terminology was not a set of definitions associated with a legislative text but a glossary designed to assist users in understanding certain terms used throughout the draft Registry Guide.

43. **Mr. Boettcher** (Germany) emphasized the importance of ensuring that the draft Registry Guide was as simple and readable as possible for users. The same term should not have different meanings in different contexts. He proposed defining the term “actual grantor” in the terminology section and using it in recommendations 23 to 27.

44. **Mr. Bazinas** (Secretariat) said that an alternative to the proposal made by the

representative of Germany would be to use the terms “grantor” and “secured creditor” as defined in the *Secured Transactions Guide*, which referred to the “actual grantor” and the “actual secured creditor”, and to introduce new terms in the draft Registry Guide such as “registration grantor”, “grantor of the record”, “registration secured creditor” or “secured creditor of the record”. The latter terms could be used in the recommendations when reference was made to the person identified in the notice as grantor or secured creditor, and the terms “grantor” and “secured creditor” could be used when reference was made to the actual grantor or secured creditor.

45. **Mr. Weise** (American Bar Association) expressed support for the point made by the representative of Germany and the secretariat’s proposal to use the term “grantor of the record”.

46. **Ms. Walsh** (Canada) urged the secretariat, in reviewing the commentary, to decide how the terms “grantor” and “secured creditor” were to be interpreted in each case. As she was somewhat concerned about the complexity of that exercise, she was in favour of simply stating that the terms generally had the same meaning as in the *Secured Transactions Guide* but, depending on the context, could refer to the person identified or to be identified in the notice.

The meeting was suspended at 3.40 p.m. and resumed at 4.10 p.m.

47. **Mr. Dennis** (United States of America) said that the proposed solutions were in most cases acceptable. However, they were difficult to incorporate at that stage in the proceedings. His delegation was therefore inclined to opt for the solution proposed by the representative of Canada, namely stating in the terminology section that the terms “grantor” and “secured creditor” had different meanings depending on the context. In his view, their meaning would in any case be clear to the reader from the context. If doubts might arise in a particular case, the commentary could specify the intended meaning of the term in that case.

48. **Mr. Weise** (American Bar Association) said that the use of the term “grantor” was very important in the recommendations. A user who was not familiar with the term should not be required to determine its meaning from the context. The

terminology used in the recommendations should therefore be as precise as possible. It was less risky in the case of the commentary to make the type of general statement proposed by the representative of Canada.

49. **Mr. Castellano** (Italy) expressed support for the proposal by the representative of Canada. Detailed guidance for users who were unfamiliar with the terminology could be included in the commentary.

50. **Mr. Dennis** (United States of America) said that readers of recommendations 23 to 27 would be unlikely to refer to the commentary in order to interpret their meaning.

51. **Mr. Walsh** (Canada) said she believed that the Commission agreed that the terminology section should explain that the terms “grantor” and “secured creditor” meant, on the one hand, the person who created the security interest in the case of the grantor or the person to whom it was granted in the case of the secured creditor and, on the other hand, the person identified or to be identified in the notice, depending on the context. The commentary would explain the two different concepts and provide examples. It could also state that the words “or to be identified” addressed the problems that arose in recommendations 23 to 27.

52. **Mr. Castellano** (Italy) and **Mr. Dennis** (United States of America) expressed support for the proposal by the representative of Canada.

53. **Mr. Weise** (American Bar Association) asked whether it would be possible in the terminology section to replace “depending on the context” with specific references to the recommendations where the different meanings of the terms were used.

54. **Mr. Bazinas** (Secretariat) drew attention to the footnote to the terminology section of document A/CN.9/781/Add.1, which stated that section B of the introduction to the *Secured Transactions Guide* on terminology and interpretation applied also to the draft Registry Guide, except to the extent modified by section B of the introduction to the draft Registry Guide on terminology and interpretation. Thus, the terminology actually formed part of the commentary. However, the comment following the definition of the term “grantor”, for example, could state that in

recommendations 23 to 27 the term meant the actual grantor or, as proposed by the representative of Canada, the person identified or to be identified as the grantor.

55. **The Chairperson** proposed that the Commission should suspend its discussion of the issue until the next meeting.

56. *It was so agreed.*

57. **Mr. Bellenger** (France) expressed reservations regarding the number of subparagraphs devoted to the name of the grantor in recommendation 24. The rules corresponded to those that were ordinarily applicable under the civil law of each State. Moreover, footnote 3 admitted that recommendation 24 was illustrative and that the enacting State should adjust it in the light of its own naming conventions.

58. **Mr. Dennis** (United States of America) concurred with the comment by the representative of France.

59. **Mr. Bazinas** (Secretariat) drew attention to paragraph 56 of document A/CN.9/WG.VI/WP.54/Add.2, the last sentence of which introduced a table related to recommendation 24, stating that the table illustrated the type of approach that might be taken but that enacting States would need to determine in accordance with their naming conventions what types of official documents were most appropriate.

60. **Mr. Castellano** (Italy) said that it would be preferable, in his view, to transfer the examples in the subparagraphs of recommendation 24 to the commentary.

61. **Mr. Boettcher** (Germany) expressed support for that proposal.

62. **Ms. Walsh** (Canada) said that recommendation 24 provided examples of the degree of precision of

the regulation governing the grantor identifier that was required for an effective registry in order to ensure a common legal understanding of how to enter the grantor's name. Such advice was required by both registrants

and searchers and was a vital prerequisite for the success of the registry. Moreover, it was clear from the footnote that the examples were illustrative and that the recommendation was not laying down rules for all legislative purposes. The entry of inaccurate grantors' names in the registry was the greatest source of litigation, frequently owing to the State's failure to provide clear guidance.

63. **Mr. Bazinas** (Secretariat), referring to recommendation 25, said that the understanding of Working Group VI was that only one document, law or decree was required for the identification of legal persons, namely the document, law or decree constituting the legal person. Many different documents might be required, on the other hand, for the identification of natural persons and they should all be mentioned in the regulations, in line with the relevant legislation. That was why recommendation 24 contained a list of documents on the basis of which natural persons could be identified.

64. **Ms. Walsh** (Canada) said that there might be different official sources for the name of a natural person, depending on the country concerned. Registrants therefore needed guidance as to which source was reliable.

65. **The Chairperson** said that the Commission would continue its discussion of the recommendations at the next meeting.

The meeting rose at 5 p.m.

Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)

Summary record of the 968th meeting, held at the Vienna International Centre, Vienna, on Monday, 15 July 2013, at 9.30 a.m.

[A/CN.9/SR.968]

Chairperson: Mr. Labardini Flores (Vice-Chairperson) (Mexico)

The meeting was called to order at 9.40 a.m.

Consideration of issues in the area of security interests

(a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)
(A/CN.9/WG.VI/ WP.54 and Add.1-4;
A/CN.9/781 and Add.1 and 2; A/CN.9/764 and 767; A/CN.9/XLVI/CRP.4)

1. **The Chairperson** invited the Commission to resume its discussion of chapter IV concerning registration of initial notices (A/CN.9/WG.VI/ WP.54/Add.2 and Add.3) of the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (draft Registry Guide) and on recommendations 23 to 29 (A/CN.9/781/Add.1).

2. **Mr. Dennis** (United States of America) reiterated his delegation's support for the reservations expressed by the representative of France concerning the number of subparagraphs devoted to the name of the grantor in recommendation 24. While it was important to have a means of identifying parties, it was unnecessary to prescribe specific identification procedures in the recommendations. It would be preferable to describe possible approaches in the commentary.

3. **Mr. Boettcher** (Germany) expressed support for the comments by the representative of the United States. He drew attention to recommendation 59 of the *Legislative Guide on Secured Transactions* (*Secured Transactions Guide*) concerning the grantor identifier where the grantor was a natural person. A simple recommendation along those lines should be included in the draft Registry Guide since the matter was basically addressed in each State's domestic legislation. Any further clarifications that

were deemed to be necessary could be provided in the commentary.

4. **Mr. Bellenger** (France) said that the commentary should emphasize the importance of giving careful consideration to the grantor identifier in the case of a natural person.

5. **Ms. Walsh** (Canada) said that she had taken note of the comments concerning the unduly prescriptive approach adopted in recommendation 24. As the footnote to the recommendation stated that it was merely illustrative, she agreed that the examples it contained should be moved to the commentary. She proposed replacing the content of subparagraphs (b), (c) and (d) with text in square brackets indicating that the enacting State should specify the manner in which the components of a grantor's name should be entered, in what order and in which designated fields. Subparagraph (e), which dealt with the question of the source to be consulted in order to determine the correct name of a grantor, was predicated on the assumption that people frequently used different names in different contexts. She proposed replacing that subparagraph with text in square brackets directing the enacting State to specify the official documents that would constitute authoritative sources of a grantor's name and to provide alternative references if a particular grantor, for example a grantor who was not a citizen of the enacting State, did not possess the documents designated as paramount. With regard to the note to the Commission at the end of subparagraph (e), she proposed inserting text in square brackets reminding the enacting State of the need to issue a rule covering the scenario in which the grantor's name changed.

6. **Mr. Castellano** (Italy) said he agreed that recommendation 24 was too detailed and that it was for individual enacting States to establish the applicable regulations. He therefore supported the

proposal by the representative of Canada to tackle the issue by means of text in square brackets. Drawing attention to the table contained in paragraph 56 of document A/CN.9/WG.VI/WP.54/Add.2, which clearly illustrated the main points, he proposed that the content of subparagraph (e) should be transferred to the commentary.

7. **The Chairperson**, summarizing the discussion on recommendation 24, said that the proposal was to leave subparagraph (a) of recommendation 24 unchanged, to include text in square brackets in subparagraphs (b), (c) and (d) indicating that the enacting State should specify the manner in which the components of a grantor's name should be entered, in what order and in which designated fields, and to move the content of subparagraph (e) to the commentary with an indication that it was merely illustrative and should be adjusted in the light of national legislation. In addition, text in square brackets should be added to the recommendation indicating that the enacting State should issue a rule covering the scenario in which the grantor's name changed.

8. **Mr. Dennis** (United States of America) said that, as noted at the previous meeting, the use of the terms "grantor" and "secured creditor" was not always consistent with their definition in the terminology section of the draft Registry Guide.

9. **Mr. Cohen** (United States of America) said that a group of interested parties had reviewed the use of the terms in the recommendations since the previous meeting. They had concluded that the context solution, namely requiring the reader to apply the definition that the context required, worked quite well for the term "grantor" but not for the term "secured creditor" because two separate and quite novel definitions of that term were used in the *Secured Transactions Guide*. Thus, one of the recommendations stated that the identifier of the secured creditor "or its representative" should be provided in the notice. A second concept was the distinction between the party to whom the security right was granted and the party listed in the notice, who might be described as the secured creditor of record. Hence, instructions to the reader to apply whatever definition suited the context might not be effective. When the reference was to an economic

secured creditor, no special assistance was required because that corresponded to the basic definition in the *Secured Transactions Guide*. However, when other situations arose in the draft Registry Guide, the reader should be offered the requisite guidance. For example, when the text was intended to refer to the actual secured creditor or its representative, the draft Registry Guide could use the phrase "the secured creditor or its representative". When the reference was to the party listed in the notice as the secured creditor, the draft Guide could either refer to "the person identified as the secured creditor in the notice" or it could use its own definition of the "secured creditor of record" or the "indicated secured creditor". He could provide the Commission with a list of recommendations in which the different terms should be used.

10. **Mr. Bazinas** (Secretariat) said that previous drafts had referred to the "secured creditor or its representative". Working Group VI had agreed that it was sufficient to refer to the "secured creditor" on the understanding that, based on the definition in the draft Registry Guide, the secured creditor could be either the economic secured creditor or its representative. He asked whether the representative of the United States considered that three concepts should be reflected in the draft Guide: the secured creditor, the actual secured creditor, who could be the economic secured creditor or its representative, and the secured creditor who was identified in the notice.

11. **Ms. Sabo** (Canada) said that, while she appreciated the efforts of the United States delegation to produce a more precise text, her delegation felt that the reader should be trusted to make the correct distinctions. As amendments would be required not only in the recommendations but also in the commentary, the risk of mistakes and inaccuracies was quite high.

12. **Mr. Cohen** (United States of America) said that he had not intended to query the decision taken by the Working Group concerning "the secured creditor or its representative" but simply to address problems that might arise for readers of the recommendations who were not familiar with the various concepts. The lack of any reference to a representative might lead to an incorrect conclusion, for example regarding recommendation 27

concerning the secured creditor identifier. His delegation was willing to submit a precise proposal on the matter to the Commission as soon as possible.

13. **The Chairperson** invited the delegation of the United States to submit a proposal.

14. **Ms. Walsh** (Canada) said she hoped that the United States would not propose different uses of terminology in the recommendations and the commentary. At the previous meeting, her delegation had proposed simply stating that the terms “grantor” and “secured creditor” generally had the same meaning as in the *Secured Transactions Guide* but, depending on the context, could also refer to the person identified or to be identified in the notice.

15. **Mr. Bazinas** (Secretariat) said that the Working Group had adopted recommendation 27 without a reference to the representative although a previous version had contained such a reference. It had adopted the later version on the understanding that it would be left to the secured creditor who made the registration to decide whether to enter its own name or the name of a representative.

16. **Ms. Walsh** (Canada) reminded the Commission of the footnote to the terminology section, which stated that the terminology and interpretation section of the Introduction to the *Secured Transactions Guide* applied also to the draft Registry Guide, except to the extent modified by the terminology and interpretation section of the draft Registry Guide. The problem that had given rise to the discussion was that in some cases the definitions of “grantor” and “secured creditor” in the latter section had replaced those in the *Secured Transactions Guide* rather than simply supplementing them. Her delegation had proposed the wording “the person identified or to be identified in the notice” to deal with that problem.

17. **Mr. Weise** (American Bar Association) noted that the representatives of the United States and Canada were both quite appropriately concerned to ensure clarity as to the meaning of the terms “grantor” and “secured creditor” and to avoid creating confusion. He suggested that an agreement might be reached through informal consultations on the best approach to adopt.

18. **Mr. Castellano** (Italy) expressed support for that suggestion.

19. **The Chairperson** urged the interested parties to engage in consultations on the matter and to present their conclusions to the Commission.

20. He invited the Commission to resume its discussion of the proposals regarding recommendation 24.

21. **Ms. Walsh** (Canada) said she understood that new subparagraph (b) would indicate in square brackets that the enacting State should have a rule specifying which components of a grantor’s name should be entered, in what order and in which designated fields; that subparagraph (c) would indicate in square brackets the authoritative sources for the grantor’s name; and that subparagraph (d) would indicate in square brackets that the enacting State should issue a rule covering the scenario in which the grantor’s name changed.

22. **The Chairperson** said that, if he heard no objections, he would take it that the Commission wished to adopt text along the lines indicated by the representative of Canada.

23. *Recommendation 24, as amended, was adopted.*

24. **The Chairperson** said he took it that the Commission wished to delete the phrase “either in the same notice or in separate notices” at the end of subparagraph (b) of recommendation 23.

25. *Recommendation 23, as amended, was adopted.*

26. **Mr. Bazinas** (Secretariat) noted that, in line with a proposal by the representative of Canada, recommendation 25 should be split into two subparagraphs in order to ensure consistency with recommendation 24. The first subparagraph would state that the grantor identifier was the name of the grantor, and the second subparagraph would state that the name of the grantor was the name specified in a current document, law or decree constituting the legal person.

27. **The Chairperson** said he took it that the Commission wished to adopt recommendation 25 as reworded along those lines.

28. *Recommendation 25, as amended, was adopted.*

29. **Mr. Bazinas** (Secretariat) said that recommendation 26 was presented in square brackets

because it was illustrative and the enacting State might wish to adjust its content to its legislation and to add other special cases. Subparagraph (a) dealt with persons who were subject to insolvency proceedings and the commentary explained that the grantor could be the person subject to insolvency proceedings or the insolvency representative. He drew attention to the note to the recommendation which suggested a number of amendments to deal with various eventualities. The note provided possible amended wording of subparagraph (b) as well as wording of a new subparagraph (c). Further to the amendment of recommendation 24, the Commission might also wish to consider whether recommendation 26 should be recast in more general terms and whether the various issues to which it gave rise should be dealt with in the commentary.

30. **Mr. Boettcher** (Germany) said that the points that were made in the note to the Commission were important and should be taken into consideration. However, if they were reflected in the recommendation, they would render its content unduly complicated although it was only intended to be illustrative. He therefore proposed that the points addressed in the note should be moved to the commentary.

31. **Mr. Bellenger** (France) said that he supported the proposal by the representative of Germany. The cases addressed in the note could not arise under French law or under the law of a large proportion of the States that would be using the draft Registry Guide.

32. **Ms. Walsh** (Canada) said that she agreed with the substance of the solutions proposed in the note to recommendation 26 and had no objection to the proposal that they should be moved to the commentary.

33. **Mr. Dennis** (United States of America) supported the views expressed by the previous speakers. Recommendation 26 should be revised to ensure consistency with the approach adopted in recommendation 24.

34. **The Chairperson** said he took it that the Commission agreed that recommendation 26 should contain text in square brackets instructing the enacting State to specify the grantor identifier in special cases. The examples set forth in the

recommendation, amended in light of the note to the Commission, would be included in the commentary.

35. *Recommendation 26, as amended, was adopted.*

The meeting was suspended at 10.50 a.m. and resumed at 11.15 a.m.

36. **The Chairperson** said he took it that the Commission wished to adopt recommendation 27.

37. *Recommendation 27 was adopted.*

38. **Mr. Bazinas** (Secretariat), introducing the note to the Commission concerning recommendation 28, said that the words “unless otherwise provided in the law” in subparagraphs (b) and (c) should be deleted. The reference to the description of encumbered assets “in a manner that reasonably allows their identification” in subparagraph (a) reflected the standard applied in the *Secured Transactions Guide*. If the words “unless otherwise provided in the law” were to be included, they might inadvertently give the impression that there were exceptions to that rule. The Commission might, however, wish to consider inserting words such as “unless otherwise indicated in the notice” in subparagraphs (b) and (c) to indicate that the parties could exclude certain assets that were part of a specific category.

39. **Mr. Weise** (American Bar Association) expressed support for the proposed deletion of the words “unless otherwise provided in the law” in subparagraphs (b) and (c). He felt it was unnecessary to add the words “unless otherwise indicated in the notice” because if the notice excluded certain assets, the description was, by definition, non-generic.

40. **The Chairperson** said he took it that the Commission wished to delete the words “unless otherwise provided in the law”.

41. *Recommendation 28, as amended, was adopted.*

42. **Mr. Bazinas** (Secretariat) said that subparagraph (c) of recommendation 29 was in square brackets because its implementation depended on the approach adopted by an enacting State to whether a registrant could choose the period of effectiveness of a notice and whether the notice should include a maximum amount for which the security right could be enforced. The intention was to leave the text in

square brackets in the final version together with the explanations contained in the footnotes.

43. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed replacing the words “an amendment notice that amends” in subparagraph (a) with “an amendment notice that changes”.

44. He further proposed adding the following phrase at the end of subparagraph (a): “and using the official search logic”. Thus, a search or a registration would be effective only if the searcher used the public registry record and applied the official search logic.

45. **Mr. Castellano** (Italy) said that while he did not oppose the second suggested amendment, he had reservations regarding the term “search logic”. He asked whether it had been used elsewhere in the draft Registry Guide. If not, it would be necessary to add an explanation in the commentary.

46. **Ms. Walsh** (Canada) said that she had similar reservations regarding the proposed amendment. Subparagraph (a) referred to a search using the grantor’s correct identifier as the search criterion. It was unclear why that criterion was inadequate.

47. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that the term “search logic” was used in recommendation 35 concerning search results. However, he would not insist on his proposed amendment. The point could be dealt with in the commentary.

48. **Mr. Bazinas** (Secretariat) said that when the Commission considered the commentary to recommendation 35, it might wish to add some further clarifications regarding the term “search logic”.

49. **The Chairperson** said he took it that the Commission wished to replace the word “amends” with “changes” in subparagraph (a).

50. *Recommendation 29, as amended, was adopted.*

51. **The Chairperson** drew attention to paragraph 44 of document A/CN.9/781, which stated that if the Commission revised recommendation 26, paragraph 68 of document A/CN.9/WG.VI/WP.54/Add.2 should be replaced by three new paragraphs 68 to 70. The text of the paragraphs was presented in paragraph 44.

52. In light of the Commission’s decision regarding recommendation 28, paragraph 51 of document A/CN.9/781 would be deleted.

53. *Chapter IV of the draft Registry Guide, as amended, was adopted.*

54. **The Chairperson** asked whether any progress had been made in the consultations on recommendation 13 concerning the period of effectiveness of the registration of a notice, which had been left pending.

55. **Ms. Walsh** (Canada) said that the consultation group had produced a revised version of the recommendation. She recalled that concerns had been raised regarding option C and by extension option A because it was possible to circumvent the maximum period of time during which a notice could be registered by registering an amendment notice soon after the registration of the initial notice. The resulting extension of the maximum period was deemed to be incompatible with the policy of establishing a maximum statutory period of effectiveness. At the same time, a certain amount of flexibility should be maintained so that secured creditors could renew their registrations before the conclusion of the registration period of the initial notice. The proposed solution took the form of a requirement in option A and option C that the registration of an amendment notice extending the period of registration should be possible only within a short period of time prior to the expiry of the current period. The wording of the different options had also been made more consistent.

56. Beginning with subparagraph (a) of option A, she said that the consultation group proposed adding the words “for example five years” after “enacting State”. Revised subparagraph (b) would read: “The period of effectiveness of the registration may be extended within [a short period of time, such as six months] before its expiry.” Subparagraph (c) would be replaced with the following text: “The registration of an amendment notice extending the period of effectiveness extends the period for [the period of time specified in subparagraph (a)] beginning from the time of expiry of the current period.”

57. Turning to option B, she said that the group proposed inserting the words “by the registrant” after

“the period of time indicated” in subparagraph (a). Both option B and option C permitted an amendment notice to reduce the initial period of effectiveness. The group had taken the view that the provision for a reduction had little practical value inasmuch as a cancellation notice would achieve the same end. It therefore proposed to delete the words “or reduced” in subparagraph (b) and to explain the underlying logic in the commentary. The words “it expires” in subparagraph (b) would be replaced with “its expiry”. Subparagraph (c) would be replaced with the following text: “The registration of an amendment notice extending the period of effectiveness extends the period for the amount of time specified by the registrant in the amendment notice beginning from the time of expiry of the current period.”

58. With regard to option C, the group proposed, as in option B, inserting the words “by the registrant” after “the period of time indicated” in subparagraph (a). It further proposed deleting the words “such as” before “for example”. Amended subparagraph (b) would read: “The period of effectiveness may be extended within [a short period of time, such as six months] before its expiry by the registration of an amendment notice that indicates in the designated field a new period of effectiveness not exceeding [the maximum period of time specified in subparagraph (a)].” Subparagraph (c) would be replaced with text identical to that proposed for subparagraph (c) of option B.

59. **Mr. Boettcher** (Germany) proposed adding the words “specified in the law of the enacting State” after the words “such as six months” in subparagraph (b) of options A and C.

60. The Chairperson said he took it that the Commission wished to adopt the version of recommendation 13 proposed by the consultation group, as amended by the representative of Germany.

61. *Recommendation 13, as amended, was adopted.*

62. **The Chairperson** invited comments on chapter V concerning registration of amendment and cancellation notices contained in document A/CN.9/WG.VI/WP.54/Add.4, on the corresponding paragraphs of document A/CN.9/781 and on recommendations 30 to 33 contained in document A/CN.9/781/Add.1.

63. **Mr. Dubovec** (National Law Center for Inter-American Trade), referring to paragraph 67 of document A/CN.9/781, said that he was confused by the reference in the second sentence to rejection of the cancellation notice “if the registration number does not match the grantor identifier”. He submitted that the registration number could never be expected to match the grantor identifier, since they were two entirely different components of a registration notice. He proposed that the phrase should be amended to read “if the grantor identifier entered in the cancellation notice does not match the grantor identifier in the registered notice to which it relates”.

64. *It was so decided.*

65. *Recommendation 30 was adopted.*

66. **Mr. Weise** (American Bar Association) said that he supported the suggestion in the note to the Commission following recommendation 31 that both option A and option B should be revised to provide that a secured creditor named in multiple registered notices could amend or request the registry to amend “its information” rather than “the secured creditor information in all these notices”.

67. *Recommendation 31, as amended, was adopted.*

68. *Recommendation 32 was adopted.*

69. **Mr. Bazinas** (Secretariat) drew attention to subparagraph (a) of recommendation 33, which stated that the secured creditor “must register” an amendment or cancellation notice under certain circumstances. If the Commission decided to retain that wording, the commentary could explain that the words “must register” were intended to clarify that the secured creditor could not be considered as having discharged its obligation by merely “submitting” a notice without ensuring that it was actually registered and not rejected for any of the reasons mentioned in recommendation 8. The definition of “notice” in the terminology section referred to a communication in writing to the registry. Recommendation 6, subparagraph (a), stated that any person “may submit a notice for registration” and recommendation 9 stated that any person “may submit a search request”. Moreover, a “registrant” was defined in the terminology section, following the Commission’s amendment, as the person who submitted the prescribed registry notice form to the registry, and “registration” was defined

as the entry of information contained in a notice into the registry record. If the Commission decided to retain the wording “must register” rather than “must submit” an amendment or cancellation notice, it might wish to include a clarification in the commentary. The commentary could also explain that, while the word “submit” might be appropriate in the case of a paper notice, the word “register” would probably be more appropriate in the case of an electronic notice.

70. **Ms. Sabo** (Canada) said that her delegation wished to maintain the text of recommendation 33 as it stood.

71. *Recommendation 33 was adopted.*

72. *Chapter V of the draft Registry Guide, as amended, was adopted.*

73. **The Chairperson** invited comments on chapter VI concerning search criteria and search results contained in document A/CN.9/WG.VI/WP.54/Add.4, on the corresponding paragraphs of document A/CN.9/781 and on recommendations 34 and 35 contained in document A/CN.9/781/Add.1.

74. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that the term “search logic” used in recommendation 35, subparagraph (b), was a technical term. He therefore proposed that the words “or search logic” in brackets should be deleted.

75. Paragraphs 47 and 48 of document A/CN.9/WG.VI/WP.54/Add.4 also referred to “search logic” and “registry system” as though they were interchangeable. He proposed replacing “search logic” in each case with “registry system”.

76. **Mr. Weise** (American Bar Association) proposed clarifying in the commentary that all references to the retrieval of information through searches denoted searches conducted by the registry office or pursuant to the system used by the registry office. As some registry offices permitted third parties to use their own data retrieval methodology, a search conducted by a third party might retrieve different information from that retrieved in a search conducted by the registry office.

The meeting rose at 12.30 p.m.

Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)

Summary record of the 969th meeting, held at the Vienna International Centre, Vienna, on Monday, 15 July 2013, at 2 p.m.

[A/CN.9/SR.969]

Chairperson: Mr. Labardini Flores (Vice-Chairperson) (Mexico)

The meeting was called to order at 2.10 p.m.

Consideration of issues in the area of security interests

(a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*) (A/CN.9/WG.VI/WP.54 and Add.1-4; A/CN.9/781 and Add.1 and 2; A/CN.9/764 and 767; A/CN.9/XLVI/CRP.4)

1. **The Chairperson** invited the Commission to conclude its discussion of chapter VI of the draft Technical Legislative Guide on the Implementation of a Security Rights Registry (draft Registry Guide) and of recommendations 34 and 35.

2. *Recommendation 34 was adopted.*

3. **The Chairperson** said he took it that the Commission wished to delete the words “search logic” in brackets in recommendation 35.

4. *Recommendation 35, as amended, was adopted.*

5. **The Chairperson** said he took it that the Commission wished to endorse the proposal by the representative of the National Law Center for Inter-American Trade to replace the word “search logic” in paragraphs 46 and 47 of document A/CN.9/WG.VI/WP.54/Add.4 with a reference to the registry system, and the proposal by the representative of the American Bar Association for a clarification in the commentary of references to the retrieval of information through searches.

6. *It was so decided.*

7. *Chapter VI of the draft Registry Guide, as amended, was adopted.*

8. **The Chairperson** invited comments by the Commission on chapter VII concerning registration and search fees (A/CN.9/WG.VI/WP.54/Add.4), on

the corresponding paragraph of document A/CN.9/781 and on recommendation 36 contained in document A/CN.9/781/Add.1.

9. *Recommendation 36 was adopted.*

10. *Chapter VII of the draft Registry Guide was adopted.*

11. **The Chairperson** invited comments on annex II to the draft Registry Guide, which contained examples of registry forms (A/CN.9/781/Add.2).

12. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that the amendment to the definition of “address” in the terminology section should be reflected in the registry forms. For instance, the slots in form I, section A.1, contained no reference to a street. He proposed that the slot in the second line, which referred to “P.O. Box (if any)” should be amended to read “Street or P.O. Box (if any)”. Moreover, as the Commission had deleted the words “that would be effective for communicating information” from the definition of “address”, the slot which referred to “Electronic or other address (if any)” should be amended to read “Electronic address (if any)”.

13. Where the grantor was a legal person, there was a slot for “Additional information about the grantor”. Neither the *Legislative Guide on Secured Transactions (Secured Transactions Guide)* nor the draft Registry Guide required additional information about a grantor that was a legal person. He therefore proposed that the slot in question should be deleted.

14. Lastly, he said that users might find the check boxes preceding “Natural person” and “Legal person” in all the forms confusing. For instance, if information was inserted in the slots relating to “Natural person” but the check box had not been checked, the registry would presumably not be required to reject the form. He therefore proposed

that the check boxes should be deleted, at least from the initial notice. The check boxes could be maintained, however, in slot 3 of the forms concerning special cases relating to grantors, but he proposed that the text should be enclosed in square brackets.

15. **Ms. Walsh** (Canada) said that she supported the proposal to enclose the text in slot 3 concerning the grantor in square brackets. She further proposed inserting a footnote containing a reference to the relevant part of the commentary and the possible need to add other special cases.

16. She also supported the proposal to delete the check boxes before “Natural person” and “Legal person”.

17. She proposed deleting sections A.2 and B.2 which were to be used only if there was more than one grantor or secured creditor. They could be replaced by a footnote indicating that in cases where there was more than one grantor or secured creditor the enacting State should include slots in its paper or electronic forms that enabled registrants to insert the required additional information.

18. **The Chairperson** said he took it that the Commission agreed on the following amendments to form I (Initial notice): the check boxes before “Natural person” and “Legal person” in sections A and B would be deleted; the references to “P.O. Box (if any)” in sections A and B would be amended to read “Street or P.O. Box (if any)”; the references to “Electronic or other address (if any)” in sections A and B would be amended to read “Electronic address (if any)”; the “Additional information about the grantor” slot following “Legal person” in section A would be deleted; the slot concerning special cases relating to grantors in section A would be enclosed in square brackets and a footnote containing a reference to the commentary would be inserted; sections A.2 and B.2 would be deleted and replaced with the footnote proposed by the representative of Canada.

19. *It was so decided.*

20. **Ms. Walsh** (Canada) pointed out that similar amendments should be made to the corresponding boxes or slots in form II concerning amendment notices.

21. *It was so agreed.*

22. **Mr. Weise** (American Bar Association) said that section J of form II entitled “Extend or reduce duration of registration” should be amended in the light of the amendments adopted at the previous meeting to recommendation 13. The effectiveness of the notice would depend on whether the enacting State was applying option A, B or C.

23. **Ms. Walsh** (Canada) proposed deleting the words “or reduce” in the title.

24. **Mr. Bazinas** (Secretariat) noted that the footnote to section J indicated that the section related only to cases involving options B or C of what was now recommendation 13.

25. **Mr. Weise** (American Bar Association) said that, in his view, option A should be covered by section J because a secured creditor needed to be able to extend the period of effectiveness of the notice under that option. With regard to option C, he felt that it would be safer for the registry office to calculate the fixed extension period from the date of expiry of the existing period.

26. **Ms. Walsh** (Canada), referring back to the initial notice, said that section D of form I concerning duration of registration stated that the notice would be effective until a certain date. Some registry systems specified instead that the notice would be effective for a certain period such as a certain number of years. She therefore proposed amending the wording of section D of form I to read: “This notice shall be effective for a period of [x years and x months] until (dd/mm/yyyy)”. It might also be preferable in section J of form II to replace “This notice shall be effective until (dd/mm/yyyy)” with “This notice shall be effective for an extended period of [x years and x months]”. She agreed that the automatic statutory period that the enacting State had proclaimed under option A should appear on the form. However, as it would be automatically generated, the registrant would be unable to enter any further information.

27. **Mr. Bazinas** (Secretariat) said that the footnote to section D of form I could be amended to read: “If an enacting State chooses option A of recommendation 13, the duration of the registration will be automatically generated by the registry.” The amended footnote to section J of form II might read:

“If an enacting State chooses option A of recommendation 13, the duration of the extension will be automatically generated by the registry.”

28. **Mr. Weise** (American Bar Association) expressed support for the proposals by the representative of Canada and the secretariat. He asked whether dates or extension periods could be automatically generated in a non-electronic system so that they were immediately available to searchers. He also proposed expanding the footnotes to indicate that, where an enacting State chose option C, the software should be programmed to reject a period of years that was longer than the maximum period permitted by the State.

29. **Ms. Walsh** (Canada) expressed support for that proposal. With regard to the automatic generation of dates and extension periods, she suggested that a note stating that “The above field is for registry office use only” might be entered in the relevant sections of the forms.

30. **The Chairperson** said he took it that the Commission wished to amend the wording of section D of form I to read: “This notice shall be effective for a period of [x years and x months] until (dd/mm/yyyy)”. The footnote to section D would be amended to read: “If an enacting State chooses option A of recommendation 13, the duration of the registration will be automatically generated by the registry.” The footnote would also indicate the measures to be taken where an enacting State chose option C.

31. With regard to section J of form II, he took it that the Commission wished to delete the words “or reduce” in the title and to amend the text of the slot to read: “This notice shall be effective for an extended period of [x years and x months] until (dd/mm/yyyy)”. The footnote to section J would read: “If an enacting State chooses option A of recommendation 13, the duration of the extension will be automatically generated by the registry.” It would also indicate that, where an enacting State chose option C, the software should be programmed to reject a period of years that was longer than the maximum period permitted by the State.

32. **Ms. Walsh** (Canada) proposed that both form I and form II should specify the maximum period for option C.

33. **Mr. Weise** (American Bar Association) said that an electronic system would automatically reject an unacceptable period. In the case of a paper system, registrants should be alerted to the legally prescribed period. He suggested that the secretariat should draft three alternatives in brackets for section D of form I and section J of form II, indicating the provisions of recommendation 13 relating to options A, B and C.

34. **Mr. Castellano** (Italy) said he agreed that all three options should be described in the forms. In particular, the prescribed maximum period should be specified wherever relevant.

35. **The Chairperson** said he took it that the Commission wished to revise section D of form I and section J of form II to reflect options A to C of recommendation 13. The commentary would deal with policy issues that might arise in the case of a paper system where registrants entered a period that exceeded the legally prescribed period.

36. *It was so agreed.*

37. **The Chairperson** invited comments on form III concerning cancellation notices.

38. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed replacing the text in the second slot, which read “Registration No. of initial notice to be cancelled”, with the following text based on recommendation 32: “Registration No. of the initial notice to which the cancellation relates”.

39. *It was so decided.*

40. **The Chairperson**, turning to form IV concerning amendment notices pursuant to a judicial or administrative order, said that “Registration No. of initial notice” would be amended to read “Registration No. of the initial notice to which the amendment relates” and the check boxes before “Natural person” and “Legal person” in sections C and D would be deleted. “P.O. Box (if any)” in sections A and D would be amended to read “Street or P.O. Box (if any)”. “Electronic or other address, if any” in sections A and D would be amended to read “Electronic address (if any)”. The slot “Additional information about the grantor” in section D would be deleted. The slot on special cases in section D would be enclosed in square

brackets and a footnote referring to the relevant commentary would be inserted. The words “or reduce” would be deleted from the text in section G and the footnote would be amended as previously agreed.

41. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that a grantor would be unlikely to request an extension of the period of effectiveness under the circumstances addressed by form IV. He therefore proposed that “Extend or reduce” in section G should be deleted.

The meeting was suspended at 3.35 p.m. and resumed at 4.05 p.m.

42. **The Chairperson** proposed that section G of form IV as a whole should be deleted.

43. *It was so decided.*

44. **The Chairperson**, referring to form V concerning cancellation notices pursuant to a judicial or administrative order, said that amendments similar to those in the case of form IV would be made to the address and electronic address slots in section A. In addition, “Registration No. of initial notice to be cancelled” would be amended to read “Registration No. of the initial notice to which the cancellation relates”.

45. Turning to form VI concerning search request forms, he said that the check boxes before “Natural person” and “Legal person” should be deleted.

46. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed that a separate slot should be included for searchers who submitted a paper search request in which they would indicate the person and address to which the results of the search should be mailed.

47. *It was so agreed.*

48. **The Chairperson** invited comments on form VII concerning search results.

49. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that, according to the footnote, a search result might show all the information in the retrieved notices depending on the design of the registry. Recommendation 35, subparagraph (a), on the other hand, required the registry to set forth all information that matched the

search criterion. He proposed amending the footnote to reflect the content of recommendation 35.

50. **Ms. Walsh** (Canada) expressed support for that proposal.

51. **Mr. Bazinas** (Secretariat) said that the Working Group had discussed, as a matter of presentation, whether all the results of a search request should be listed immediately or whether a table permitting additional searches should be provided.

52. **Ms. Walsh** (Canada) said that the latter approach would be appropriate in an electronic system, where the searcher could click on an item to obtain additional information. In a paper system, the searcher would need to return to the registry to seek further details. The footnote could indicate that the presentation of the information required by recommendation 35 might differ depending on the registry system.

53. **Mr. Dennis** (United States of America) said that the search result provided to the searcher should not necessitate a second request for more detailed information. The footnote should indicate the approach to be adopted in both electronic and paper systems.

54. **The Chairperson** said that the footnote would be amended to take account of the various proposals made.

55. He invited comments on form VIII concerning rejection of a registration or a search request.

56. **Mr. Weise** (American Bar Association), noting that there was just one check box in section B.1 for “The identifier or address of the grantor” and for “The identifier or address of the secured creditor”, proposed that there should be two check boxes in each case, one for the identifier and the other for the address.

57. Section B.2 contained the check box “Relevant information for addition, deletion or change”, which implied that the registry would evaluate which information was relevant. He proposed deleting the word “Relevant” and providing separate check boxes for “Addition”, “Deletion” and “Change”.

58. **Mr. Dubovec** (National Law Center for Inter-American Trade) proposed that the text “The

registration number of the initial notice” in section B.2 should be amended to read “The registration number of the initial notice to which the amendment relates”. “The registration number of an initial notice” in section B.3 should also be amended to read “The registration number of the initial notice to which the cancellation relates”.

59. **Mr. Bazinas** (Secretariat) said that, in line with recommendation 32, which did not contain the word “initial”, the amended version should read: “The registration number of the notice to which the cancellation relates”.

60. **Ms. Walsh** (Canada) said that the registration number was always that assigned to the initial notice.

61. **Mr. Dubovec** (National Law Center for Inter-American Trade) said that, while the addition of the word “initial” was redundant because “registration number” was defined in the terminology section as “a unique number allocated to an initial notice by the registry”, he agreed with the representative of Canada that it should be included in the amended version of section B.3.

62. **The Chairperson** said he took it that the Commission wished to adopt the amendments proposed by the representatives of the American Bar Association and the National Law Center for Inter-American Trade.

63. *It was so decided.*

64. **The Chairperson**, referring to form II concerning amendment notices, said that

“Registration No. of initial notice” should be amended to read “Registration No. of the initial notice to which the amendment relates”.

65. *Annex II concerning examples of registry forms, as amended, was adopted.*

66. **The Chairperson** asked whether agreement had been reached in the informal consultations on how to ensure clarity throughout the draft Registry Guide as to the meaning of the terms “grantor” and “secured creditor”.

67. **Mr. Dennis** (United States of America) said that the delegations of Germany and the United States had circulated a proposal in English to all delegations.

68. **Ms. Sabo** (Canada) proposed that discussion of the proposal should be deferred until a version was available in all working languages.

69. *It was so agreed.*

70. **The Chairperson** drew attention to document A/CN.9/XLVI/CRP.4, which contained the draft decision concerning the adoption of the UNCITRAL Guide on the Implementation of a Security Rights Registry.

71. The decision concerning the adoption of the UNCITRAL Guide on the Implementation of a Security Rights Registry was adopted.

The meeting rose at 5 p.m.

Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)

Summary record of the 970th meeting, held at the Vienna International Centre, Vienna, on Tuesday, 16 July 2013, at 9.30 a.m.

[A/CN.9/SR.970]

Chairperson: Mr. Labardini Flores (Vice-Chairperson) (Mexico)

The meeting was called to order at 9.55 a.m.

Consideration of issues in the area of security interests

(a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)
(A/CN.9/WG.VI/WP.54 and Add.1-4;
A/CN.9/781 and Add.1 and 2; A/CN.9/764 and 767; A/CN.9/XLVI/CRP.6)

1. **The Chairperson** invited the Commission to consider the proposal concerning the terminology used in the Legislative Guide on the Implementation of a Security Rights Registry (draft Registry Guide) submitted by the delegations of Germany and the United States of America contained in document A/CN.9/XLVI/CRP.6.

2. **Mr. Cohen** (United States of America) said that the proposal focused on the definitions of the terms “grantor” and “secured creditor” in the terminology section of document A/CN.9/781/Add.1. The Commission had noted that the manner in which the terms were used in the draft Registry Guide sometimes corresponded to those definitions but at other times reflected the definition contained in the *Legislative Guide on Secured Transactions (Secured Transactions Guide)*. It had been suggested that readers should be alerted to the problem by stating that the terms could have either meaning depending on the context. An alternative suggestion had been to offer guidance to readers by presenting two sets of definitions. In the case of a “secured creditor”, for example, one definition would refer to the person to whom the right was granted and a second definition would refer to the person indicated in the notice as the secured creditor. The proposal by Germany and the United States was a compromise between the two suggestions. While readers would be trusted to make the right decision with respect to

“grantor” because the intended meaning of the term was usually discernible with little difficulty from the context, the same was not true of the term “secured creditor”.

3. As a result of informal consultations prior to the meeting, agreement had been reached on a simpler approach to the implementation of the proposal. It was now proposed to delete from the draft Registry Guide the definitions of “grantor” and “secured creditor” so that when the terms were used in the draft Guide they would correspond to the definitions in the *Secured Transactions Guide*. The term “secured creditor” in recommendations 3, subparagraph (g), 18, 19 and 31 would be replaced with “the person identified in the notice as the secured creditor”. Lastly, a statement would be inserted in the commentary, adjacent to the terminology section, indicating that the terms “grantor” and “secured creditor” were used in the commentary as defined in the *Secured Transactions Guide* but that there might be some instances in which, depending on the context, they had a narrower meaning.

4. **Mr. Boettcher** (Germany) said that the initial plan to define both “grantor” and “actual grantor” had proved to be unduly complicated. He believed that the new drafting proposals submitted by the representative of the United States provided a workable solution.

5. **Mr. Walsh** (Canada) also welcomed the proposals as a solution that was not unduly complicated.

6. She proposed that the term “grantor” in recommendation 18, subparagraph (b), should be replaced with “the person identified in the notice as the grantor”.

7. **Mr. Tosato** (Italy), **Mr. Maradiaga** (Honduras) and **Ms. Talero** (Colombia) expressed support for

the proposal by the representatives of Germany and the United States.

8. **Mr. Bazinas** (Secretariat) asked whether the amended version of the term “secured creditor” should be used with respect to recommendations 30, 32 and 33 in addition to recommendation 31. Recommendations 30 and 32 did not actually mention a secured creditor but the commentary contained a lengthy discussion of amendments and cancellations by secured creditors. He asked whether the commentary should refer to the definition in the *Secured Transactions Guide* or to “the person identified in the notice as the secured creditor”.

9. **Mr. Cohen** (United States of America) said that the key policy was expressed in recommendation 19 concerning the amendment of information in the public registry record. Following the amendment proposed by the delegations of Germany and the United States, that recommendation would refer to an amendment by “the person identified in the notice as the secured creditor”. A similar policy was applicable to recommendation 31 concerning global amendments of secured creditor information in multiple notices. If a secured creditor was mentioned in the commentary on recommendations 30 and 32, the reference would presumably be to the person entitled to make an amendment and hence to “the person identified in the notice as the secured creditor”. No amendment to recommendation 33 was required because it listed duties of the secured creditor owed, in particular, to the grantor. The secured creditor should not be able to waive those obligations simply by arranging for somebody else to be the party listed in the notice.

10. **Mr. Tosato** (Italy) expressed support for the proposal to clarify in the commentary which definition of “secured creditor” was used in the various recommendations.

11. **Ms. Walsh** (Canada) stressed that the term “the person identified in the notice as the secured creditor” would not need to be used throughout the commentary. The meaning should be discernible from the context.

12. **The Chairperson** said he took it that the Commission agreed to delete the terms “grantor”

and “secured creditor” from the terminology section; to replace the term “secured creditor” in recommendations 3, subparagraph (g), 18, 19 and 31 with “the person identified in the notice as the secured creditor”; to indicate in the commentary that the terms “grantor” and “secured creditor” were generally used as defined in the *Secured Transactions Guide* but that there might be some instances in which, depending on the context, they referred to the person identified in the notice; and to replace the term “grantor” in recommendation 18, subparagraph (b), with “the person identified in the notice as the grantor”.

13. *It was so decided.*

14. *The UNCITRAL Legislative Guide on the Implementation of a Security Rights Registry, as amended, was adopted.*

(b) Progress report of Working Group VI

(A/CN.9/764 and 767; A/CN.9/WG.VI/WP55 and Add.1-4)

15. **The Chairperson** invited the secretariat to introduce the progress report of Working Group VI.

16. **Mr. Bazinas** (Secretariat) said that the reports of the twenty-second and twenty-third sessions of Working Group VI were contained in documents A/CN.9/764 and 767. Paragraphs 63 and 64 of document 767 summarized the Working Group’s exchange of views on the draft Model Law on Secured Transactions (draft Model Law). The Commission had tasked the Working Group with preparing a model law that was consistent with UNCITRAL texts on secured transactions and based on the general recommendations of the *Secured Transactions Guide*. The secretariat had prepared on behalf of the Working Group the preliminary draft Model Law contained in documents Group A/CN.9/WG.VI/WP55 and Add.1-4, which consisted essentially of a synopsis of the non-asset-specific recommendations contained in the *Secured Transactions Guide*.

17. According to the Commission, the model law should be simple, short and concise inasmuch as the *Secured Transactions Guide* ran to 450 pages and contained some 250 recommendations. At the same time, however, it should be consistent with all UNCITRAL texts on secured transactions.

Fulfilment of the two requirements was not an easy task. If core commercial assets were excluded in order to ensure simplicity, different laws might be applicable to what was basically one and the same transaction. After the twenty-third session of the Working Group in April 2013, the secretariat had engaged in extensive consultations and research, and was currently redrafting the draft Model Law. Although the new draft contained less than half of the *Secured Transactions Guide* recommendations, it covered all the main categories of assets.

18. To sum up, Working Group VI had taken note of the Commission's mandate and the secretariat was preparing a revised version of the draft Model Law based on the Working Group's instructions. The Commission was scheduled to discuss future work priorities later in the session, taking into account the agendas of all the Working Groups. The Commission might therefore wish to take note at the current meeting of the progress report of Working Group VI and confirm its decision to prepare a draft Model Law, subject to further discussions concerning overall priorities.

19. **Ms. Sabo** (Canada) said that Working Group VI was proceeding in the right direction and producing a draft Model Law that would complement the *Secured Transactions Guide*. The Commission should, in her view, accord priority to that assignment.

20. **Mr. Bellenger** (France) welcomed the announcement by the secretariat that it was preparing a somewhat shorter version of the draft Model Law. The document should focus on enunciating a number of guiding principles to assist States whose legislation needed to be updated.

21. **Mr. Dennis** (United States of America) said that the draft Model Law would be particularly helpful for countries with emerging economies. Considerable progress in the enactment of secured transactions legislation had been made, for example, in Latin America, partly with the assistance of the Model Inter-American Law on Secured Transactions produced by the Organization of American States.

22. He agreed with the secretariat's comments on the scope of the draft Model Law, which should focus on assets that were economically valuable in the context of secured transactions.

23. **Mr. Dashe** (Kenya) said that Kenya, as an emerging economy, currently lacked legislation on secured transactions. It therefore looked forward to receiving and applying the draft Model Law.

24. **Ms. Talero** (Colombia) said that Colombia had recently updated its legislation on secured transactions with the assistance of the *Secured Transactions Guide*. However, in view of the scale of the Guide, access to a brief and concise model law would have been extremely helpful.

25. **Mr. Özsunay** (Turkey) said that the draft Model Law would usefully contribute, like the UNCITRAL Model Law on International Commercial Arbitration, to the harmonization of national legislation.

26. **The Chairperson** said that the Commission took note of the progress made by Working Group VI in drafting a Model Law on Secured Transactions and stressed the importance of the project in assisting jurisdictions throughout the world in enacting relevant legislation. Subject to the outcome of the forthcoming discussion of the priorities to be set by the Commission regarding future work, he took it that the Commission wished to confirm its decision that Working Group VI should continue its work on the draft Model Law.

27. *It was so decided.*

(c) Coordination in the field of security interests

28. **The Chairperson** invited the secretariat to introduce agenda item 5 (c) concerning coordination in the field of security interests.

29. **Mr. Bazinas** (Secretariat) said that one of the matters to be considered by the Commission under item 5 (c) concerned coordination with the European Commission on the law applicable to third-party effects of assignments. The issue had been addressed in a draft of the European Commission Regulation establishing uniform rules for determining the law applicable to contractual obligations in the European Union, a Regulation which had replaced the 1980 Rome Convention on the law applicable to contractual obligations. The draft had included an article which implemented to a large extent the approach of UNCITRAL in the United Nations Convention on the Assignment of Receivables in International Trade and in the

Secured Transactions Guide, namely by invoking the law of the assignor's location. However, that draft provision had not been included in the final text. The European Commission had requested the British Institute of International and Comparative Law to carry out a study of the matter and was currently preparing a report in the light of its results. The secretariat had attended a coordination meeting with the European Commission in Brussels, pursuant to the Commission's mandate, with a view to promoting the adoption of a consistent approach but one that was flexible enough to meet the requirements of parties to all categories of transactions. The Commission might wish to take note of the coordination efforts and confirm its mandate to the secretariat with a view to reaching an agreement on a consistent approach to the law applicable to third-party effects of assignments. A further meeting with the European Commission might be held in late 2013 or early 2014, at which a draft report by the European Commission would be discussed. The report would analyse the issues involved but was unlikely to adopt a position prior to the elections to the European Parliament scheduled for June 2014.

30. A second matter to be considered was coordination with the World Bank. In 2011 UNCITRAL and the World Bank had prepared a joint set of principles concerning creditor rights and insolvency. A similar effort was under way to prepare a joint set of principles on secured transactions or secured creditor rights, which would include the recommendations of the *Secured Transactions Guide*. An informal draft was currently

being discussed. When a more mature draft was available, arrangements might be made for a meeting of experts to discuss the details. The Commission would, of course, have an opportunity to discuss the text in due course. In the meantime, it might wish to confirm the secretariat's mandate to coordinate with the World Bank on the issue. He expressed his appreciation of the assistance provided by the World Bank and indeed the World Bank Group as a whole to States in the field of secured transactions which was consistent to a large extent with the recommendations of UNCITRAL.

31. **Ms. Sabo** (Canada), **Mr. Dennis** (United States of America) and **Mr. Boettcher** (Germany) thanked the secretariat for its outstanding work and expressed strong support for the continuation of its mandate to coordinate with the European Commission and the World Bank.

32. **Mr. Tata** (World Bank) thanked the Commission for its excellent work in the area of secured transactions, which was of great assistance to the World Bank and the World Bank Group. He also thanked the secretariat for its efforts to integrate the results of the Commission's work in that area into the guidance that the World Bank provided to its member States.

33. **The Chairperson** said he took it that the Commission wished to confirm the secretariat's mandate and to encourage it to pursue its work in the area of coordination with unflagging enthusiasm.

34. *It was so decided.*

The meeting rose at 11.10 a.m.

Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)

Summary record of the 971st meeting, held at the Vienna International Centre, Vienna, on Tuesday, 16 July 2013, at 2 p.m.

[A/CN.9/SR.971]

Chairperson: Mr. Labardini Flores (Vice-Chairperson) (Mexico)

The meeting was called to order at 2.10 p.m.

Consideration of issues in the area of security interests

(a) Finalization and adoption of the Technical Legislative Guide on the Implementation of a Security Rights Registry (*continued*)

(b) Progress report of Working Group VI (*continued*)

(c) Coordination in the field of security interests (*continued*) (A/CN.9/WG.VI/ WP.54 and Add.1-4; A/CN.9/WG.VI/ WP.55 and Add.1-4; A/CN.9/764, 767, 781 and Add.1 and 2; A/CN.9/XLVI/CRP.1/Add.5-7 and 16)

1. **The Chairperson** invited the secretariat to introduce the section of the draft report concerning the finalization and adoption of the UNCITRAL Guide on the Implementation of a Security Rights Registry.

2. **Mr. Bazinas** (Secretariat) said that the first part of the draft report was contained in document A/CN.9/XLVI/CRP.1/Add.5. The second part was contained in document A/CN.9/XLVI/CRP.1/Add.6, which would be distributed shortly. An oral report on the discussion at the previous meeting would be presented and reflected in the record.

3. **The Chairperson** invited comments on document A/CN.9/XLVI/CRP.1/Add.5.

4. **Mr. Weise** (American Bar Association) noted that paragraphs 6 and 9 referred to the terms “grantor” and “secured creditor”, concerning which a number of decisions had been adopted at the previous meeting. He asked whether a footnote should be inserted to draw attention to those decisions.

5. **Mr. Bazinas** (Secretariat) said that paragraphs 6 and 9 could be deleted. Alternatively, the words “the Commission agreed” in the two paragraphs could be amended to read “the Commission considered a proposal” and a cross-reference could be inserted to the later part of the report in which the Commission’s decisions were reflected.

6. **Mr. Dennis** (United States of America) and **Mr. Boettcher** (Germany) expressed a preference for the second option, since it was helpful to preserve the drafting record.

7. *It was so agreed.*

8. **Mr. Dubovec** (National Law Center for Inter-American Trade), referring to the phrase in paragraph 12 which stated that coordination among registries would only be required if the secured transactions law “excluded” some types of asset. His organization had actually pointed out that coordination would be necessary only if such assets were “included” in the secured transactions law because it was only in those circumstances that coordination would be required between different regimes. He therefore proposed that the word “excluded” should be replaced with “included”.

9. *It was so decided.*

10. **Mr. Dennis** (United States of America) proposed that paragraph 15, subparagraph (c), should be amended to read: “Recommendation 8, subparagraph (a), should be revised to refer to ‘the information’ not entered in ‘each required designated field’.”

11. *It was so decided.*

12. **Mr. Bazinas** (Secretariat) suggested that the last sentence in paragraph 19, according to which

the Commission deferred a decision on recommendation 13 until to a later stage in the session, should be deleted and replaced with the paragraph setting out the relevant decision in document A/CN.9/XLVI/CRP.1/Add.6.

13. *It was so decided.*

14. **Mr. Bazinas** (Secretariat) said that a new paragraph would be inserted after paragraph 25 to reflect the Commission's decisions regarding the terms "grantor" and "secured creditor". Paragraph 25 referred to recommendations 23 to 27, which was correct in terms of the drafting history. However, it might be preferable to refer to "certain recommendations" since the relevant numbers had changed.

15. **Mr. Weise** (American Bar Association) expressed support for the amendment proposed by the secretariat.

16. *It was so decided.*

17. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.5, as amended, was adopted.*

18. **The Chairperson** invited the secretariat to present an oral report on the outcome of the previous meeting.

19. **Mr. Bazinas** (Secretariat) said that the report he was about to present was contained in document A/CN.9/XLVI/CRP.1/Add.7, which would be distributed later that day.

20. During the earlier part of the meeting the Commission had discussed the terms "grantor" and "secured creditor" in the draft Registry Guide. He read out the paragraph reflecting the discussion, which would eventually be inserted after paragraph 25 of document A/CN.9/XLVI/CRP.1/Add.5.

21. **Mr. Dennis** (United States of America) said that, according to subparagraph (e), the commentary to recommendations 19, 30 and 32 should clarify that the person identified in the notice as the secured creditor would be the person authorized to amend the information in a registered notice. As that point was already made in recommendation 19, a clarification in the commentary would be necessary only in the case of recommendations 30 and 32. He proposed an amendment to the effect that the

commentary should clarify the matter "where appropriate".

22. **Ms. Walsh** (Canada) said that her delegation considered that no clarification was necessary, especially in the case of recommendations 30 and 32 which contained no reference to the secured creditor. The Commission should not give the impression that it was deciding who should be authorized to make an amendment or cancellation. It would be preferable to incorporate a general statement in the commentary to the effect that the term "secured creditor" meant either the person who received the security right or the person identified in the notice as the secured creditor, depending on the context. She therefore proposed that subparagraph (e) should be deleted.

23. **Mr. Dennis** (United States of America) said he understood that the commentary would merely refer to the rule set forth in recommendation 19 concerning the person authorized to make an amendment. According to subparagraph (c), recommendation 19 would refer to "the person identified in the notice as the secured creditor".

24. **Ms. Walsh** (Canada) pointed out that recommendations 30 and 32 did not refer to the person authorized to make an amendment.

25. **Mr. Bazinas** (Secretariat) said that the content of subparagraph (e) was the logical consequence of the decision in subparagraph (c) to replace the term "secured creditor" in recommendations 3, subparagraph (g), 18, 19 and 31 with "the person identified in the notice as the secured creditor". While recommendations 30 and 32 did not use the term "secured creditor", they dealt with amendments and cancellations. The commentary would therefore be required to refer, where appropriate, to the secured creditor as the person authorized to make the amendments and cancellations.

26. **Ms. Sabo** (Canada) reiterated her delegation's belief that a general explanation in the terminology section of the contextual meanings of the term "secured creditor" should be sufficient, and that instructions in the draft report regarding various amendments to the commentary were unnecessary.

27. **Mr. Bazinas** (Secretariat) said that the commentary on recommendations 30 and 32 would need to include a cross reference to the term "secured

creditor” as understood in recommendation 19 in order to clarify matters for the reader.

28. **Ms. Walsh** (Canada) said that recommendations 30 and 32 did not refer to the obligations of the secured creditor. They merely specified the type of information that was required in an amendment or cancellation notice.

29. **Mr. Dennis** (United States of America) said that subparagraph (e) reflected, in his view, the decision taken at the previous meeting. However, if it was likely to cause confusion, his delegation was willing to defer to the arguments presented by the representatives of Canada.

30. **Mr. Bazinas** (Secretariat) suggested that the references to recommendations 30 and 32 in subparagraph (e) should be deleted. He pointed out, however, that the commentary on recommendations 30 and 32 in document A/CN.9/WG.VI/WP.54/Add.4 contained several references to the secured creditor. A cross reference to the commentary in the terminology section could be inserted the first time the term was used.

31. **The Chairperson** said he took it that the Commission wished to delete the references to recommendations 30 and 32 in subparagraph (e) and to draw attention, where appropriate, to the commentary adjacent to the relevant paragraphs of the terminology section.

32. *It was so decided.*

33. **Mr. Bazinas** (Secretariat) read out the section of document A/CN.9/XLVI/CRP.1/Add.7 to be distributed later that day entitled “Progress report of Working Group VI and future work”.

34. **Mr. Dennis** (United States of America) proposed replacing the words “It was widely felt that”, which were used on two occasions, with “It was the unanimous view that”.

35. **Mr. Bazinas** (Secretariat) suggested replacing “It was widely felt that” with “It was agreed that”.

36. *It was so decided.*

37. **Mr. Dennis** (United States of America) proposed adding a sentence to the effect that the scope of the draft Model Law should include all economically valuable assets.

38. **Ms. Sabo** (Canada) said that her delegation was unable to support the latter proposal since further discussion of the matter was required.

39. **Mr. Tosato** (Italy) said that no discussion had taken place at the previous meeting of the economic relevance of the assets to be included in the scope of the draft Model Law. It had been agreed that the draft Model Law should be simple, short and concise and should focus on core commercial assets.

40. **Mr. Bazinas** (Secretariat) suggested that the additional sentence proposed by the representative of the United States might be reflected in the draft report as the statement of a particular viewpoint. The sentence might read: “It was stated that the scope of the draft Model Law should include all economically valuable assets.”

41. The last sentence of the general introduction in the first paragraph might be expanded to state that the secretariat was preparing a revised version of the draft Model Law that would implement the mandate given by the Commission to the Working Group and would cover core commercial assets. The secretariat had stated at the previous meeting that if core commercial assets were excluded, different regimes might be applicable to the same transactions.

42. **Mr. Dennis** (United States of America) said that the brief reference to “core commercial assets” could be read as suggesting either a very narrow or a very broad mandate. It would be helpful if an example of what the term denoted could be provided.

43. **Mr. Bazinas** (Secretariat) said that the following phrase might be inserted after “core commercial assets”: “such as equipment, inventory, receivables, bank accounts, negotiable instruments and negotiable documents”. If a specific example were to be provided, it might create a certain imbalance in the text.

44. **Ms. Rojas** (Mexico) expressed support for the proposal by the representative of the United States to insert a sentence stating that the scope of the draft Model Law should include all economically valuable assets.

45. **Ms. Sabo** (Canada) said that her delegation’s concern was that the draft report might prejudice the outcome of the discussions to be held in Working

Group VI. It was opposed to the inclusion of any examples after “core commercial assets”.

46. **Mr. Dennis** (United States of America) said that the use of the word “core” might prejudice the outcome of the discussions. It could be interpreted by some as denoting a broad range of assets and by others as denoting quite the opposite. He therefore proposed that it should be replaced with “economically valuable assets” or, alternatively, that an illustrative example should be provided.

47. **Mr. Tosato** (Italy) said that “core commercial assets” was the term habitually used by Working Group VI and should also be used in the report to preclude any discussion concerning the scope of the draft Model Law, which was not on the agenda. Incorporation of new terminology such as “economically valuable assets” into the report would give the impression that a discussion of the scope had actually taken place.

48. **Mr. Boettcher** (Germany) concurred with the previous speaker. The report should accurately reflect the Commission’s discussion and the inclusion of examples might prejudice future discussions concerning the scope of the draft Model Law.

49. **Mr. Bellenger** (France) expressed support for the points made by the representatives of Italy and Germany.

50. **Mr. Dennis** (United States of America) said that the Commission was entitled to expand the scope of the mandate and an example would indicate the types of assets to be covered. His delegation had proposed at the previous meeting that the draft Model Law should focus on economically valuable assets. The report should reflect that proposal.

51. **The Chairperson** said that there was a consensus that the report should not prejudice future discussions of the scope of the draft Model Law. It could, however, reflect statements presenting independent views.

52. **Mr. Bazinas** (Secretariat) reiterated his suggestion that the following sentence should be inserted at the end of the second paragraph: “It was also stated that the scope of the draft Model Law should be broad and cover all economically valuable assets.”

53. The end of the last sentence of the first paragraph, which referred to the secretariat’s preparation of a revised version of the draft Model Law, could be amended to read: “that would implement the mandate given by the Commission to the Working Group and facilitate commercial finance transactions”. That was a general statement which could not be construed as a comment on the scope of the draft.

54. **Mr. Dennis** (United States of America) said that his delegation could support the proposed new sentence in the second paragraph if the words “be broad and” were deleted. It also supported the amendment to the first paragraph.

55. *The section of the draft report concerning the progress report of Working Group VI and future work, as amended, was adopted.*

56. **Mr. Bazinas** (Secretariat) read out two paragraphs of the draft report concerning coordination in the field of security interests. The paragraphs would eventually be published in the section of the Commission’s overall draft report concerning coordination and cooperation (A/CN.9/XLVI/CRP.1/Add.16).

57. *The section of the draft report concerning coordination in the field of security interests was adopted.*

The meeting was suspended at 3.45 p.m. and resumed at 4.10 p.m.

58. **The Chairperson** invited comments on document A/CN.9/XLVI/CRP.1/Add.6.

59. **Mr. Dennis** (United States of America), referring to paragraph 11 which stated that the Commission had adopted chapter V concerning the registration of amendment and cancellation notices, pointed out that amendments had actually been made to that chapter at a later stage in the discussions. He proposed that a cross reference should be inserted to alert readers to that development.

60. **Mr. Bazinas** (Secretariat) said that, as noted earlier, a paragraph concerning the final outcome of the discussions would be inserted after paragraph 25 of document A/CN.9/XLVI/CRP.1/Add.5. A cross reference to that paragraph could be

included in paragraph 11 of document A/CN.9/XLVI/CRP.1/Add.6.

61. He also noted that the opening phrase of paragraph 21 of the latter document would be amended to read: “At its 970th meeting, on 16 July 2013, the Commission adopted the following decision”.

62. *Document A/CN.9/XLVI/CRP.1/Add.6, as amended, was adopted.*

63. *The draft report as a whole, as amended, was adopted.*

The meeting rose at 4.25 p.m.

Finalization and adoption of revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency

Finalization and adoption of legislative recommendations on directors' obligations in the period approaching insolvency

Finalization and adoption of revisions to the Model Law on Cross-Border Insolvency: The Judicial Perspective

Summary record of the 973rd meeting, held at the Vienna International Centre, Vienna, on Thursday, 18 July 2013, at 9.30 a.m.

[A/CN.9/SR.973]

Chairperson: Mr. Schöll (Switzerland)

The meeting was called to order at 9.35 a.m.

Consideration of issues in the area of insolvency law

(a) Finalization and adoption of revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (A/CN.9/766; A/CN.9/792 and Add.1-3; A/CN.9/WG.V/WP.112; A/CN.9/XLVI/CRP.5)

1. **The Chairperson** invited the secretariat to introduce the proposed revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency (the Guide to Enactment).

2. **Ms. Clift** (Secretariat) said that the proposed revisions contained in document A/CN.9/WG.V/WP.112 had been modified by the decisions taken by the Working Group at its last session, which were contained in document A/CN.9/766. While the revisions focused on centre of main interests (COMI), amendments had also been made to the definitions section under article 2 of the Guide to Enactment. The introduction to the Guide had also been revised. The secretariat had noted that paragraphs 14 to 17 had been inadvertently omitted from the existing introduction. It suggested that they should be reintegrated into the text under the heading "Origin of the Model Law".

3. **The Chairperson** invited comments on the proposed revisions to the Guide to Enactment contained in documents A/CN.9/766 and A/CN.9/WG.V/WP.112.

4. **Ms. Clift** (Secretariat), referring to paragraphs 123F and 123G of document A/CN.9/WG.V/WP.112 concerning factors relevant to the determination of centre of main interests under article 16, suggested including a cross-reference in those paragraphs to article 17, which addressed the question of the time at which those factors were to be considered.

5. **Ms. Sabo** (Canada), **Mr. Beale** (United Kingdom), **Mr. Maradiaga** (Honduras) and **Mr. Redmond** (United States of America) expressed support for the secretariat's suggestion.

6. *It was so decided.*

7. **Ms. Clift** (Secretariat) suggested that the words "The Model Law expressly provides that" at the beginning of paragraph 166 of document A/CN.9/WG.V/WP.112 should be replaced with "Article 23, paragraph 1, expressly provides that".

8. *It was so decided.*

9. **Mr. Bellenger** (France) proposed replacing the words "est habilité" ("has standing") in paragraph 98 of the French version of document A/CN.9/WG.V/WP.112 with "détient une habilitation".

10. *It was so decided.*

11. **The Chairperson** drew attention to document A/CN.9/XLVI/CRP.5, which contained the draft decision of the Commission on the revisions to the Guide to Enactment.

12. **Mr. Redmond** (United States of America) said that many centre of main interests issues had been clarified in the revisions to the Guide to Enactment, which could therefore be expected to provide substantial benefits, especially in the context of the current financial crisis. He strongly supported the decision and commended the excellent work undertaken by the Working Group and the secretariat.

13. **The Chairperson** endorsed the previous speaker's commendation of the achievements of the Working Group and the secretariat.

14. *The decision concerning the proposed revisions to the Guide to Enactment contained in document A/CN.9/XLVI/CRP.5 was adopted.*

(b) Finalization and adoption of legislative recommendations on directors' obligations in the period approaching insolvency

(A/CN.9/766; A/CN.9/792 and Add.1-3; A/CN.9/WG.V/WP.113; A/CN.9/XLVI/CRP.5)

15. **The Chairperson** invited the secretariat to introduce the proposed text concerning directors' obligations in the period approaching insolvency.

16. **Ms. Clift** (Secretariat) said that the proposed text contained in document A/CN.9/WG.V/WP.113 had been modified by the decisions taken by the Working Group at its last session, which were contained in document A/CN.9/766. Comments by Governments and international organizations were contained in documents A/CN.9/792 and Add.1-3 and the draft decision on the proposed text was set out in document A/CN.9/XLVI/CRP.5.

17. The proposed text created obligations incurred by a company that was approaching insolvency. However, they became enforceable only when insolvency proceedings were instituted. In accordance with the Commission's mandate, the text focused on the provisions that might be included in an insolvency law as opposed to either corporate law or criminal law.

18. **The Chairperson** invited comments on the recommendations contained in documents A/CN.9/766 and A/CN.9/WG.V/WP.113.

19. **Ms. Clift** (Secretariat) said that the Russian Federation had requested clarification of the term

"administrative expenses" in recommendation 10. The secretariat proposed inserting a footnote that would direct readers to the relevant part of the glossary contained in the introduction to the Legislative Guide on Insolvency Law.

20. *It was so decided.*

21. **Mr. Redmond** (United States of America), referring to recommendation 12, said that his delegation's position was that it was inappropriate to provide for measures to be taken against directors in addition to those envisaged in the area of insolvency. That position had been discussed at length by the Working Group.

22. **Mr. Baer** (International Bar Association) expressed support for the comment by the representative of the United States. His Association consistently maintained that it was inappropriate to move beyond the realm of insolvency and to envisage complementary sanctions.

23. **Mr. Beale** (United Kingdom) said that his delegation had no problem with the text as currently drafted. The disqualification of directors on account of their conduct during the period approaching insolvency was an important tenet of the regime in the United Kingdom and many other jurisdictions. The European Union was currently engaged in negotiations on the exchange of insolvency information and was considering a proposal for the sharing of information regarding disqualification among European Union member States.

24. **Ms. Clift** (Secretariat) said that a sentence at the end of paragraph 32 of document A/CN.9/WG.V/WP.113 concerning the reluctance of courts to second-guess directors in their commercial dealings had been deleted. The words "As noted above" in paragraph 37 should therefore also be deleted.

25. In paragraph 51, she suggested that the phrase "Under some laws in some circumstances, such as where the insolvency representative takes no action" should be amended to read: "Under some laws, where the insolvency representative takes no action".

26. *It was so decided.*

27. **The Chairperson** drew attention to document A/CN.9/XLVI/CRP.5, which contained the draft

decision on the proposed text concerning directors' obligations in the period approaching insolvency.

28. **Mr. Redmond** (United States of America) said that he supported the draft decision. The negotiations concerning the proposed text concerning directors' obligations had presented numerous challenges and provoked a number of adverse comments, including from his delegation. However, the outcome was a very balanced text, which reflected the views of many different States. He again commended Working Group V and the secretariat on their excellent work.

29. **Mr. Beale** (United Kingdom) agreed with the representative of the United States that the production of the text before the Commission had been a challenging project. He commended the secretariat on its skilful handling of the varied and disparate comments from delegations to produce a text that had achieved a consensus. Business confidence was a highly pertinent issue under the current circumstances and policymakers throughout the world would find the text extremely helpful.

30. *The decision concerning legislative recommendations on directors' obligations in the period approaching insolvency contained in document A/CN.9/XLVI/CRP.5 was adopted.*

(c) Finalization and adoption of revisions to the Model Law on Cross-Border Insolvency: The Judicial Perspective (A/CN.9/766 and 778)

31. **The Chairperson** invited the secretariat to introduce the documents concerning revisions to the Model Law on Cross-Border Insolvency: The Judicial Perspective.

32. **Ms. Clift** (Secretariat) said that the revisions were contained in document A/CN.9/778. When the Commission adopted the text of the Model Law in 2011, it had requested the secretariat to establish a mechanism for continuous updating of The Judicial Perspective, ensuring that the neutral approach was maintained. The secretariat had invited a group of experts from Canada, Colombia, France, New Zealand, the Republic of Korea, Slovenia, the United Kingdom and the United States to engage in consultations on the revisions. They communicated for the most part by electronic means and the revisions contained in

document A/CN.9/778 were the product of those communications. A significant number of new cases had been added and some older cases had been deleted. A case list was annexed to the document. The Judicial Perspective had also been updated to take account of the revisions to the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency and a number of cross references would be added in due course.

33. She proposed inserting a reference in the final paragraph of the preface to the members of the Board of Experts.

34. **Mr. Redmond** (United States of America) expressed support for the proposed revisions. The references to the substantial modifications of the Guide to Enactment should, in his view, be highlighted because many jurisdictions currently interpreted the Model Law on the basis of the previous version of the Guide to Enactment.

35. **Ms. Clift** (Secretariat) said that the secretariat had been faced in some cases with differences between the position adopted by the Working Group and the Commission and some of the existing case law. It had decided to adopt a historical approach to the issue by retaining the sequence of cases and drawing attention to slight differences between the Guide to Enactment and the case law.

36. Several key decisions had been handed down after the latest version of The Judicial Perspective had been finalized. They could be reflected by means of additional text or footnotes or, alternatively, in the next revision.

37. **Mr. Redmond** (United States of America) said that the text could remain unchanged but attention should be drawn to the fact that the case law did not reflect decisions adopted after a certain date.

38. *It was decided that the preface should include reference to the names and States of the experts constituting the board of experts consulted on the updates to The Judicial Perspective.*

39. *It was also decided that the preface should clarify that judgements issued prior to 15 April 2013 were included and that later judgements would be considered for inclusion in a subsequent update of The Judicial Perspective.*

40. Alternatively, the words “It was so decided.” could be added at the end of para. 33. And the words “That date might be 15 April 2013. Later judgements could be considered for inclusion in a subsequent update of The Judicial Perspective. It was so decided” could be added at the end of para. 37.

41. **The Chairperson** said he took it that the Commission wished to take note of the revisions to the Model Law on Cross-Border Insolvency: The Judicial Perspective.

42. *It was so decided.*

The meeting was suspended at 10.35 a.m. and resumed at 11.05 a.m.

(d) Progress report of Working Group V
(A/CN.9/763, 766 and 789)

43. **The Chairperson** invited the Commission to engage in a preliminary exchange of views on possible future work in the area of insolvency law. No decisions would be taken until the Commission discussed agenda item 16 on planned and possible future work later in the session.

44. **Ms. Clift** (Secretariat) said that both of the texts that had been adopted at the current meeting focused on the insolvency of individual debtors or companies. Parts one and two of the Legislative Guide on Insolvency Law focused on the insolvency of individual debtors. Part three addressed the situation of enterprise groups, first in a domestic context and subsequently in a cross-border context. The Working Group had decided when revising the Guide to Enactment to deal first with centre of main interests in the context of individual debtors. It had later requested the Commission to confirm its view that the scope of the centre of main interests mandate included centre of main interests in the context of enterprise groups. It had also decided to take up that matter, which was one of the most complex issues in the area of cross-border insolvency, as soon as it completed its work on the Guide to Enactment. The Working Group had also agreed that, once it completed its consideration of the obligations of directors of individual companies, it would address the obligations of directors in the context of enterprise groups. At its forty-third session in April 2013, the Working Group had

concluded (document A/CN.9/766, paras. 104-109) that it had not yet fully implemented the 2010 mandate. However, the procedure to be adopted with respect to the pending issues was as yet unclear. Responding to a proposal for a colloquium, the Working Group had agreed that such a project could be useful but that it should not replace the Working Group sessions that were required to complete the mandate.

45. **Mr. Dennis** (United States of America) said that the United States had submitted a proposal regarding the Commission’s future work, which was contained in document A/CN.9/789. In the section on insolvency, it suggested that a colloquium to identify specific projects and possible future areas of work should be scheduled in lieu of any full intergovernmental meetings on insolvency for the next year. Work on insolvency could be resumed once an appropriately specific project had been identified and approved by the Commission. Although the Working Group’s mandate had not been technically exhausted, no specific workplan on pending legal issues had been developed for the time being. The Working Group had therefore concluded that a colloquium could be useful in determining what future projects would be the most valuable. The United States agreed with that conclusion. It also urged UNCITRAL to consider additional projects that could utilize the expertise of the delegates and observers who had participated in previous projects. However, in light of the uncertainty regarding the most suitable projects for immediate work, the United States did not believe that working group meetings would be a prudent use of increasingly scarce resources while those projects were being identified.

46. **The Chairperson** said that the Working Group had agreed that a colloquium would be useful, but the idea that it should replace the sessions of the Working Group had not attracted sufficient support.

47. **Mr. Dennis** (United States of America) agreed that the prevailing view in the Working Group was that work should go forward. However, an UNCITRAL prerequisite for the authorization of further work was the existence of a specific workplan. Working Group V had no such plan. While his delegation was not opposed to work in the area of insolvency law, it felt that, given the scarcity

of resources, that standard should be applied to the Working Group.

48. **The Chairperson** said that, as he saw it, the Working Group needed to reflect on how best to fulfil the remaining portion of its mandate.

49. **Mr. Dennis** (United States of America) said that document A/CN.9/789 was based on the Working Group's report contained in document A/CN.9/766.

50. **Mr. Beale** (United Kingdom) said that the mandate for completion of the work on enterprise groups was extremely important. It would be a missed opportunity if the Working Group failed to complete its work on what was a key topic in the area of cross-border insolvency. The texts that the Working Group had produced over the years were of great practical value to policymakers throughout the world. He trusted that the products of its future work would be of the same calibre.

51. **The Chairperson** asked delegations who considered that the sessions of the Working Group should be suspended what kind of political signal the cessation of UNCITRAL work on insolvency would send out in a post-financial-crisis situation.

52. He invited delegations who considered that the sessions of the Working Group should not be suspended to present an estimate of the number of sessions that would be required to complete the mandate, since the scarcity of resources was a legitimate concern.

53. **Mr. Bellenger** (France) said that his delegation was opposed to the consideration of centre of main interests in the context of enterprise groups, since it would cause an upheaval in existing legislation by denying the autonomy of companies that were members of such groups. His delegation therefore considered that the mandate had been completed in that regard. The Working Group should focus instead on topics such as the coordination of proceedings and collaboration among directors.

54. **Ms. Fedko** (Russian Federation) proposed a new topic that was highly relevant under the current circumstances, namely the development of a standard that would support staff welfare in the

context of insolvency. It was unclear whether it could be handled under the existing mandate.

55. Her delegation considered that the Working Group sessions should continue, but it could also support the convening of an intersessional colloquium.

56. **Ms. Talero** (Colombia) emphasized the importance of convening a colloquium to identify possible topics for future work which could assist countries that were confronted with crisis-related difficulties and found it difficult to handle existing challenges in the area of insolvency. The colloquium could also examine how the remaining part of the Working Group's mandate should be addressed.

57. **Ms. Sabo** (Canada) said that her delegation supported the United States proposal. As UNCITRAL currently lacked resources, it was essential to set clear priorities among its many projects. While Canada recognized the important work undertaken by Working Group V, it stressed the complexity of the issue of enterprise groups. The Working Group had in fact acknowledged that it needed time to reflect on how best to proceed. The colloquium provided an opportunity to analyse the best approach to the issue of enterprise groups, to generate ideas for future work and to attract new collaborators. It would therefore facilitate and would certainly not impede the mandate of the Working Group. Moreover, it would not send out a negative message. The Commission itself received little publicity, but a colloquium would attract far more attention and advertise the fact that UNCITRAL was focusing on important issues.

58. **The Chairperson** asked whether the Canadian delegation considered that no further sessions of the Working Group should be scheduled for the time being.

59. **Ms. Sabo** (Canada) replied in the affirmative. She assumed that the Commission would reconvene the Working Group in autumn 2014. It could then address the pending issues within a shorter timeframe.

60. **Mr. Ghia** (Italy) expressed support for the points made by the representative of the United Kingdom. Some fifty insolvency declarations were registered every day in Italy, several of which normally involved foreign companies. He therefore

felt that the Commission should seize the opportunity to complete its work on enterprise group issues. In particular, it was essential to clarify centre of main interests issues and directors' obligations in that context. He believed that two meetings of the Working Group would be sufficient for the purpose.

61. **Ms. Talero** (Colombia) expressed support for the views expressed by the representatives of the United States and Canada.

62. **Mr. Kono** (Japan) expressed support for the views expressed by the representatives of the United Kingdom and Italy. International guidance on the issue of enterprise groups would be greatly appreciated.

63. **Mr. Tata** (World Bank) said that the World Bank was a major beneficiary of the output of Working Group V and the Commission. The issues that the financial crisis continued to generate were affecting all jurisdictions, particularly in developing countries. In the context of globalization, one of the most critical and controversial issues was how to deal with enterprise groups. It was a source of considerable uncertainty and confusion, and legal decisions in that regard had been far from consistent. The World Bank therefore considered that the issue of enterprise groups as well as that of directors' obligations should be addressed by the Working Group.

64. Referring to the evolution of specialized insolvency regimes in various contexts, he suggested that the Working Group's future programme of work should also include the interface between general enterprise insolvency law and specialized insolvency regimes.

65. **Mr. Maradiaga** (Honduras) expressed support for the proposals made by the representatives of the United States and Canada.

66. **Ms. Kagwanja** (Kenya), emphasizing the need to take the concerns of developing countries into account, joined the previous speaker in expressing support for the proposals made by the representatives of the United States and Canada.

67. **Mr. Bellenger** (France) said that his delegation was not opposed to the continuation of the Working Group's sessions provided that the discussions

did not focus on centre of main interests in the context of enterprise groups. He noted in that context that the European Union, which was currently considering amendments to European Council Regulation No. 1346/2000 on insolvency proceedings, had decided to set aside the question of centre of main interests and to maintain the autonomy of subsidiary companies. His delegation supported the idea of convening a colloquium.

68. **Mr. Beale** (United Kingdom) said that centre of main interests remained a fundamental concept in the Council Regulation on insolvency proceedings. With regard to enterprise groups, the European Union was developing rules for the coordination of multiple insolvencies within an enterprise group in order to ensure the best possible outcome under the existing legislation. When Working Group V had first discussed enterprise groups, the basic aim had not been to devise a new understanding of centre of main interests that would be applicable only to such groups but to analyse how enterprise groups were coordinated. European Union efforts to develop rules governing cooperation and coordination among courts involved in enterprise group insolvencies should also be examined in that context.

69. **The Chairperson**, summing up the discussion, said that all delegations agreed that the work accomplished by Working Group V had offered valuable practical guidance on insolvency issues and assisted in clarifying legal concepts. There was also a consensus that UNCITRAL must use its scarce resources wisely and that serious discussions were therefore required about future work.

70. He was reluctant to divide speakers into two camps, since he was convinced of the possibility of reconciling seemingly conflicting proposals. Moreover, none of the delegations that were in favour of suspending the Working Group's sessions had suggested that the secretariat's work on the relevant topics should also be suspended. A large number of delegations took the view that the Working Group's mandate had not been completed and some delegations considered that the pending issues could be addressed within a relatively short period of time. The representative of France had made his expression of support for further meetings of the Working Group contingent on the issues to be addressed. A significant number of delegations also

supported the idea of holding a colloquium to identify possible future areas of work. All points made would be reflected in the report and the discussion would be continued when the Commission took up agenda item 16.

71. **Mr. Dennis** (United States of America) said that the record should reflect that the majority of delegations that had taken the floor had expressed support for the holding of a colloquium and hence for the suspension of the sessions of Working Group V.

72. **The Chairperson** said that it could not be inferred from the support expressed for a colloquium that delegations were in favour of suspending the sessions of the Working Group.

73. **Mr. Sorieul** (Secretary of the Commission) said that the two questions were interrelated inasmuch as the holding of a colloquium and the convening of the sessions of the Working Group would be financed from the same resources and the same conference services would be used. The Commission's resources were currently sufficient to cover 14 weeks of meetings per year. If a three-day colloquium were to be held, the time available for meetings of Working Group V or other Commission meetings would be reduced by three days.

The meeting rose at 12.10 p.m.

**Summary record of the 975th meeting, held at the Vienna International Centre, Vienna, on Friday,
19 July 2013, at 2 p.m.**

[A/CN.9/SR.975]

Chairperson: Mr. Schöll (Switzerland)

The meeting was called to order at 2.20 p.m.

Adoption of the draft report

(A/CN.9/XLVI/CRP.1/Add.4, Add.7, Add.8, Add.12-15 and Add.20)

1. **The Chairperson** invited comments on the section of the draft report concerning the finalization and adoption of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (A/CN.9/XLVI/CRP.1/Add.4).

2. He said that the delegation of Switzerland proposed that the following sentence should be inserted at the end of paragraph 7: “Yet another view was that it would be premature to decide which form such future work might take, and that any decision on future work on this topic ought to preserve the option of analysing the issue of parallel proceedings in commercial arbitrations in the context of the New York Convention.”

3. *It was so decided.*

4. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.4, as amended, was adopted.*

5. **The Chairperson** invited comments on the section of the draft report entitled “Electronic commerce: progress report of Working Group IV” (A/CN.9/XLVI/CRP.1/Add.12).

6. **Mr. Bellenger** (France) proposed amending the words “A statement was made that” at the beginning of paragraph 4 with “The wish was expressed that” (*Le souhait a été émis que*). He further proposed that the words “might not be possible” at the end of that sentence should be replaced with “might entail legal difficulties” (*pouvait soulever des difficultés juridiques*).

7. *It was so decided.*

8. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.12, as amended, was adopted.*

9. **The Chairperson** said that the section of the draft report concerning the finalization and adoption of the UNCITRAL Guide on the Implementation of a Security Rights Registry contained in document A/CN.9/XLVI/CRP.1/Add.7 had been adopted on the basis of an oral presentation. He invited comments on the written report.

10. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.7 was adopted.*

11. **The Chairperson** invited comments on the section of the draft report entitled “Technical assistance: law reform” (A/CN.9/XLVI/CRP.1/Add.13).

12. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.13 was adopted.*

13. **The Chairperson** invited comments on the section of the draft report concerning the promotion of ways and means of ensuring a uniform interpretation and application of UNCITRAL legal texts (A/CN.9/XLVI/CRP.1/Add.14).

14. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.14 was adopted.*

15. **The Chairperson** invited comments on the section of the draft report concerning the status and promotion of UNCITRAL texts (A/CN.9/XLVI/CRP.1/Add.15).

16. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.15 was adopted.*

17. **The Chairperson** invited comments on the section of the draft report concerning relevant General Assembly resolutions (A/CN.9/XLVI/CRP.1/Add.20).

18. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.20 was adopted.*

19. **The Chairperson** invited comments on the section of the draft report concerning the consideration of issues in the area of insolvency law (A/CN.9/XLVI/CRP.1/Add.8).

20. **Mr. Bellenger** (France), referring to section (d) concerning the progress report of Working Group V, said that the question as to whether the applicability of the concept of centre of main interests (COMI) to enterprise groups formed part of the Working Group's mandate had not been clarified. He therefore proposed that a phrase should be inserted in the second sentence of paragraph 18 stating that the colloquium should clarify the Working Group's mandate in that regard.

21. **The Chairperson** noted that the first sentence of section (d) stated that the Working Group had discussed remaining elements of the mandate, particularly as it related to the applicability of the concept of centre of main interests to enterprise groups.

22. **Mr. Beale** (United Kingdom) proposed inserting the following sentence at the end of paragraph 18: "Another view was that Working Group V should continue with its mandate as planned."

23. **Mr. Redmond** (United States of America) said that the substance of the additional sentence proposed by the representative of the United Kingdom was reflected in paragraph 19. He proposed replacing the words "reflect on how to address" in the first sentence of paragraph 18 with the word "clarify". He stressed the importance of maintaining a balance between the different views that had been expressed during the discussion.

24. **Mr. Bellenger** expressed support for the amendment proposed by the representative of the United States.

25. *It was so decided.*

26. **Mr. Schoefisch** (Germany) said that the amendment proposed by the representative of the United Kingdom indicated support for the continued implementation by the Working Group of its mandate without a colloquium. The sentence in paragraph 19 mentioned by the representative of the United States provided for the continuation of the

Working Group's mandate once a colloquium had been held.

27. **Mr. Redmond** (United States of America) proposed that, if the sentence suggested by the United Kingdom were to be inserted in paragraph 18, the following additional sentence should be added: "Another view was that the mandate should not proceed, as the Working Group does not have a plan for what its work on those topics would produce, and no work should proceed until that issue is clarified."

28. **Mr. Beale** (United Kingdom) said that the Commission had not, as far as he could recall, discussed the possible cessation of the Working Group's mandate. The discussion had focused on the manner in which it should be completed.

29. **Mr. Redmond** (United States of America) said that his delegation had addressed the issue at the meeting held the previous morning.

30. **Ms. Nimeřická** (Observer for the Czech Republic) and **Mr. Kono** (Japan) expressed support for the insertion in paragraph 18 of the sentence proposed by the representative of the United Kingdom.

31. **Ms. Sabo** (Canada) and **Mr. Ghia** (Italy) expressed support for the insertion in paragraph 18 of both the sentence proposed by the representative of the United Kingdom and that proposed by the representative of the United States.

32. **The Chairperson** said he took it that the Commission agreed to insert in paragraph 18 the sentence proposed by the representative of the United Kingdom, followed by the sentence proposed by the representative of the United States.

33. *It was so decided.*

34. *The section of the draft report contained in document A/CN.9/XLVI/CRP.1/Add.8, as amended, was adopted.*

The meeting rose at 3.05 p.m.

**Summary record of the 976th meeting, held at the Vienna International Centre, Vienna, on Monday,
22 July 2013, at 9:30 a.m.**

[A/CN.9/SR.976]

Chairperson: Mr. Schödl (Switzerland)

The meeting was called to order at 9.40 a.m.

Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests (A/CN.9/752 and Add.1; A/CN.9/774; A/CN.9/789)

1. **The Chairperson** proposed that the Commission should first discuss its strategic approach to the setting of priorities for future work, taking into account the scarcity of resources in recent years. The Commission would then discuss the practical application of its strategic approach to existing projects. He invited the secretariat to introduce the first part of the discussion.

2. **Ms. Nicholas** (Secretariat) drew attention to documents A/CN.9/752 and Add.1 concerning a strategic direction for UNCITRAL, which had been prepared by the secretariat for the previous session, and to document A/CN.9/774, which dealt with planned and possible future work. Paragraph 5 of document A/CN.9/774 contained an additional list of relevant reports.

3. As many States had gained valuable experience in recent years in making the most of scarce resources, their advice to the Commission and the secretariat on the adoption of a strategic approach to the assignment of tasks would be greatly appreciated. Referring to the title of document A/CN.9/774, “Planned and possible future work”, she said that the Commission was invited to set the scope of all UNCITRAL’s activities during the year ahead. It would therefore need to identify the activities to be undertaken and to specify when and how they should be undertaken. The activities comprised not only legislative work but also, for example, technical assistance, coordination and cooperation with other relevant bodies, and promotion of the uniform interpretation of texts.

4. With regard to legislative work, the secretariat had collated various views and comments previously expressed by the Commission. For instance, the Commission had noted the constraints imposed by the limited amount of conference time available for its formal deliberations. Tables 1 and 2 in document A/CN.9/774 identified 10 substantive topics related to legislative work. Summarizing the discussions during the previous two weeks of the session, she said that recommendations had been made in the area of arbitration and conciliation concerning the development of a convention on transparency, followed by the development of notes on the organization of arbitral proceedings and possibly concurrent and parallel proceedings. In the area of electronic commerce, it had been recommended that the work on electronic transferable records should continue. However, the question as to whether it should be expanded to include issues of identity management, single windows and mobile commerce remained to be assessed. The work under the current mandate in the area of insolvency, including that relating to centre of main interests (COMI) and directors’ obligations, would continue. In the area of secured transactions, it was proposed that work should continue on the development of the Model Law, subject to further discussion of priorities, which might include security interests in non-intermediated securities.

5. As only 12 conference weeks would be available over the year ahead, it would clearly be necessary to set priorities among the foregoing topics. The Commission might wish to consider whether it should establish a number of general principles applicable to the assessment of priorities for future work in order to promote both a strategic and a consistent approach. The Commission had repeatedly recognized the importance of the development of legislative texts through working group sessions. The comparative advantage enjoyed by UNCITRAL texts was that they were universally applicable and therefore widely accepted. A further important factor was the publication of draft texts in

advance. While some UNCITRAL texts had been developed on an exceptional basis outside that environment, they were generally less widely recognized and used. The Commission might therefore wish to reaffirm the importance of the development of legislative texts by the working groups.

6. When setting priorities, the Commission traditionally identified topics in terms of their importance but also in terms of their urgency. The section entitled “Prioritization of subject areas” in document A/CN.9/774 reviewed the history of the Commission’s approach to the matter since its establishment in 1968. It had been observed at the outset that harmonization was more easily achieved in technical branches of the law than in subjects closely connected with national traditions and basic principles of domestic law. The importance of focusing on areas where there was an economic need for harmonization and where a beneficial effect on international trade could be envisaged had also been recognized. A third point was the importance of bearing in mind the potential to harness what was termed the “radiation” effect. Thus, even if States did not adopt an entire UNCITRAL text, the principles and basic provisions it contained might be adopted and used in a variety of ways.

7. The Commission had been invited in the documents before it at its forty-fifth session in 2012 to consider the role and relevance of UNCITRAL activities within the broader United Nations agenda and with respect to donor community and national government priorities. A further important principle was ensuring the balance of UNCITRAL legislative and supportive activities, in other words balancing legislative development through formal working group sessions with activities undertaken by the secretariat, assisted where appropriate by experts. Other issues included the mobilization of additional resources, including partnering activities, as and when appropriate.

8. The Commission might wish to answer some general questions in deciding whether topics should be submitted to a working group. The secretariat had compiled a list of examples for the Commission to consider. The first was whether the topic was likely to produce a consensus or whether it was unduly divisive and unlikely to lead to harmonization and a

viable text. A second question was whether there was a sufficient likelihood that a legislative text would enhance international trade law. A third question was whether the scope of the topic and the policy issues to be addressed in a legislative text were sufficiently clear. A final question was whether related activities were being undertaken on similar issues in other relevant bodies.

9. The Commission might also wish to bear in mind the life cycle of an UNCITRAL text as set out in document A/CN.9/752. Working groups and colloquia had expressed the view that more informal activities could be particularly helpful, for example in preparing texts for submission to working groups. However, policy issues and substantive drafting issues should generally be addressed by a working group. A great deal of emphasis had recently been laid on the importance of using all the conference resources available to UNCITRAL. The use of colloquia might be regarded as a type of middle ground between formal and informal working methods inasmuch as colloquia that were held during conference time could attract a large audience and the proceedings could be conducted in all the United Nations working languages. With sufficient planning outside the current budgetary period, the secretariat might be able to organize colloquia outside the duty stations of New York and Vienna with limited financial consequences. The secretariat might also benefit from holding joint meetings with other relevant bodies, such as regional development banks.

10. There was an increasing demand, particularly by developing countries, for activities aimed at promoting the adoption and use of UNCITRAL texts, which required a certain level of understanding of the policies and procedures that they envisaged. It was essential to take account of the relevant country’s social context and legal traditions. The secretariat was attempting to undertake more technical assistance activities, but the scarcity of resources was a major problem in that regard. The Commission might therefore wish to consider how to promote a balance of formal and informal legislative development and to provide appropriate support for technical assistance without interrupting more formal work. If, for example, it was decided that work should be undertaken through colloquia, steps would need to be taken to prevent a

hiatus from occurring in subsequent working group sessions.

11. She drew attention to the suggestion in paragraph 43 of document A/CN.9/774 that time should be set aside at UNCITRAL meetings for the sharing of information by States on initiatives that they were undertaking to promote UNCITRAL instruments. The last paragraph of the document highlighted the increasing difficulties involved in ensuring that documents were issued simultaneously in all official United Nations languages. That problem was also particularly relevant in the area of technical assistance.

12. **The Chairperson** invited the Commission to focus on a number of basic strategy-related questions. The first was whether the working groups should continue to be assigned responsibility for the performance of core Commission tasks and what conditions a topic should meet in order to be deemed ripe for submission to a working group. For instance, it should be technical rather than political, it should have a bearing on international trade and it should be clearly defined. It was also important to avoid duplication of the work being undertaken by another governmental or non-governmental organization. He also invited comments on the complementarity between formal and informal working procedures. Certain tasks could be delegated, for instance, to the secretariat or to other informal forums. In addition, delegations were invited to express their views on cooperation with other inter-State organizations and on the future role of technical assistance.

13. **Mr. Dennis** (United States of America) drew attention to document A/CN.9/789, which contained a proposal by the United States regarding the future work of the Commission. With regard to the sustainability of the working groups, the United States considered that the Commission should no longer base its work priorities on a system of six semi-permanent working groups with titles confining them to a particular area of law. Changes in the titles and structure of the working groups would make it easier for the Commission to review current projects on an annual basis. He also highlighted the important contribution of the secretariat. As noted in document A/CN.9/752 concerning a strategic direction for UNCITRAL, the

draft versions of the Legal Guide on Electronic Funds Transfers and the Legislative Guide on Privately Financed Infrastructure Projects had both been produced by the secretariat and referred directly to the Commission. Texts on highly technical topics could be developed by experts or special rapporteurs and then submitted to the Commission for review. If they were deemed to be inadequate, they could be referred to a working group.

14. He agreed with the secretariat's comments regarding the subject matter to which high priority should be assigned. The selected topics should have a beneficial effect on international trade. An additional criterion should be the effect that a topic would have on inclusive economic development and the rule of law, particularly in developing countries. He drew attention to the following UNCITRAL decision dating from 1978, which was quoted in document A/CN.9/789: "[a]s a general rule, the Commission should not refer subject-matters to a working group until after preparatory studies had been made by the Secretariat and the consideration of these studies by the Commission had indicated not only that the subject-matter was a suitable one but that the preparatory work was sufficiently advanced for a working group to commence work in a profitable manner". Furthermore, the Commission should not duplicate the work of other international entities.

15. With regard to the mobilization of additional resources, it was essential to coordinate with international bodies, particularly organizations such as the International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law. UNCITRAL had recently collaborated with those organizations on the publication of a paper concerning security interests. He suggested that UNCITRAL might also collaborate with the Hague Conference on a project relating to sources of law, an area in which that organization had developed considerable expertise. Similarly, UNIDROIT had expertise in the area of contract law. At the meeting of its Governing Council in May 2013, UNIDROIT had strongly supported the idea of substantive cooperation with UNCITRAL on the joint development of instruments.

16. Given the scant resources available, the secretariat could not be expected to provide detailed technical assistance. However, it could act as a clearing-house for such assistance and his delegation supported the establishment of additional regional centres. Moreover, all States had a responsibility to promote technical assistance projects.

17. **Mr. Sorieul** (Secretary of the Commission) said that when the Commission had decided to double the number of working groups, it had assigned a number rather than an official title to each group. The title mentioned in brackets after the group's number was merely intended to inform delegations of the its field of specialization. The working groups were formally re-established each year and assigned a specific mandate.

18. **Ms. Nicholas** (Secretariat) emphasized that the development of texts outside the working group environment occurred only in exceptional situations. While the initial stages or the final technical drafting stages might be conducted outside that environment, policy and substantive issues were addressed within the working groups to ensure that the product was widely acceptable.

19. **Mr. Fruhmann** (Austria) agreed that legal texts should be developed within the working groups to ensure the inclusiveness of the process. However, that did not preclude the involvement of outside bodies, such as international organizations, in the preparation of the texts.

20. With regard to the fields of specialization of the working groups, one option mentioned in document A/CN.9/774 was that each working group should handle more than one topic at a time.

21. On the question of prioritization, the criteria of the impact on international trade law, the "radiation" effect and the envisaged added value were of key importance. However, his delegation was not entirely convinced that the additional criterion suggested in paragraph 29 of document A/CN.9/774 fell into that category. He requested the secretariat to clarify the idea underlying the suggestion.

22. Referring to the resources required for the publication of UNCITRAL documents in the official United Nations languages, he asked whether it was

really necessary to have all documents translated into the six languages. Substantial savings could be made by introducing a more streamlined system with greater reliance on electronic rather than paper-based documentation.

23. **Ms. Nicholas** (Secretariat), responding to the question regarding paragraph 29 of document A/CN.9/774, said that the additional criterion had been suggested in document A/CN.9/752/Add.1 in light of the role and relevance of UNCITRAL both within the United Nations and in the field of international trade and commerce. Its work in the area of international trade law was designed to support sustainable and inclusive development and the rule of law through the harmonization of the relevant legal provisions. The Commission might therefore wish to bear in mind the types of activities that would most directly support such development. For example, UNCITRAL might support the implementation of the provisions of the Paris Declaration on Aid Effectiveness relating to the rule of law, governance and anti-corruption. UNCITRAL's work on public procurement was currently being used by the custodians of the United Nations Convention against Corruption and some of the multilateral development banks as support for improving governance in the area of public procurement.

24. **Mr. Sorieul** (Secretary of the Commission) said that great importance was attached to the publication of the Commission's work in all the official United Nations languages. However, caseloads of paper documents were no longer shipped from one duty station to another. Steps were being taken to reduce the amount of paper-based documentation to the minimum.

25. **Mr. Bellenger** (France) emphasized the desirability of updating the Commission's working methods and suggested that strategic planning should be discussed at all future sessions. With regard to the proposals made by the representative of the United States, while he recognized the value of an approach based on the authorization of individual projects and the assignment of work to experts, he insisted that all UNCITRAL legislative drafting work must be undertaken by the working groups. Otherwise the requisite transparency vis-à-vis UNCITRAL member States might not be

assured. Further in-depth reflection was therefore required to achieve the aim of greater flexibility.

26. His delegation suggested that the Chairperson of the Commission should be appointed for a calendar year instead of for the period between two plenary sessions. Under the existing system, the Chairperson's duties were confined to chairing the sessions. A Chairperson who was elected prior to a plenary session could assist in organizing the proceedings.

27. **Mr. Schoefisch** (Germany) said that the working group system had worked very well to date. It should therefore be preserved but provision should be made for a more project-oriented approach and for greater flexibility. It was not necessary for all six working groups to meet each year. If a working group had no urgent topic to address, its meeting time could be transferred to another working group with a heavy workload. If a working group felt that it could handle more than one topic, it should be permitted to do so, but it was preferable in his view to address just one topic at a time.

28. The working group proceedings provided the best guarantee of transparency. However, preparatory work could be undertaken outside that context, for example in a colloquium.

29. Technical assistance was of great importance and should be undertaken by the secretariat provided that it did not interfere with the task of preparing the proceedings of the Commission and the working groups. Member States should also provide technical assistance as and when appropriate.

30. Coordination and joint projects with other bodies, such as UNIDROIT and the Hague Conference, was also of great importance.

31. **Mr. Shautsou** (Belarus) expressed support for the idea of updating UNCITRAL's working methods. While certain projects might be assigned to experts, such projects should be essentially of a technical nature, such as the compilation of glossaries and reference material. The most valuable work undertaken by UNCITRAL consisted in the development of legislative texts and in some cases informal texts. It assisted States in evolving from a narrow regional or specialized approach to an

international approach and in balancing different interests.

32. His delegation agreed that the coordination of work with other international bodies, such as UNIDROIT and the Hague, was of great importance.

33. **Mr. Rodriguez** (Switzerland) expressed support for the strategic approach to future work and for the four basic criteria to be applied in identifying future projects.

34. It would be unwise to adopt a prescriptive approach to the relationship between formal and informal meetings. As resources were scarce, it was essential to exploit available resources to the full. His delegation therefore endorsed innovative approaches and flexibility when it came to organizing colloquia or joint meetings. He understood the concern that semi-permanent working groups might perpetuate their existence and emphasized the need to ensure respect for the criteria applicable to future work. However, the value of such working groups should also be recognized, since the expertise that they developed over time was unique. Their output in many cases was inconceivable outside that context.

35. **Mr. Maradiaga** (Honduras) said that sections A, B and C of part IV of document A/CN.9/774 concerning the allocation of resources and prioritization contained an accurate summary of the core issues to be addressed by the Commission. In some cases, other international bodies such as UNIDROIT were working simultaneously on projects that fell within UNCITRAL's sphere of competence. As several different organizations might be devoting staff, resources and infrastructure to the same task, it was essential to forge close links with regional and international organizations with a view to setting priorities.

36. He proposed that the secretariat should be requested to look into the possibility of reducing the number of working groups owing to the lack of resources. It might be possible, for instance, to combine the working groups on arbitration and conciliation, online dispute resolution and electronic commerce.

37. **Mr. Chan Wah Teck** (Singapore) said that his delegation supported the proposals contained in document A/CN.9/789 submitted by the United

States. As it was vital to ensure the optimum use of resources under the current circumstances by means of a strategic approach and prioritization, it also fully supported the proposals presented by the secretariat. An overriding factor in that context was the UNCITRAL mandate to promote the modernization and harmonization of international trade law. Topics that fell outside the scope of that mandate should preferably be addressed by other agencies with the requisite expertise. Document A/CN.9/789 contained implicit criticism of some working groups that were allegedly attempting to perpetuate themselves. Those working groups had defined themselves not by numbers but by subject matter and had arrogated to themselves the exclusive right to deal with the topics in question. While the semi-permanent working groups had a great deal of expertise, continued work in an environment of scarce resources on topics that precluded work on more urgent issues was inadmissible.

38. Working groups were composed of representatives of States and their basic mandate consisted in preparing legal texts that were widely acceptable at the international level. He queried whether soft-law instruments such as guides, which did not set standards and were not binding, could be deemed to constitute legal texts. It might be preferable to assign such tasks to experts working with the secretariat. The resultant texts could then be reviewed and endorsed by the Commission. He drew attention in that connection to paragraph 20 of document A/CN.9/779 concerning public-private partnerships (PPPs), which stated that there was no widespread awareness of UNCITRAL privately financed infrastructure project (PFIP) instruments and that they had proved to be of limited utility for legislators and regulators. He was disappointed with that finding, since he had chaired the session of the Commission that had adopted the UNCITRAL Legislative Guide on PFIPs. However, the Guide was clearly not a legal text and did not set legally binding standards.

39. Technical assistance was extremely important and should be prioritized even when resources were scarce because of the reliance of developing countries on such assistance. States that were considering the possibility of adopting complex UNCITRAL legal texts required expert advice on

how the texts should be implemented in practice. Ideally, legal officers from the States concerned should receive personal guidance from UNCITRAL experts.

40. UNCITRAL should coordinate with other international agencies working in the area of international trade law, including within the United Nations system, with a view to avoiding duplication and ensuring the optimum use of scarce resources. A close examination of internal United Nations procedures would be necessary before any specific recommendations could be made in that regard. However, he was confident that the modalities for coordination could be developed in due course.

41. **Ms. Talero** (Colombia) expressed support for the proposals contained in document A/CN.9/789 submitted by the United States. She highlighted the reference to technical texts developed on an informal basis by the secretariat with input from experts and without prior negotiations in a working group. Such texts were generally highly appreciated by the member States of the Commission.

42. **Ms. Sabo** (Canada) said she agreed with the representative of France that strategic planning and prioritization should be discussed at all future sessions of the Commission.

43. She agreed with the representative of Germany that the working group system should be flexible. When the Commission had decided to increase the number of working groups from three to six, it had agreed that the number could be modified in exceptional circumstances. The key factors were the number of projects that the Commission decided to tackle, the working methods used to expedite projects, and the resources available to the secretariat and to States.

44. With regard to informal work, she believed that some technical or even legal texts could be prepared by the secretariat provided that they were thoroughly reviewed by the Commission or a working group.

45. Her delegation broadly agreed with the project selection criteria that were set out in document A/CN.9/774. With regard to paragraphs 28 and 29, UNCITRAL's role and relevance with respect to the work and priorities of the United Nations, donor communities and priorities of national governments

should be taken into account but they should not be deemed to constitute the main criteria governing the selection of projects.

46. Her delegation strongly supported the proposal by the representative of the United States concerning joint work with organizations such as UNIDROIT. She suggested that the Commission should take note of the support expressed by the Governing Council of UNIDROIT for substantive cooperation with UNCITRAL and that it should actively seek to identify an appropriate joint project.

47. Although some documents were issued on the UNCITRAL website before they were available in all six official United Nations languages, she considered that they should eventually be available in the six languages.

48. **Mr. Leinonen** (Observer for Finland) supported the view that strategic planning and prioritization should be included in the agenda of all future sessions of the Commission.

49. The selection criteria set out in document A/CN.9/774 were highly pertinent and should be borne in mind when deciding on the topics to be addressed by the working groups.

50. The principles applied to the organization of work were basically sound and the framework did not preclude greater flexibility. It was unnecessary to allot exactly the same number of meeting days to each working group. More time should be allocated, where appropriate, to more urgent projects and priority should be given to legislative work. While soft-law instruments were very important, it was questionable whether the working groups should devote a great deal of time to such documents. He had no objection to the idea of assigning more than one topic to a particular working group provided that a clearly defined mandate was issued by the Commission.

51. His delegation was very much in favour of substantive cooperation with other organizations. It agreed with the representative of Canada that the Commission should take note of the relevant decision of the UNIDROIT Governing Council and seek to identify a joint project.

52. **Ms. Marcucci** (Italy) said that the prioritization criteria set forth in document

A/CN.9/774 should serve as guidelines for the assessment of existing projects and possible future work. The problem of scarce resources should not be addressed in a manner that would alter the structure and scope of the mandate assigned to UNCITRAL. It was important to maintain as a general rule that the mandate should be implemented through working groups in order to promote the legitimacy and transparency of the Commission's products. That principle did not preclude the assignment of responsibility for analysis of technical material to groups of experts.

53. Cooperation with other organizations had proved highly productive and should be continued.

54. **Mr. Estrella Faria** (International Institute for the Unification of Private Law — UNIDROIT) said that at its session in May 2013 the Governing Council of UNIDROIT had confirmed its strong interest in resuming its long-standing practice of cooperating with United Nations bodies on the finalization of legal texts and in developing joint ventures. As UNCITRAL was a natural candidate for that type of cooperation, the Governing Council would appreciate any steps taken by the Commission to identify a suitable topic for future cooperation.

55. **The Chairperson**, summing up the discussion, said that broad support had been expressed for the prioritization criteria proposed by the secretariat. It had been noted that the Commission's mandate to promote the modernization and harmonization of international trade law remained in place, even in a situation of scarce resources. The development of texts within working groups had been highlighted as one of the Commission's key comparative advantages, which enhanced the transparency and legitimacy of the resulting texts. The importance of a multilingual approach had also been stressed. While concern had been expressed regarding the risk of self-perpetuation of working groups, the benefits that accrued from the accumulation of expertise had also been noted. Several speakers had stressed that priority should be given to the drafting of legal texts rather than non-binding instruments such as legislative guides. In response to the suggestion that the Commission should adopt a more project-based approach, it had been pointed out that current

working group practice already allowed for sufficient flexibility to meet that concern.

56. Speakers had noted that informal work was an exceptional option and that only technical work should be assigned to the secretariat or outside experts. The secretariat should be allowed sufficient flexibility to organize such work in the manner best suited to the individual case concerned.

57. It had been emphasized that UNCITRAL was not a regional but a global organization. The benefits that accrued to developing countries from its positive impact on international trade were to be welcomed. However, the Commission's mandate and its side effects should not be inversed. The importance of the technical assistance provided both by the secretariat and by States had been underscored.

58. Many speakers had urged the Commission to forge effective links with organizations that were active in similar fields and to promote coordination both within and outside the United Nations system. The Commission had also taken note of the invitation by UNIDROIT to build a more formal cooperative relationship. Different views had been expressed on whether the Commission should align its work priorities with those of other United Nations bodies.

59. Lastly, it had been recommended that a discussion of strategic planning and prioritization should be included in the agenda of future sessions of the Commission.

The meeting was suspended at 11.35 a.m. and resumed at 12.10 p.m.

60. **The Chairperson** invited comments on his summary of the discussion.

61. **Mr. Dennis** (United States of America) stressed the importance of taking the rule of law into account in prioritizing topics. He drew attention again to his delegation's reference in document A/CN.9/789 to a 1978 Commission decision concerning, inter alia, preparatory studies by the secretariat. Lastly, there seemed to be a consensus that documents produced by expert groups or regional meetings should be formally reviewed either by a working group or by the Commission.

62. **Mr. Fruhmam** (Austria) expressed reservations regarding paragraphs 28 and 29 of the section of document A/CN.9/774 concerning the prioritization of subject areas, especially the reference to a symbiotic approach to activities of the United Nations, donor communities and national governments.

63. **Mr. Bellenger** (France) said that it would be difficult for UNCITRAL to focus on legislative texts rather than on non-binding soft-law instruments, since it frequently began its work in specific areas by producing soft-law legislative guides and proceeded at a later stage to produce more binding texts.

64. He noted that several delegations had expressed support for the proposal to work on the basis of projects. It had also been suggested that the mandates of the working groups should be defined in greater detail.

65. He reiterated his proposal that the Chairperson of the Commission should be elected for a calendar year rather than for the intersessional period.

66. **Mr. Chan Wah Teck** (Singapore) said, by way of clarification, that his delegation was not opposed to the production by UNCITRAL of non-standard-setting texts. However, it questioned the appropriateness of assigning such tasks to working groups. With regard to the comment by the representative of France, he noted that the working groups sometimes began by producing a legislative text and followed up that work by producing a soft-law instrument. He added that working group mandates should specify the expected outcome of the deliberations.

67. **Mr. Sorieul** (Secretary of the Commission) said that the history of UNCITRAL demonstrated the difficulty of producing detailed definitions of working group mandates and their expected outcomes. He referred by way of example to the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit. The secretariat had first produced a paper based on an intensive analysis of the subject. Discussions based on that paper had continued for several years before the mandate to draft a model law was assigned to a working group. After several sessions the working group had decided, for technical reasons, to opt

instead for a convention and had obtained the Commission's approval for that decision.

68. **Mr. Zhang** Chenyang (China) expressed support for the working group system, the multilingual approach, and the modernization and harmonization of international trade law. At a time

of scarce resources, however, special importance should be attached to flexibility, which was a basic prerequisite for the effectiveness of the work of UNCITRAL and its secretariat.

The meeting rose at 12.30 p.m.

**Summary record of the 977th meeting, held at the Vienna International Centre, Vienna, on Monday,
22 July 2013, at 2 p.m.**

[A/CN.9/SR.977]

Chairperson: Mr. Schöll (Switzerland)

The meeting was called to order at 2.05 p.m.

UNCITRAL regional presence (A/CN.9/775)

1. **The Chairperson**, welcoming the Deputy Minister for Legal Affairs of the Republic of Korea, Mr. Kang Chan Woo, invited the secretariat to introduce the agenda item concerning the UNCITRAL regional presence.

2. **Mr. Castellani** (Secretariat) said that a description of the activities undertaken in the last year by the UNCITRAL Regional Centre for Asia and the Pacific, which had been established in January 2012 and was based in the Republic of Korea, was contained in paragraphs 51 to 70 of document A/CN.9/775. The technical assistance priorities pursued included promotion of the universal adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). In addition, programmes had been tailored to the needs and requests of the countries of the region. He emphasized in that connection the Centre's cooperation with regional organizations. For instance, the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP) was drafting an instrument on the facilitation of paperless trade and had sought the assistance of the Regional Centre on legal aspects of the project. A review of electronic commerce and electronic transactions law was being conducted by the Secretariat of the Association of South-East Asian Nations (ASEAN) and the United Nations Conference on Trade and Development (UNCTAD) with the involvement of the Regional Centre. Support had been provided to the adoption by the Lao People's Democratic Republic of a Law on Electronic Transactions. Expert group meetings had also been held on subjects such as online dispute resolution and the use of uniform texts in contract law reform.

3. **Mr. Kang Chan Woo** (Republic of Korea) said that the UNCITRAL Regional Centre for Asia and the Pacific had been established with the aim of

promoting standard UNCITRAL texts in the region and providing States with legal assistance for their adoption. To that end, the Korean Ministry of Justice had made a legal expert available and endeavoured to support the Centre's activities. In 2012 the Ministry and the Centre had successfully hosted three international conferences on contracts for the international sale of goods, e-commerce and online dispute resolution, and international commercial arbitration, at which UNCITRAL texts and relevant information had been promoted and shared. The Ministry and the Centre had also cooperated in assisting Myanmar in acceding to the New York Convention. Myanmar had become the 149th State party to the Convention in April 2013. The Ministry was planning to hold further international conferences together with the Regional Centre before the end of 2013. One such conference would deal with the creation of an appropriate legal environment for micro-businesses. As part of his country's efforts to assist its neighbours, the Ministry of Justice and the Regional Centre were preparing a joint research project to assist Mongolia in enacting modern arbitration legislation. In addition, the Republic of Korea had successfully provided the Lao People's Democratic Republic with assistance in overhauling its laws relating to securities. In the context of the Asia and the Pacific "Ease of Doing Business" project, the Regional Centre and the Ministry of Justice were taking action to improve the environment for the enforcement of contracts.

4. The Regional Centre's impressive achievements within such a short time were comparable to his country's rapid recovery from the ruinous consequences of the Korean War. In 1958, when the New York Convention was adopted, a journalist had made the following comment on war-torn Korea: "Expecting democracy to bloom in Korea is like hoping for a rose to blossom in a garbage bin." He had clearly been proven wrong. The Republic of Korea was thriving. As a nation that had overcome tremendous difficulties within a

relatively short period of time, his country was eager to share its expertise with its neighbours in the region. It was therefore appropriate that the Republic of Korea had been chosen to host the first UNCITRAL Regional Centre and the Ministry of Justice would provide unwavering support for the implementation of UNCITRAL's mandate.

5. **Mr. Dennis** (United States of America) congratulated the Regional Centre and the Korean Government on their outstanding achievements to date. He had attended regional conferences at the Centre on electronic commerce, online dispute resolution and international contract law. UNCITRAL could act as an effective clearing-house for technical assistance but States should also be actively involved. The conferences had offered States an excellent opportunity to discuss and coordinate the implementation of UNCITRAL instruments.

6. **Mr. Okemwa** (Kenya) said that the Kenyan Government was committed to the establishment of a regional centre. The new administration had begun to examine appropriate mechanisms and the UNCITRAL secretariat would be kept informed of progress in that regard.

Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests (*continued*) (A/CN.9/752 and Add.1, 774, 780, 789 and 790)

7. **The Chairperson** invited the secretariat to introduce the second part of the Commission's discussion of agenda item 16.

8. **Ms. Nicholas** (Secretariat) said that there were 10 possible topics to be discussed with respect to future work. The secretariat considered that the Commission had already taken decisions concerning the following topics at the current session: arbitration, electronic commerce, insolvency, online dispute resolution and secured transactions. The following topics remained to be considered: commercial fraud, international contract law, microfinance and creating an enabling legal

environment for microbusiness and small and medium-sized enterprises, and public-private partnerships.

9. **Mr. Dennis** (United States of America) said that a final decision had not been taken in the case of insolvency regarding whether a colloquium should be held in preference to a two-week meeting of Working Group V.

10. **The Chairperson** agreed that no final decision had been taken on that point. However, the Commission should first clarify its position on the outstanding topics mentioned by the secretariat. Commercial fraud was the first such topic listed in paragraph 11 of document A/CN.9/774.

11. **Mr. Sorieul** (Secretary of the Commission) said that there was currently no proposal for the preparation of a new instrument and no request for meeting time or the establishment of a working group. The Commission had published indicators of commercial fraud several years ago that were deemed to be helpful. It had been proposed at the forty-fifth session in 2012 that the secretariat should convene a committee of experts to discuss the possible updating of the indicators. The committee had broadly confirmed the ongoing relevance of the indicators and had suggested that the secretariat should continue to convene a group of experts from time to time to assess the need for updating.

12. **Ms. Sabo** (Canada) said that priority should not be accorded to work on commercial fraud. Basic monitoring of the indicators by the secretariat would be sufficient.

13. **Mr. Dennis** (United States of America) said that the United States had expressed support in document A/CN.9/789 for the holding of a colloquium on commercial fraud in coordination with the United Nations Office on Drugs and Crime (UNODC). An informal meeting of experts organized by the secretariat in April 2013 had also concluded that a colloquium on the subject could be of significant benefit. The meeting had highlighted a UNODC decision calling for the development of a model law on identity theft and for coordination in that regard between UNODC and UNCITRAL. UNODC could focus on the consumer aspects and UNCITRAL on the corporate aspects of identity theft. A colloquium could also address the question

of commercial fraud in the context of online dispute resolution and the electronic transferability of records. Electronic commerce had grown exponentially since the convening of the first colloquium on commercial fraud in 2004. His delegation's position on the timing of a colloquium was flexible, but it attached great importance to the proposal to hold joint meetings with UNODC on identity theft.

14. **Mr. Schoefisch** (Germany) said that his delegation did not consider that commercial fraud was a priority topic. The secretariat should monitor the situation and, if necessary, provide for an updating of the indicators.

15. **The Chairperson** noted that there was agreement on the need to monitor developments in the area of commercial fraud and, in particular, to promote coordination with the work being undertaken by UNODC. With regard to the proposal to hold a colloquium, he suggested that the Commission should revisit the issue at its next session.

16. **Mr. Dennis** (United States of America) proposed that the secretariat should be authorized to organize meetings of experts on the subject.

17. **Ms. Sabo** (Canada) queried the desirability of devoting the secretariat's scarce resources to that type of work. If the secretariat considered, in light of its monitoring activities, that additional action was necessary, the matter could be referred to the Commission at its next session.

18. **Mr. Rivera Mora** (El Salvador) said that his delegation attached great importance to the topic of commercial fraud which, as demonstrated by the statistics, was a major problem. It would therefore support an independent analysis of mechanisms that could be used to address the problem.

19. **Mr. Chan Wah Teck** (Singapore) said that his delegation supported the views expressed by the representatives of Germany and Canada. The impact of commercial fraud on international trade was not on a scale consistent with UNCITRAL's mandate to harmonize international trade law.

20. **Mr. Schoefisch** (Germany) said that he agreed with the comments by the representatives of Canada

and Singapore. Commercial fraud was basically a criminal law issue.

21. **Mr. Dennis** (United States of America) said that his delegation was not suggesting that the secretariat should utilize scarce resources to address the issue. However, the secretariat should be authorized to comply with a possible decision by the United Nations Economic and Social Council regarding cooperation between UNCITRAL and UNODC on the development of a model law on identity theft.

22. **Mr. Sorieul** (Secretary of the Commission) reassured the Commission that the secretariat had no plans for the time being to devote resources to projects such as the drafting of a model law. One staff member would devote a very limited amount of time to the monitoring of developments in the area of commercial fraud, including in the context of UNODC. If it appeared that more substantive work might be required, the secretariat would refer the matter to the Commission.

23. **The Chairperson** said that the concerns of the representative of the United States had been taken into account. The question of commercial fraud would be revisited at the Commission's next session.

24. He invited the secretariat to introduce the topic of international contract law.

25. **Mr. Sorieul** (Secretary of the Commission) said that the delegation of Switzerland had submitted a proposal at the Commission's forty-fifth session in 2012 concerning work in the area of international contract law. The Commission had requested the secretariat to organize symposiums and other informal meetings to assess the need for such work and to investigate, in cooperation with the International Institute for the Unification of Private Law (UNIDROIT), the need to update the 1980 United Nations Convention on Contracts for the International Sale of Goods. The secretariat had been unable to organize any symposiums or other meetings owing to the lack of resources. However, it had attended meetings on the topic held in the United States, one organized by the Department of State and the other by Villanova University in Pennsylvania. The secretariat would continue to assess the feasibility of holding a symposium or other informal meeting on international contract law.

26. **Mr. Dennis** (United States of America) drew attention to the proposal by the United States contained in document A/CN.9/789 for the organization by UNCITRAL of a colloquium to celebrate the 35th anniversary of the United Nations Convention on the International Sale of Goods in 2015. The Convention was recognized as one of the most successful treaties in the history of modern commercial law. There were currently 79 States parties and the holding of a colloquium to mark the anniversary would probably lead to a further increase in ratifications. He noted that UNCITRAL had co-sponsored the meeting on international contract law that had been held at Villanova Law School in January 2013. In addition, an expert meeting on contract law had been held in February 2013 at the UNCITRAL Regional Centre for Asia and the Pacific. The secretariat had therefore complied with the request to organize symposiums and other meetings.

27. His delegation did not see the need for a global initiative on international contract law, but it was willing to consider the possibility of introducing reforms. At its 2007 and 2010 sessions, the Commission had endorsed the UNIDROIT Principles of International Commercial Contracts, which provided a useful complement to the Convention. UNIDROIT continuously monitored the principles with a view to enhancing their relevance.

28. **Ms. Sabo** (Canada) said that her delegation considered that there was no demonstrable need to revise the United Nations Convention on the International Sale of Goods, especially since it was effectively complemented by the 2010 edition of the UNIDROIT Principles of International Commercial Contracts. Expressing support for the proposal to mark the 35th anniversary of the Convention, she said that the need for revision could be assessed on that occasion.

29. **Mr. Schoefisch** (Germany) suggested that the Commission should confirm the request that it had made to the secretariat at the previous session. He noted with appreciation the secretariat's comment that it would continue to assess the feasibility of holding a symposium or other informal meeting on international contract law. He would also be interested in hearing the secretariat's views on the

proposal to mark the 35th anniversary of the Convention in 2014.

30. **Mr. Sorieul** (Secretary of the Commission) said that it would be important not only to celebrate the anniversary of the Convention but also to take the opportunity to analyse certain points that had not been fully addressed in that instrument. As it was somewhat early to take decisions regarding the Commission's work in 2015, it might be preferable not to fix a date for a colloquium but to authorize the secretariat to look into the matter and to assess availability of the requisite resources.

31. **The Chairperson** noted that the Commission supported the idea of holding a colloquium to celebrate the 35th anniversary of the Convention. The scope of the colloquium would not be limited to the Convention but would shed light on areas in which harmonization had not yet been achieved. The secretariat would be authorized to look into the matter and assess the most appropriate date for the colloquium.

32. **Ms. Sabo** (Canada) recommended that the colloquium should be held during one of the regular sessions of the Commission.

33. **Mr. Dennis** (United States of America) noted that when UNCITRAL had celebrated the 25th anniversary of the Convention in 2005, the Commission had discussed papers concerning a variety of issues as well as the UNIDROIT Principles of International Commercial Contracts.

34. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat would submit a detailed proposal to the Commission at its next session.

35. **The Chairperson** invited the secretariat to introduce the topic entitled "Microfinance/creating an enabling legal environment for micro-business and small and medium-sized enterprises".

36. **Mr. Lemay** (Secretariat), introducing document A/CN.9/780, said that the topic of microfinance and the creation of an enabling legal environment for micro-business and small and medium-sized enterprises (MSMEs) had been on the Commission's agenda since its forty-second session in 2009, when the Commission had requested the secretariat to prepare a detailed study, including an assessment of the legal and regulatory issues at

stake in the field of microfinance. The study was also to include proposals concerning the form and nature of a possible reference document for legislators and policymakers indicating the elements required to establish a favourable legal framework for microfinance. At its forty-third session, the Commission had discussed the study and agreed that the secretariat should convene a colloquium involving experts from other organizations to explore the legal and regulatory issues that fell within the mandate of UNCITRAL. The colloquium had been held in January 2011. At its forty-fourth session, the Commission had decided to include microfinance as a topic for its future work and had requested the secretariat to prepare a study on four basic issues and to circulate a questionnaire among States regarding their experience with the establishment of a legislative and regulatory framework for microfinance and the obstacles they had encountered. The study had been submitted to the Commission at its forty-fifth session in 2012, and the Commission had agreed to hold one or more colloquia on microfinance and other topics related to creating an enabling legal environment for MSMEs.

37. A colloquium attended by experts from governments, international organizations, non-governmental organizations, the private sector and academia had been held from 16 to 18 January 2013 and the resulting report was contained in document A/CN.9/780. There had been a broad consensus at the colloquium that a working group should be established to address the legal aspects of an environment for MSMEs. The creation of such an environment would be consistent with the Commission's primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade. The participants had further suggested that a flexible tool, such as a legislative guide or a model law, would assist in harmonizing efforts in the sector and provide momentum for reforms that would further encourage micro-business participation in the economy.

38. The questionnaire circulated to States in 2011 had contained nine questions, some of a general nature and other more specific questions on secured financing, electronic money, supervision of microfinance institutions and resolution of disputes arising from low-value transactions. Twenty-nine

States had responded to the questionnaire. Some of the responses were summarized in document A/CN.9/780. The secretariat had also prepared a lengthy compilation of comments, but as insufficient resources were available to have the document translated into all six official United Nations languages, it would be posted unofficially in English only on the password-protected pages of the UNCITRAL website.

39. Very few States had enacted specific legislation on microfinance or microcredit, and regulatory impact assessments prior to the initiation of the law-making process appeared to be the exception rather than the rule. The main challenges encountered included the following: lack of formalization of companies; difficulties in raising awareness of the microfinance sector; financial entities that exceeded the monitoring capacities of regulators; the existence of limited and/or contradictory regulatory frameworks; and difficulties in the standardization of some of the main microfinance concepts. Where States had no specific legislation, the general provisions governing financial institutions were also applicable in most cases to microfinance.

40. With regard to secured financing, most States allowed MSMEs to use all types of assets as collateral and did not differentiate in terms of the size of the enterprise. Some did not allow the use of future property or fixtures as security for credit. Most States had a registration system in place and some were currently establishing such a system. Some States allowed the enforcement of security interests without the involvement of courts, while others required an enforcement order, usually involving a court decision. Several States did not regulate electronic money (e-money) in their jurisdictions. Others applied special legal provisions and did not recognize such money as savings. In most States e-money was not covered by deposit insurance schemes.

41. As a rule, microfinance institutions were supervised by the bodies that oversaw financial markets, and the regulations applicable to financial institutions and credit brokers were also applicable to them. In some States specific bodies had been assigned responsibility for supervising microfinance institutions. All States provided for confidentiality,

usually in the legislation applicable to financial services or consumer protection. In general, financial institutions were required to disclose the terms and conditions of service to clients.

42. With regard to the resolution of low-value transaction disputes, States mostly indicated that financial disputes could be settled before courts or arbitral tribunals. Some States had established specialized institutions for the resolution of disputes resulting from financial claims and relating to consumer contracts. In some cases customers could file complaints with the central bank or an ombudsman. In general, States did not employ special means for the resolution of disputes relating to microfinance.

43. States did not appear to have consistent views on the need for specific legislation on microfinance. The areas suggested for legislation included the following: the supply of capital for investment in microfinance; the quality of the products and services offered; specialized licensing criteria; the definition of microcredit; guidelines for the registration and licensing of microfinance institutions; monitoring and recovery processes; disclosure of information; collateral for microcredit loans; safeguards for low-income borrowers; and extrajudicial mechanisms for dispute resolution.

44. **Mr. Velez** (Colombia) said that the Commission, at its forty-fifth session, had agreed to hold one or more colloquiums on microfinance and the creation of an enabling legal environment for MSMEs. The secretariat had summarized the conclusions of the colloquium held in January 2013, as reflected in document A/CN.9/780. It had recommended, *inter alia*, that a working group should be established to address legal aspects of the creation of such an enabling environment. It had also stressed that work aimed at establishing such an environment would be consistent with the Commission's primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade. MSMEs required an internationally recognized legal framework in order to operate effectively on a global basis. He therefore proposed that two weeks should be reserved in the year ahead for meetings of a working group to discuss microfinance and related topics. The proposal was

set out in document A/CN.9/790 and was co-sponsored by El Salvador, Kenya, the Philippines and Uganda. It would be the first time in the history of UNCITRAL that a proposal from developing countries led to the establishment of a working group.

45. **The Chairperson** requested the representative of Colombia to comment on the criteria applicable to the prioritization of topics. The basic questions to be addressed were whether the formalization of MSMEs was likely to lead to consensus in a working group and to an increase in international trade, whether work in that area was being undertaken by other international bodies, such as the World Bank Group, and whether the topic was sufficiently clear in technical terms and in terms of the policy issues to be addressed.

46. **Mr. Velez** (Colombia) said that the informal sector, which operated outside the law, accounted for a large proportion of many emerging economies. For instance, it could account for as much as 50 per cent of economic activity in Colombia and many other Latin American countries. It was estimated that half of the workforce worldwide was employed in the informal sector and, according to World Bank data, the value of the business conducted by the sector amounted to approximately 10 trillion United States dollars. Action to formalize MSMEs would therefore promote the rule of law. However, the problems to be addressed were highly complex. The reasons that prompted businesses to operate in the informal sector included the tax burden, excessive regulation of the formal sector, a deterioration in the quality of public administration, and the dynamics of the formal sector. The problem in most States was not the absence of legislation but the poor quality of the existing legislation. The goal to be pursued was the development of a simple and flexible legal framework that would not impede formalization. The framework should be related to the different components of the life cycle of an enterprise and could take the form, for instance, of a model law concerning the establishment and registration of MSMEs. Provision should be made for simplified microfinance mechanisms and banking services, alternative dispute resolution mechanisms and simplified insolvency regimes. Action in that area was doubtless consistent with the mandate of

UNCITRAL to promote the modernization and harmonization of international trade law.

47. **Mr. Maradiaga** (Honduras) commended the overview of the problems related to microfinance set out in document A/CN.9/780, which clearly illustrated the adverse impact on emerging economies of the current economic situation. He also shared the views expressed by the representative of Colombia and endorsed his proposal for the development of a legal instrument to address the problems. Honduras had enacted legislation on microfinance and MSMEs but there was no consensus on how it should be enforced. The production by UNCITRAL of a standard-setting instrument would therefore be of great assistance.

48. **Mr. Schoefisch** (Germany) noted with surprise that only 29 States had responded to the secretariat's questionnaire and that most of those States had no specific legislation concerning microfinance. He therefore supported the proposal to engage in work in that area, focusing on international trade law aspects.

49. **Mr. Bellenger** (France) said that while his delegation also supported the proposal, it was somewhat concerned about the scope and complexity of the topic. It would perhaps be desirable to focus initially on company law.

50. **Mr. Fruhmenn** (Austria) said that it was unclear whether the topic under discussion concerned microfinance and microcredit or problems relating to the creation of an enabling legal environment for MSMEs. The scope of the latter topic, for instance in social terms, was far broader than that of the former. Clarity was essential if a mandate was to be assigned to a working group. A second question, in light of the existing scarcity of resources, was whether formalization was in itself desirable, whether it fulfilled an economic need and whether it would have a beneficial effect on international trade. The legal problems faced by micro-businesses were different from those faced by small and medium-sized enterprises. There was also a presumption that formalization would lead to the resumption of economic growth. He drew attention in that connection to a tendency in the European Union under the current economic circumstances to introduce escape clauses and exemptions from legal

regimes for small and medium-sized enterprises in order to enhance their development opportunities.

51. **Ms. Phongsathit** (Thailand) expressed support for the proposal made by the representative of Colombia. She emphasized the importance of an enabling legal environment for micro-businesses, especially in developing countries where large numbers of MSMEs regularly participated in cross-border trade. Access to credit for MSMEs and the associated legal framework should also be further explored by the Commission. Her delegation considered that the outcome would have a beneficial impact on international trade.

52. **The Chairperson** noted that broad support had been expressed for the proposal submitted by the representative of Colombia and co-sponsored by four other delegations. The scope of the topic was very broad since it encompassed the entire business cycle and a wide range of issues. The Commission might therefore wish to focus on one area, since it would then be easier to respond to follow-up questions regarding, for instance, whether formalization was desirable and feasible, and whether public policy issues were involved. He suggested simplified incorporation as the first issue to be addressed. If a working group was established, it should familiarize itself with relevant studies, for instance on the effectiveness of incorporation. It would also be necessary to investigate whether simplified incorporation would have the same effect on micro-businesses and on small and medium-sized enterprises. A working group should also be aware of contrasting circumstances in different parts of the world.

53. **Mr. Chan Wah Teck** (Singapore) said that microfinance was not an area requiring urgent action by UNCITRAL. However, the current discussion concerned an entirely different proposal, namely the creation of an enabling environment for MSMEs. The link between the two components of the topic was that MSMEs required micro-financing.

54. The size of the informal sector of the economy was in many cases a constraint on development and had an adverse impact on international trade. While the topic therefore seemed to fall within the mandate of UNCITRAL, it encompassed a very large number of issues. The basic aim was to modernize domestic legislation with a view to facilitating national

economic and social development. The question arose whether that aim could be achieved more effectively by another international agency, within or outside the United Nations system. Furthermore, the mandates of existing UNCITRAL working groups covered certain aspects of the topic. For instance, mobile payments were on the agenda of Working Group IV on electronic commerce, and a simplified form of dispute resolution was on the agenda of Working Group II on arbitration and conciliation. Furthermore, even if domestic legislation was reformed to create an enabling environment for MSMEs, such action would not have an extraterritorial impact unless UNCITRAL drafted a convention aimed at promoting extraterritoriality and hence international trade. He doubted, however, whether that was a practicable outcome. To sum up, his delegation was not opposed to the establishment of a working group, but it considered that such a step might be premature, since no preparatory work had yet been undertaken on its precise mandate.

55. **Ms. Fernández Sobarzo** (Observer for Chile) expressed strong support for the proposal made by the representative of Colombia. The colloquium held in January 2013 had shed light on the importance and scope of the topic, especially for developing countries. If the area to be addressed at the outset was narrowed down, a working group could develop a dynamic and modern legal instrument that would facilitate the emergence into the light of day of enterprises currently operating in the informal sector.

The meeting was suspended at 4.10 p.m. and resumed at 4.35 p.m.

56. **Ms. Matos** (Observer for the Dominican Republic) expressed support for the proposal made by the representative of Colombia, which would assist developing countries in which a large number of MSMEs were currently operating.

57. **Mr. Arosemena** (Panama) expressed support for the proposal that had been made both by Colombia and by the colloquium held in January 2013 to establish a working group on the creation of an enabling legal environment for MSMEs.

58. **Mr. Rodríguez** (Switzerland) said that the importance of microfinance for economic development throughout the world was evidenced by

the number of multilateral bodies that were currently dealing with the topic. The uniform criteria to be applied in prioritizing the Commission's future work included the topic's impact on international trade, the clarity of its scope and the existence of relevant documentation. A further criterion was the avoidance of duplication of work. Clarification was required with respect to the need for supranational legislation on the wide variety of issues that fell under the current topic. It would be helpful to have an overview of the work that was being undertaken by other bodies such as the World Bank and regional development banks and to hear their views on the possible coordination of their work with UNCITRAL.

59. The informal status of a business was a free choice under some legislation. The actors involved were not deemed to be engaged in unlawful conduct provided that they paid their taxes and other contributions. Moreover, certain studies had shown that a high degree of formalization of enterprises was not necessarily reflected in greater economic growth.

60. His delegation was not recommending that the prioritization criteria should be strictly applied at the current session to the proposal made by Colombia. It supported work on some aspects of the topic, such as incorporation, in the medium term. Existing working groups could also be asked to focus on issues of relevance to MSMEs, such as simplified dispute resolution and insolvency proceedings.

61. **Ms. Mlosovicova** (Bolivarian Republic of Venezuela) expressed support for the proposal by Colombia to establish a working group on the creation of an enabling legal environment for MSMEs. The working group should not focus exclusively on MSMEs but should also deal with the availability of microfinance for other types of associations and groups.

62. **Mr. Rivera Mora** (El Salvador) said that States that participated in UNCITRAL and other forums were generally prepared to develop legal frameworks to regulate large companies and transnational corporations. When it came to MSMEs, however, there was a tendency to downplay the prospective public and private benefits. Addressing, in particular, the member States of the European

Union, he said that the establishment of a working group to promote formalization of the informal sector would greatly benefit developing countries, including future members of the European Union, not only in economic terms but also in terms of fulfilment of their international financial obligations. His delegation therefore strongly supported the proposal by the representative of Colombia.

63. **Ms. Sabo** (Canada) reiterated her delegation's position concerning the lack of any well-defined project in the area of microfinance. However, Canada had supported the proposal by the delegation of Colombia at the forty-fifth session of the Commission for a project concerning simplified business incorporation and registration. The question whether that project should be submitted to a working group was a separate issue. It would be helpful to have written contributions from the secretariat concerning existing work in the area and the aspects of the topic that would need to be addressed.

64. With regard to the proposal by Colombia at the current session concerning the creation of an enabling legal environment for MSMEs, some of the issues, as noted by previous speakers, were already on the agenda of existing working groups. It might therefore be sufficient for the Commission to invite those groups to examine whether their work might be adjusted to take into account the needs of MSMEs.

65. **Ms. Gibbons** (Ecuador) expressed support for the proposal by the representative of Colombia

because of the important role played by MSMEs in the economies of developing countries. She emphasized in that connection the desirability of promoting flexible rules.

66. **Mr. Zhang** Chenyang (China) expressed support for the proposal by the representative of Colombia and urged the Commission to focus in its future work on the creation of an enabling environment for MSMEs. The colloquium held in January 2013 had covered many technical aspects of the topic but it was also necessary to investigate the legislative aspects.

67. **Mr. Sorieul** (Secretary of the Commission) said that the secretariat would produce working documents on the topic if so instructed by the Commission. However, the documents would not be ready for consideration by a working group until spring 2014.

68. **Mr. Ivančo** (Observer for the Czech Republic) expressed support for the proposal to address the topic of MSMEs. However, his delegation suggested that work should focus initially on simplified business incorporation.

69. **The Chairperson** interpreted the proposal under discussion as a call to the Commission to allocate substantial resources to activities aimed at meeting developing countries' concerns. He assured the delegations concerned that their call had been heard.

The meeting rose at 5 p.m.

**Summary record of the 978th meeting, held at the Vienna International Centre, Vienna, on Tuesday,
23 July 2013, at 9.30 a.m.**

[A/CN.9/SR.978]

Chairperson: Mr. Schöll (Switzerland)

The meeting was called to order at 9.50 a.m.

Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests (*continued*) (A/CN.9/752 and Add.1, 774, 779, 780, 789 and 790)

1. **The Chairperson**, referring to the Commission's discussion at the previous meeting on the topic entitled "Microfinance/creating an enabling legal environment for micro-business and small and medium-sized enterprises", suggested that the following text should be inserted in the draft report:

"After discussion, the Commission agreed that work to reduce the legal obstacles faced by micro-business and small and medium-sized enterprises throughout their life cycle, in particular in developing economies, should be added to the agenda of the Commission.

The Commission also agreed that such work should start with a focus on the legal questions surrounding incorporation and that the secretariat should prepare the requisite documentation for the early convening of a working group.

The Commission agreed that the working group should include in its progress reports to the Commission: (i) information or empirical evidence demonstrating how its work relates to or affects sustainable development and inclusive finance; and (ii) information on how its work is complementary to the work of other international and intergovernmental organizations which are active or have a mandate in these fields."

He invited the Secretary of the Commission to indicate how the proposed work might be apportioned and how long it would take to prepare the ground for a working group on the topic.

2. **Mr. Sorieul** (Secretary of the Commission) said that working groups were normally mandated to prepare a text rather than to submit reports to the Commission on the legal situation in different countries or in a specific field. Clearly the proposed working group would need to take into account the information and evidence referred to in the text read out by the Chairperson. However, it might be preferable not to confine its terms of reference to research and investigation.

3. The secretariat would prepare documents reviewing the experience of developing countries in the area of simplified incorporation of micro-business and small and medium-sized enterprises (MSMEs), taking into account legal aspects of incorporation in other countries. It would need some time to undertake comparative studies and to hold meetings of expert groups. He estimated that the required documents could be produced by the end of 2013 and that a working group could be convened in spring 2014.

4. **Ms. Sabo** (Canada) proposed that the information-gathering mandate assigned to the working group in the text read out by the Chairperson should be assigned instead to the secretariat.

5. She further proposed inserting the word "simplified" before "incorporation" in the phrase "focus on the legal questions surrounding incorporation".

6. **Mr. Dennis** (United States of America) proposed expanding the phrase just mentioned by the representative of Canada to read "focus on developing a legal instrument or legal instruments relating to simplified business registration and incorporation". He further proposed adding the

following sentence: “The work should also include the elements of the enabling legal environment that were identified at the colloquium and spelt out in the secretariat paper and the paper submitted by the delegation of Colombia.” The work would thus cover alternative dispute resolution, mobile banking and e-money, access to credit, secured transactions and insolvency.

7. He agreed with the representative of Canada that the secretariat could undertake the information-gathering tasks mentioned at the end of the Chairperson’s text. He pointed out, however, that the secretariat reports on the two colloquiums already contained a great deal of relevant information.

8. With regard to the prioritization criteria, he considered that the topic of simplified business registration and incorporation was likely to lead to consensus in a working group. It would also certainly lead to an increase in international trade, since some 50 per cent of businesses in many developing countries were operating in the informal sector and were therefore unable to compete in international trade. Document A/CN.9/780 concerning microfinance contained a quotation from the World Bank according to which economies with modern business registration grew faster, promoted greater entrepreneurship and productivity, created jobs, boosted legal certainty and attracted larger inflows of foreign direct investment. The January 2013 colloquium had also stressed that the establishment of an enabling environment for MSMEs would be consistent with the Commission’s primary mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade.

9. With regard to the work being undertaken in that area by other international bodies, both colloquiums had concluded that such bodies were not involved in creating an enabling legal environment for MSMEs because they did not deal with the informal sector. It was therefore imperative for UNCITRAL to take up the topic, especially since the States that had co-sponsored and expressed support for future work in that area represented all regions of the world.

10. Another prioritization criterion was whether the topic was sufficiently clear in technical terms

and in terms of the policy issues to be addressed. In his view, it was. The delegation of Colombia had proposed that a model law should be developed on simplified business registration and incorporation. Other proposals relating to the topic included the following: notes on how a system of alternative dispute resolution in the field of microfinance should be organized; a best practices guide in the area of mobile payments; and model laws on access to credit and insolvency.

11. His delegation had no objection to the proposal that other working groups should deal with aspects of the topic that fell within their area of specialization. The Commission should make that clear when assigning priorities, for instance to the working groups on insolvency law and on arbitration and conciliation, and should provide for coordination on MSME issues between the different working groups.

12. **Mr. Adensamer** (Austria) said that his delegation supported the text proposed by the Chairperson. However, it proposed replacing “work to reduce legal obstacles” with “work on international trade law aimed at reducing legal obstacles”.

13. **Ms. Laborte-Cuevas** (Philippines) said that the creation of an enabling environment for MSMEs was consistent with the Commission’s mandate to promote coordination and cooperation in the field of international trade, including regional cross-border trade. Her delegation supported the assignment of a mandate to the secretariat to prepare information documents prior to the convening of a working group in 2014 to discuss simplified incorporation of MSMEs.

14. **Mr. Chan Wah Teck** (Singapore) said he took it that the Commission was still engaged in a general discussion of the issues raised by Colombia in document A/CN.9/790 and that any further points on which a consensus was reached would be reflected in the draft report. The title of the topic was “Microfinance/creating an enabling legal environment for micro-business and small and medium-sized enterprises”, but he proposed that the report should state that the Commission was no longer dealing with the question of microfinance. While many speakers had mentioned the findings of the two colloquiums, he pointed out that both had

focused on microfinance. It was therefore not surprising that the representatives of other international bodies who attended the colloquiums had shown little interest in creating an enabling legal environment for MSMEs.

15. His delegation was not opposed to the establishment of a working group. However, the working group's mandate should be clearly defined by means of careful preparatory work by the secretariat, with input from representatives of agencies both within and outside the United Nations system that were involved in creating a conducive legal environment for small and medium-sized enterprises. Many related issues were currently being addressed by other UNCITRAL working groups. While he emphasized that they did not have an exclusive mandate in those areas, they had accumulated a great deal of expertise. Hence, if the proposed new working group were to deal with the topic of alternative dispute resolution, it would be greatly disadvantaged if it was unable to draw on the expertise of the members of the working group on arbitration and conciliation. The secretariat should examine that aspect when undertaking its preparatory work.

16. **The Chairperson** invited further comments on whether the Commission should decide to delete the reference to "microfinance".

17. **Mr. Schoefisch** (Germany) expressed support for the creation of the proposed working group, which should have a clearly defined mandate. He agreed that the first paragraph of the text proposed by the Chairperson should refer to international trade law and that the word "simplified" should be inserted in the second paragraph.

18. The "microfinance" label was, in his experience, somewhat misleading. He therefore agreed with the representative of Singapore that the Commission should make it clear that it was no longer dealing with microfinance but with the creation of an enabling legal environment for MSMEs.

19. With regard to the statement by the representative of the United States, he warned against overloading the working group with a wide range of topics. It should focus initially on a single

topic and move on to other areas when the Commission decided that the time was ripe.

20. **Mr. Maradiaga** (Honduras) said that, in his view, there was no substantive difference between microfinance and the creation of an enabling legal environment for MSMEs. It was simply a matter of terminology. The Commission should adopt a constructive approach. The secretariat would be assigned the key task of compiling the requisite information and investigating links with the work of other international bodies. A colloquium should then be organized to discuss the outcome.

21. **The Chairperson** said that "creation of an enabling legal environment for micro-business and small and medium-sized enterprises" was an unduly lengthy title for a working group. He suggested as an alternative title "MSME framework".

22. **Mr. Anwar** (Indonesia), emphasizing the major role played by MSMEs in both developed and developing countries, expressed support for the creation of a working group. MSMEs had accounted for 59.08 per cent of the gross domestic product of Indonesia in 2012 and the country had recorded an economic growth rate of about 6 per cent. Moreover, some 107 million people had been employed by MSMEs in 2012. Legislation to regulate MSMEs had been enacted in 1995.

23. **Ms. Malaguti** (Italy) expressed support for the proposal to establish a working group and for the Chairperson's draft summary, as amended. Her delegation had consistently emphasized that its support depended on a link being established with international trade and with action to reduce legal obstacles faced by MSMEs.

24. **Mr. Rodriguez** (Switzerland) also expressed support for the amended version of the Chairperson's summary.

25. It was important to take advantage of the expertise accumulated by the different working groups by requesting them to address various aspects of the topic under discussion. If all those aspects were assigned to a single working group, an extremely lengthy period of time would be required for the proceedings. Provision could also be made for coordinated work by more than one working group.

26. **The Chairperson** invited the Commission to comment on whether the following constituted an acceptable summary of the discussion and decision. There was broad support for the establishment of a working group on the topic of MSMEs, which would meet for the first time in spring 2014. In the meantime, the secretariat would undertake the necessary preparatory work. He listed three amendments to his proposed summary: “work to reduce legal obstacles” in the first paragraph would be replaced with “work on international trade law aimed at reducing legal obstacles”; the word “simplified” would be inserted in the second paragraph before “incorporation”; the third paragraph would state that “The Commission agreed that the secretariat should undertake the following preparatory work” and the words “both within and beyond the United Nations context” would be inserted after “intergovernmental organizations”.

27. **Mr. Velez** (Colombia) said that his delegation found the summary and proposed decision acceptable. He took it that when the working group met for a week in spring 2014 it would discuss a draft model law on simplified incorporation. The report should make it clear that the preparation of such a model law would require two weeks at the very least.

28. **Mr. Sorieul** (Secretary of the Committee) reassured the representative of Colombia that the working group would not be expected to produce a model law in a single session. Such work was rarely completed within two years.

29. **Mr. Cabeiro Quintana** (Observer for Cuba) expressed support for the creation of a working group on an enabling legal environment for MSMEs. His delegation agreed with the recommendation made by the representative of the Bolivarian Republic of Venezuela at the previous meeting that the working group should not focus exclusively on MSMEs but should also deal with the availability of microfinance for other types of associations and groups.

30. **Mr. Nogues** (Paraguay) said that his delegation wished to co-sponsor the proposal for the establishment of a working group. There were about 300,000 MSMEs in Paraguay and they generated a great deal of employment. Yet the majority of such companies were denied access to financial services.

31. **Mr. Bellenger** (France) said that the report should mention the proposal that the Commission should refrain from using the term “microfinance” in the mandates that it assigned to working groups.

32. **The Chairperson** said he took it that the Commission wished to drop the term “microfinance”, while acknowledging that its discussions concerning microfinance had shed light on other aspects of the topic that would be addressed in the future.

33. The representative of Singapore had recommended that a working group should not be established until the secretariat had completed its preparatory work. That recommendation had received support from the representatives of Austria, Germany and Switzerland. He asked whether those four delegations would object to a decision by the Commission at the current session to establish a working group that would meet in spring 2014.

34. **Mr. Chan Wah Teck** (Singapore) said that his delegation would not object to such a decision. However, if the secretariat failed to complete its preparatory work by spring 2014, the working group would be unable to commence its proceedings. The representative of Honduras had proposed that a colloquium should be held. He suggested that the colloquium should be held as soon as the secretariat completed its work.

35. A key task to be assigned to the secretariat was the development of a definition of micro-businesses and small and medium-sized enterprises.

36. He proposed that the second paragraph of the Chairperson’s summary should refer to the research to be undertaken by the secretariat on relevant work by other agencies within and outside the United Nations system.

37. **Ms. Sabo** (Canada) said that while she agreed in principle that a colloquium might serve a useful purpose, she was concerned that the Commission might be overburdening the secretariat. It would perhaps be preferable to authorize the secretariat to confer with experts on various aspects of its preparatory work.

38. **Mr. Dennis** (United States of America) said he agreed that meetings between the secretariat and expert groups would be preferable to the convening of a colloquium.

39. He had proposed in his earlier statement that the Chairperson's summary should refer to a list of the elements constituting an enabling legal environment. Such a list would assist other working groups in assessing the relevance of the topic to their own mandates before the new working group met. For instance, there had been some confusion regarding the specific mandate of Working Group V on insolvency law. He suggested that simplified insolvency regimes, which had been mentioned in document A/CN.9/790 submitted by Colombia, might be an appropriate topic.

40. **Mr. Sorieul** (Secretary of the Commission) said that experience had shown that it was not particularly easy to promote cooperation between different working groups. He also doubted whether the publication of a general list of topics relating to MSMEs would prompt existing working groups to take up one of those topics. Furthermore, he cautioned against broadening the mandate of the new working group in a manner that might destabilize the existing working groups.

41. **Ms. Talero** (Colombia) said that she agreed with the representative of Canada that the proposal to hold a colloquium might overburden the secretariat, especially at a time of scarcity of budgetary resources. She also agreed that the working group should initially focus on simplified incorporation.

42. **Mr. Maradiaga** (Honduras) withdrew his proposal to hold a colloquium.

43. **The Chairperson** concluded that there was broad agreement on the Colombian proposal to set up a working group on the MSME framework that would meet for its first session in spring 2014. Preparatory work would be undertaken in the meantime by the secretariat in line with the amended version of the Chairperson's summary.

44. *It was so decided.*

The meeting was suspended at 11.30 a.m. and resumed at 11.50 a.m.

45. **The Chairperson** invited the secretariat to introduce the topic entitled "Public procurement and related areas, including public-private partnerships (PPPs)".

46. **Ms. Nicholas** (Secretariat) said that the Commission had agreed at its forty-fifth session in 2012 that the secretariat should organize a colloquium on public-private partnerships with a view to identifying whether the Commission should undertake work in that area. She drew attention in that connection to the UNCITRAL Legislative Guide on Privately-Financed Infrastructure Projects, which had been adopted by the Commission in 2000, and the Model Legislative Provisions on Privately-Financed Infrastructure Projects, which had been adopted in 2003. The purpose of the colloquium, which had been held in May 2013, was to assess whether the recommendations in the Legislative Guide and the Model Legislative Provisions remained an appropriate and adequate guide for such infrastructure projects and whether the market in PPPs was sufficiently well developed. There had been a broad consensus at the colloquium on the importance of PPPs as a developmental topic and as support to foreign direct investment and sustainable development.

47. With regard to the prioritization criteria, she drew attention to the report on the colloquium contained in document A/CN.9/779. The first criterion was whether the topic was likely to lead to consensus in a working group. The concept of a "public-private partnership" had been defined and regulated in several jurisdictions since 2005. Recent studies had shown that extremely different approaches were adopted to the regulation of PPPs despite the existence of many texts on the subject at the regional and international levels. Hence, there was no universally applicable standard that could be used by States. For instance, natural resources concessions were not included in the UNCITRAL texts but were included in other relevant international texts. There was also a great deal of confusion regarding terminology, the content of PPP legislation and its interaction with other laws. The colloquium had therefore concluded that there was an urgent need to address the chaotic and uncoordinated results in the legislative sphere. The current UNCITRAL texts could not fulfil that task.

48. The scope of possible UNCITRAL work on PPPs was set out in paragraphs 36 to 45 of document A/CN.9/779. The colloquium had expressed strong support for the notion of a model law on PPPs and a guide similar to the Guide to

Enactment of the UNCITRAL Model Law on Public Procurement that the Commission had adopted in 2012. It had been recognized, however, that if a comprehensive set of policy guidelines could not be issued, a legislative guide might be a better option. The colloquium had not addressed the question of whether the development of a legal text would enhance international trade law. Moreover, the precise scope of the work that should be envisaged had not been defined. There had been some disagreement among participants, for instance on the complexity of the work that might be required to harmonize and synthesize the existing UNCITRAL texts and other available instruments. However, the United Nations Economic Commission for Europe had stated that it would fully support legislative work by UNCITRAL and use it to support its capacity-building activities. No duplication of effort with other international bodies had been identified by the secretariat.

49. The topic was arguably ready for submission to a working group. However, paragraphs 69 and 70 of document A/CN.9/779 indicated that further preparatory work was necessary to define a precise mandate. Persons currently working in PPPs had indicated that a text on a clearly defined and limited set of issues was urgently needed. While the UNCITRAL instruments were recognized as a useful tool for experts, they were not widely used in the area of international development. The colloquium had concluded that future texts should be developed in the context of a working group. Its comments were set out in paragraphs 82 and 83 of the report.

50. Bearing in mind the importance of identifying the key elements that should be included in a model law and the importance of understanding the relevant techniques that were currently being applied, the Commission might consider that secretariat-based desk research should be complemented by consultations with experts and persons working in the field, especially in developing countries, with the support of the multilateral development banks. The colloquium had not recommended that the topic should be referred forthwith to a working group. Some participants had recommended that parts of the Legislative Guide that required updating should first be identified and that the possibility of developing a model law should be discussed in the context of colloquiums or

expert groups. A firm proposal could be submitted to the Commission at its forty-seventh session in 2014. The resources required from UNCITRAL for action along those lines would be conference support for a maximum of one week.

51. **Mr. Bellenger** (France) noted the important role played by PPPs in sustainable development and the great need for PPP infrastructure in developing countries at a time of scarce public funds and a decline in development assistance. It was a sensitive and complex topic that should be entrusted to a working group after the requisite preparatory work outlined by the secretariat, including perhaps the holding of colloquiums, had been completed.

52. **Mr. Fruhmann** (Austria) said that PPPs were an important topic for both developed and developing countries and met the prioritization criteria. His delegation supported the establishment of a working group following preparatory work by the secretariat, including the holding of colloquiums. He asked where such colloquiums might be held.

53. **Ms. Nicholas** (Secretariat) said that the secretariat planned to adopt a flexible and transparent approach and to seek the broadest possible participation, for instance by organizing expert group meetings in Europe and North America and holding colloquiums in other regions. The regional development banks and the World Bank had expressed support for such an approach.

54. **Mr. Dennis** (United States of America) said that the representative of Singapore had drawn attention at a previous meeting to paragraph 20 of document A/CN.9/779 concerning PPPs, which stated that there was no widespread awareness of UNCITRAL privately financed infrastructure project (PFIP) instruments and that they had proved to be of limited utility for legislators and regulators.

55. The proposed model law was already virtually complete and the United States had suggested in document A/CN.9/789 that it should be finalized by a meeting of experts rather than by a colloquium and should be submitted to a working group in 2014 for adoption. His delegation cautioned against expanding the scope of the revision and prolonging the discussions.

56. **Ms. Sabo** (Canada) said that her delegation was not convinced that a model law was the

appropriate instrument. The PFIP instruments previously produced by UNCITRAL were still highly relevant. However, she agreed with the proposal for the secretariat to undertake preparatory work with the assistance of experts. When it submitted its findings in 2014, the Commission could decide whether a guide or a model law should be developed.

57. **Ms. Nicholas** (Secretariat) said that the colloquium held in May 2013 had considered whether the proposed legal text was already virtually complete and simply needed to be updated. It had concluded that further work was required and could not be completed solely by means of secretariat research. It had also emphasized the need to adopt an inclusive approach in expert consultations through mechanisms designed to promote multilingualism and transparency. A colloquium had been proposed to meet those requirements.

58. **Ms. Whyte** (United Kingdom) expressed support for the comments by the representative of Canada.

59. **Ms. Malaguti** (Italy) said that the expert groups consulted by the secretariat should include representatives of the public sector.

60. **The Chairperson** said that resources were available for five days of expert group meetings in

different parts of the world in the interests of transparency and with a view to obtaining the widest possible range of views on the topic. One possible reason for the limited application of the UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects was that wide-ranging consultations had not been held on that instrument.

61. **Mr. Chan Wah Teck** (Singapore), speaking as the former Chairperson of the session of the Commission that had adopted the UNCITRAL Legislative Guide in 2000, said that there had been no suggestion during the lengthy deliberations that the text was deficient in any way or that the prior consultations had not been sufficiently wide-ranging.

62. **Mr. Fruhmenn** (Austria) said that the proposed instrument should respond to practical needs and should not be unduly complex.

63. **The Chairperson** noted that the Commission supported continuous work by the secretariat on the topic of PPPs and the organization of consultations with experts. In light of the scarcity of resources, the secretariat would adopt a flexible approach to the question of whether a colloquium should be convened with the support of the regional development banks.

The meeting rose at 12.30 p.m.

**Summary record of the 979th meeting, held at the Vienna International Centre, Vienna, on Tuesday,
23 July 2013, at 2 p.m.**

[A/CN.9/SR.979]

Chairperson: Mr. Schöll (Switzerland)

The meeting was called to order at 2.10 p.m.

Planned and possible future work, including in the areas of arbitration and conciliation, commercial fraud, electronic commerce, insolvency law, international contract law, microfinance, online dispute resolution, public procurement and infrastructure development, including public-private partnerships, and security interests (*continued*) (A/CN.9/752 and Add.1, 774 and 789; A/CN.9/XLVI/CRP.1/Add.8)

1. **The Chairperson** said that the mandates of Working Group II on arbitration and conciliation, Working Group III on online dispute resolution and Working Group VI on security interests had been confirmed and all three had been allocated two working group sessions.

2. He invited the secretariat to introduce the topic of insolvency.

3. **Ms. Clift** (Secretariat) drew attention to the summary of the Commission's discussion the previous week that was contained in the draft report (A/CN.9/XLVI/CRP.1/Add.8). Some of the proposals had been discussed informally during the intervening period.

4. The Commission had agreed that the mandate accorded to Working Group V had not been completed and that it was unclear how the Working Group should proceed with the remaining tasks. It had been proposed that, resources permitting, a colloquium on the subject should be held in December 2013. It had also been proposed that the colloquium should take place in the context of a meeting of the Working Group. The colloquium would discuss enterprise group issues and topics for future work, which could include insolvency issues raised by microbusiness and small and medium-sized enterprises (MSMEs). The Working Group would continue in spring 2014 to work on enterprise group issues and possibly also issues relating to MSMEs. The Commission would

decide how to proceed on the basis of the Working Group's report and would issue an additional mandate, if necessary, concerning MSMEs.

5. **Mr. Redmond** (United States of America) said that his delegation broadly supported the proposals outlined by the secretariat, also regarding the holding of a colloquium, followed by a meeting of the Working Group, in December 2013. The experts attending the colloquium should present their views on insolvency issues relating to MSMEs, and the Working Group should be given a mandate to discuss those issues when it met in April 2014. The working group on MSMEs that had just been established could determine public policy issues and obtain clarification on insolvency aspects of those issues as well as advice from Working Group V on additional issues that should be addressed.

6. The Working Group had held lengthy discussions on the subject of centre of main interests (COMI) in the context of enterprise groups. A colloquium would be of great assistance in identifying the work that should be accomplished in that area and in providing advice on whether a legislative guide or model law should be developed. The members of the Working Group should, of course, also decide whether they wished to proceed with such a project.

7. **Mr. Rodriguez** (Switzerland) and **Mr. Maradiaga** (Honduras) expressed support for the approach recommended by the representative of the United States.

8. **Ms. Talero** (Colombia) also expressed support for the proposals made by the representative of the United States. Insolvency was a source of great concern for MSMEs, which required speedier, more flexible and less costly proceedings. Working Group V had sufficient expertise to address the topic, and coordination on policy issues with the new working group on MSMEs could prove extremely helpful.

9. **Ms. Sabo** (Canada) expressed support for the proposals outlined by the secretariat. With regard to

the comments by the representative of the United States, she understood that the purpose of the colloquium would be to assist Working Group V by clarifying how it should approach issues relating to enterprise groups and by generating new ideas. However, its conclusions would not determine how the Working Group should proceed. That would be decided by the Commission on the basis of an assessment by the Working Group.

10. **Mr. Schoefisch** (Germany) expressed support for the proposals by the representative of the United States. He agreed with the representative of Canada that the purpose of the colloquium was to identify topics that might be addressed by Working Group V and that the Commission should decide which topics were appropriate.

11. **Mr. Bellenger** (France) also emphasized the need to distinguish between the processes of reflection and implementation. He agreed with the points made in that regard by the representatives of Canada and Germany.

12. **Mr. Redmond** (United States of America) read out the following proposal for a Working Group V mandate concerning MSMEs: "After discussion, the Commission agreed that work concerning insolvency considerations related to microbusiness, small and medium-sized enterprises should be taken up as an additional mandate by Working Group V in coordination with the new working group."

13. **Mr. Schoefisch** (Germany) said that he had understood that the colloquium and Working Group V should first discuss possible future topics.

14. **Ms. Sabo** (Canada) said that the proposal by the representative of the United States implied that Working Group V was being given a mandate both to continue considering issues relating to enterprise groups and to take up a new subject that might require several sessions. The position of her delegation was that the various elements of the MSME topic should be considered by the Commission in 2014. It would be helpful if working groups could provide information in the meantime that would assist the Commission in taking a decision on those elements.

15. **The Chairperson** said that there seemed to be broad support for the allocation of the first part of the five-day session in December 2013 to a

colloquium that would discuss the remaining portion of the Working Group's mandate and generate new ideas. There was also broad support for the consideration by the Working Group of insolvency in relation to MSMEs in due course. There were divergent views, however, on the question of timing. He suggested that the new working group on MSMEs, which would meet in spring 2014, could identify the basic issues to be addressed in an insolvency context and submit them to the Commission for a decision. In response to a question from the representative of Germany, he confirmed that if Working Group V took up those issues, they would not be discussed concurrently by any other working group.

16. **Ms. Sabo** (Canada) said that a basic issue was whether the Legislative Guide on Insolvency Law addressed the question of insolvency in relation to MSMEs.

17. **The Chairperson** said that the Working Group could consider that matter and discuss ways of enhancing the usefulness of the Legislative Guide from an MSME perspective.

18. **Mr. Redmond** (United States of America) said that ideas regarding new work generated by the colloquium would obviously not be implemented until the Commission gave its approval. His delegation was merely suggesting that the Working Group should be authorized to consider insolvency in relation to MSMEs during the period prior to the next session of the Commission. It would approach the subject solely from a technical perspective in coordination with the new working group, which would be responsible for identifying policy issues and defining the scope of its work.

19. **Ms. Clift** (Secretariat) proposed the following preliminary draft wording for the report: "After discussion, the Commission agreed that Working Group V should be requested to examine insolvency considerations relating to MSMEs, including whether the Legislative Guide on Insolvency Law provides sufficient solutions and, if not, what further work might be required, with a view to reporting to the Commission in 2014."

20. **The Chairperson** said that the draft report would also state that a total of five working days would be devoted in December 2013 to the

convening of a colloquium and a meeting of the Working Group to explore the remaining issue under the mandate, namely centre of main interests in the context of enterprise groups, and to discuss possible additional issues.

21. **Ms. Whyte** (United Kingdom) expressed support for the proposals just made by the secretariat and the Chairperson.

22. **Mr. Redmond** (United States of America) proposed stating in addition that policy decisions would be reserved for the new working group on MSMEs. Technical advice could then be provided by the other working groups.

23. **Mr. Chan Wah Teck** (Singapore) said that the practical implications of the dichotomy between policy considerations and technical considerations were unclear. As a rule, working groups were convened to implement a specific mandate and they were required to consider all policy and technical issues pertaining to that mandate.

24. **Mr. Sorieul** (Secretary of the Commission) expressed reservations concerning the establishment of a hierarchy among working groups. It would be the first time that the Commission mandated a working group to develop general policies and to coordinate the activities of another working group. Responsibility for policymaking lay with the Commission. The proposed procedure was, in his view, unduly complex. If the idea was simply to ensure coordination among the working groups, the secretariat could ensure the requisite communication and synergy.

25. **Mr. Bellenger** (France) and **Mr. Schoefisch** (Germany) expressed support for the secretariat's suggestion.

26. **Mr. Redmond** (United States of America) said that his delegation would also support the suggestion provided that the new working group focused on MSME policy issues and Working Group V on technical issues.

27. **Ms. Sabo** (Canada) said that the Commission could address that aspect when it adopted its report.

28. **The Chairperson** noted that there was a broad consensus on how the Commission should proceed with respect to the topic of insolvency.

29. **The Commission** had thus concluded its discussion of agenda item 16 on future work.

The meeting was suspended at 2.55 p.m. and resumed at 3 p.m.

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

30. **The Chairperson** invited the secretariat to introduce the agenda item.

31. **Ms. Musayeva** (Secretariat) said that the item on the promotion of the rule of law had been on the Commission's agenda since its forty-first session in 2008 in response to the General Assembly's invitation to the Commission to comment, in its reports to the General Assembly, on the Commission's current role in promoting the rule of law. At its forty-first to forty-fifth sessions, the Commission had expressed its conviction, in its annual reports to the General Assembly, that the promotion of the rule of law in commercial relations should be an integral part of the broader agenda of the United Nations to promote the rule of law at the national and international levels. That view had been endorsed by the General Assembly.

32. At its forty-third session, the Commission had emphasized the importance of engaging in a regular dialogue with the Rule of Law Coordination and Resource Group through the Rule of Law Unit and to keep abreast of progress made in the integration of the work of UNCITRAL into the United Nations joint rule of law activities. To that end, it had requested the secretariat to organize briefings by the Rule of Law Unit biannually, when sessions of the Commission were held in New York. The first briefing had been provided at the Commission's forty-fifth session in 2012 and the next briefing was planned for 2014. At the 2012 briefing, the Commission had been informed about progress made in raising awareness of the work of UNCITRAL and about preparations for a high-level meeting of the General Assembly on the rule of law. The Commission had proposed ways and means of ensuring that aspects of its work were duly reflected at the meeting and in its outcome document.

33. There were no written reports to be considered at the Commission's current session. She drew attention, however, to General Assembly resolution

67/97 on the rule of law at the national and international levels. Paragraph 17 decided that the Sixth Committee should focus on the subtopic “The rule of law and the peaceful settlement of international disputes” at the sixty-eighth session of the General Assembly in 2013. As the Commission might also wish to focus on that subtopic in its comments to the General Assembly, the secretariat had invited experts in related areas of UNCITRAL work, namely arbitration and conciliation and online dispute resolution, to participate in a panel discussion.

34. General Assembly resolution 67/97 had further decided that the Sixth Committee should focus on the subtopic “Sharing States’ national practices in strengthening the rule of law through access to justice” at the forty-seventh session of the General Assembly in 2014. The Commission might wish to decide to focus on the same subtopic at its next session.

35. **The Chairperson** invited Professor Hrvoje Sikirić from Croatia, who had chaired the last session of the Commission, to report on the implementation of the relevant decisions of the Commission taken at its forty-fifth session and of its instructions regarding the High-level Meeting of the General Assembly on the rule of law.

36. **Mr. Sikirić** (Croatia) said that there had been a consensus in the Commission at its forty-fifth session that the Chairperson of UNCITRAL should address the High-level Meeting and that the outcome document of that meeting should recognize the contribution made by UNCITRAL to the promotion of the rule of law in the economic field, which was vital for its promotion in a broader context. The Commission had requested him in his capacity as Chairperson to transmit its views as reflected in the report of the forty-fifth session of the Commission to the Office of the President of the General Assembly. Further to his dialogue with that Office, UNCITRAL had been invited to present its views on the strengthening of the rule of law at the national and international levels to the High-level Meeting held on 24 September 2012.

37. A key point conveyed to that Meeting on behalf of UNCITRAL was that the rule of law concerned not only issues of public international law, human rights, criminal law and transitional justice

but also concerned the recognition and enforcement of property rights and contracts, and action to guarantee the legal security required to promote entrepreneurship, investment and job creation, as well as States’ capacity to mobilize resources for rule of law fundamentals, such as due process and judicial and legal infrastructure, including well-trained lawyers and judges. In his statement to the Meeting, he had provided examples of the wide-ranging impact of UNCITRAL work in that regard based on observations by practitioners made during discussions in the Commission. He had also referred to steps recommended by UNCITRAL whereby interested countries could achieve sustained capacity to implement commercial law reforms, with assistance, where necessary, from the international community.

38. The Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels contained two paragraphs in which the views of UNCITRAL on the promotion of the rule of law in the economic field were set out as an essential element of the promotion of the rule of law in a broader context. Paragraph 7 acknowledged that the rule of law and development were strongly interrelated and mutually reinforcing, and that the advancement of the rule of law at the national and international levels was essential for sustained and inclusive economic growth and sustainable development. It called for reflection on that interrelationship in the post-2015 international development agenda. Paragraph 8 recognized the importance of fair, stable and predictable legal frameworks for generating inclusive, sustainable and equitable development, economic growth and employment, generating investment and facilitating entrepreneurship, and commended the work of UNCITRAL in modernizing and harmonizing international trade law. The High-level Meeting had thus increased awareness of local needs with respect to the promotion of the rule of law in the economic field, the importance of addressing those needs and the Commission’s constructive role in that regard.

39. **Mr. Sorieul** (Secretary of the Commission) said that UNCITRAL had been invited to participate in a meeting held in June 2013 in the context of the General Assembly’s thematic debate on “Entrepreneurship for Development”. Mr. Sikirić, as

Chairperson of UNCITRAL, had delivered the message that no society could develop unless it could respect and enforce legal relationships. An enabling environment, laws, institutions, skills and practices were necessary, especially for small and medium-sized enterprises in developing countries.

40. A one-day conference on the potential role of the private sector in helping fragile countries to emerge from conflict, co-hosted by the United Nations Peacebuilding Commission and the United Nations Global Compact, had also been held in June 2013. The UNCITRAL Chairperson had moderated a panel that had discussed ways and means of addressing the challenges that faced fragile peacebuilding environments.

41. The secretariat had been requested by the Rule of Law Unit to prepare a guidance note of the United Nations Secretary-General on the promotion of the rule of law in commercial relations. The secretariat's text, which had drawn heavily on the decisions taken by the Commission since 2008, was currently being considered by the Unit. It aimed at building States' sustained capacity for promotion of the rule of law in commercial relations with the assistance of the international community where necessary, and at increasing the ability of the United Nations to respond effectively to States' needs in that regard. It is intended for use in a variety of situations, including in the conflict prevention, post-conflict reconstruction and development contexts.

42. The Declaration adopted at the end of the High-level Meeting on the rule of law had called for reflection on the interrelationship between the rule of law and development in the post-2015 international development agenda. A special event to be held in the context of the General Assembly on 25 September 2013 would focus on that theme. The post-2015 agenda was intended to succeed the Millennium Development Goals (MDGs). The special event would provide an opportunity to discuss lessons learned from the MDGs' processes. It was as yet unclear whether UNCITRAL would participate therein.

43. Discussions were also being held in an Open Working Group of the General Assembly on Sustainable Development Goals and an Intergovernmental Committee of Experts on

Sustainable Development Financing. The Working Group had met four times in 2013 and had scheduled four further meetings in the period up to February 2014. It planned to discuss economic growth, infrastructure development, rule of law and governance. Steps would be taken to ensure that relevant contributions by UNCITRAL were taken into account.

44. The Commission might wish to note the relevance of its work to the formulation throughout the United Nations system of aspects of the post-2015 international development agenda that had a bearing on the rule of law. It might also wish to instruct the Chairperson and the secretariat to take appropriate steps to ensure that the role of UNCITRAL in the promotion of the rule of law and sustainable development were not overlooked.

45. **Ms. Sabo** (Canada) endorsed the secretariat's suggestions regarding future action.

46. **The Chairperson** invited the first panellist, Mark McNeill, who was a partner in Shearman & Sterling's International Arbitration Group in Paris and who specialized in international investment and commercial arbitration, to take the floor. Mr. McNeill had previously been employed at the Department of State of the United States and had worked on investor-State litigation and the drafting of investment chapters of free trade agreements.

47. **Mr. McNeill** (Panellist) said that he would discuss commercial arbitration as a neutral legal framework for adjudicating disputes and as a tool for conflict prevention, with a special focus on the extractive industries. He would also comment on the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

48. One of the earliest examples of international arbitration as a means of conflict prevention and resolution had been the Jay Treaty of 1794 between the United States and Great Britain. As a number of disputes had been left unresolved since the war of independence 10 years earlier, there was a risk of renewed conflict. The commissions set up under the Treaty to resolve the disputes embodied features that were nowadays recognized as the hallmarks of international arbitration. They had demonstrated the utility of deploying an ad hoc procedure that was

adapted to the specific dispute. A similar flexible approach was adopted, for example, in the UNCITRAL Arbitration Rules. When an arbitral tribunal was constituted, it had inherent powers, in consultation with the parties, to decide on the time limit within which an award would be rendered, the number and order of pleadings, the taking of evidence and other aspects of the proceedings. Another core feature of arbitration under the Jay Treaty was the provision for a neutral and denationalized forum. Nobody was required to litigate in the courts of the other party and the commissions were insulated from government interference and were entitled to rule on their own jurisdiction. Similarly, the UNCITRAL Model Law on International Commercial Arbitration had been highly successful in ensuring the independence and denationalization of international arbitration. Article 5, for instance, enshrined the principle that courts must not interfere with international arbitration proceedings.

49. Since 1958 the New York Convention, which had been ratified by 148 States, had provided a common set of standards for the recognition and enforcement of international arbitration awards. It required the national courts of contracting States to enforce awards that were made in other contracting States unless they were deemed to be inconsistent with public policy or unenforceable pursuant to the narrow grounds set forth in article V. A website relating to the Convention listed more than a thousand relevant decisions handed down by courts in both civil-law and common-law jurisdictions throughout the world. Access by courts to that source should improve judicial interpretation, consistency and predictability.

50. Work in the extractive industries in developing countries was frequently conducted under an international agreement between a multilateral corporation and a government agency. Such agreements usually involved long-term investments binding together private and public actors that sometimes had conflicting goals. The producing country generally required the financial resources and technical expertise of the multinational corporation, but it naturally also wished to maintain sovereignty over its natural resources and to develop its own technology. In the long term, the investor was faced with commercial, legal and political risks,

since the host State might change its attitude to foreign investment. When disputes arose, neither party wished to have them resolved in the home courts of the other party. It had therefore become standard practice to include international arbitration clauses in the relevant agreements. Multilateral corporations also sought to conclude favourable investment treaties.

51. International private or treaty-based arbitration had certainly been one of the most effective means of resolving cross-border disputes concerning investments and natural resources. The question arose, however, whether such arbitration promoted the rule of law and helped to prevent future conflicts in countries that were struggling against poverty and other crises. In the case of inter-State arbitration proceedings, it could probably be concluded that international arbitration could help to resolve conflicts, including territorial disputes, under the right circumstances. However, the parties must have confidence in the process, be committed to resolving the dispute and be prepared to lose, which was unlikely where the issue involved was perceived to be of vital national importance.

52. When concluding an international investment treaty, some States were required to align their investment regime and other laws with international standards. In addition, international arbitration arguably reduced the opportunity for inter-State conflict by obviating the need for direct confrontation between States on behalf of their aggrieved citizens. Having a reliable mechanism for protecting investments and adjudicating claims tended to increase the amount of capital that investors were willing to risk overseas, particularly in developing countries where the courts might be perceived to be unreliable. Moreover, the increase in recourse to arbitration had led, in general, to greater clarity with respect to the legal standards that were applicable to investments.

53. On the other hand, international arbitration in the extractive industries had at times led to a backlash, especially in Latin American countries such as Ecuador. International arbitration could also sometimes impose an unwanted burden on States in post-conflict situations or struggling to recover from a national crisis. Moreover, in some cases arbitration proceedings involving State resources were kept

confidential and were concealed from citizens who had a vested interest in the disposition of public resources. Secret commercial deals between multilateral corporations and government officials could promote corruption and lead to popular dissent. The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were therefore of fundamental importance, especially in the extractive industries.

54. All in all, the UNCITRAL instruments he had mentioned provided a robust legal framework for the peaceful resolution of disputes, which was of essential importance in the volatile environment of cross-border investment in the extractive industries. The judiciaries in developing countries and post-conflict States were frequently mistrusted by foreign investors. The framework provided by the UNCITRAL instruments might thus be the only effective means of attracting the investment funds required for sustainable development and capacity-building.

55. **Ms. Knieper** (Secretariat) said that Myanmar and the Democratic Republic of the Congo had recently ratified the New York Convention, so that there were now 150 States parties. Iraq was also contemplating the possibility of ratifying the Convention.

56. **The Chairperson** invited the panellist Daniel Magraw to take the floor. He was a President Emeritus at the Centre for International Environmental Law (CIEL) and in that capacity had attended the meetings of Working Group II on the UNCITRAL Rules on Transparency as an observer. He had also formerly been an Associate General Counsel and Director at the International Environmental Law Office of the United States Environmental Protection Agency.

57. **Mr. Magraw** (Panellist) said that he would discuss transparency in the context of investor-State arbitration. An initial question to be addressed was the definition of “rule of law”. The United Nations had defined it in Security Council document S/2004/616 as:

“a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally

enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

He highlighted the need for procedural and legal transparency, which was a fundamental concept for trade and investment communities. It created legal certainty and predictability and led to fairness in the application of laws and the avoidance of arbitrariness.

58. Transparency was also related to accountability. It required that the conduct of individuals, organizations and institutions should be made known to various actors in society. Examples in the business community included securities laws that required the disclosure of material business developments, thereby curtailing corruption. The disclosure of information concerning, for instance, the implementation of anti-pollution laws could be used to assess whether laws were being enforced on an equal basis. At the international level, it was vital to have access to information regarding law enforcement, the degree to which compliance with the law was independently adjudicated, and respect for human rights norms. An important tool in that regard was the shadow reports submitted by civil society organizations to the United Nations Human Rights Council. In fact, there was now a human right to access to information based on article 19 of the Universal Declaration of Human Rights.

59. Investor-State disputes were manifestly a matter of public interest. They could involve very substantial funds in terms of the gross domestic product of the country concerned and frequently involved vital natural resources. They could undermine domestic health and challenge environmental regulations that constituted sovereign prerogatives. The outcome of the cases brought to date, which invariably involved allegations that the host country had violated international law, was being used to develop a corpus of international law. It was therefore vital to generate awareness of the

results. Unfortunately, the existing investor-State system was very deficient in terms of transparency. Hence the importance of the new UNCITRAL Rules on Transparency, which were the product of more than three years of intense negotiations. The Rules were nuanced and balanced, and they covered virtually all aspects of treaty-based investor-State arbitration. The question arose, however, whether they would be implemented in practice, since many States feared the type of pressure for transparency that they would entail. The Rules on Transparency were not applicable to arbitration brought under an existing treaty unless the States parties opted in unilaterally, bilaterally or pursuant to a convention to be drafted by Working Group II. On the other hand, the Rules would be applicable to future treaties unless the parties opted out. UNCITRAL should, of course, urge States parties to existing treaties to opt for application of the Rules on Transparency. It should also urge parties to individual arbitrations to apply them and should collect and publicize good practices. It was to be hoped that UNCITRAL would obtain sufficient funding to become the repository under the Rules on Transparency. In the meantime, the Permanent Court of Arbitration had agreed to serve as the repository. Lastly, UNCITRAL could engage in a periodic stocktaking exercise with respect to the implementation of the Rules.

60. **Mr. Chan Wah Teck** (Singapore) emphasized the important role played by the rule of law in ensuring that people were aware in advance of the consequences of their actions and hence made the proper choices. Most investments should also be made on the basis of clear-cut rules. Certainty was essential and expectations should not be compromised. Any modification of the rules after an investment was made would negate the concept of the rule of law. He therefore welcomed the opt-in clause in the Rules on Transparency with respect to existing treaties. A critical factor in determining whether a State would opt in was the extent to which such a decision would negate investors' expectations and the general impact it would have on the concept of the rule of law.

61. **The Chairperson** invited the panellist Anna Joubin-Bret to take the floor. Ms. Joubin-Bret had a unique combination of work experience as a legal adviser to multinational corporations and as a Senior

Legal Advisor with the Division on Investment, Technology and Enterprise Development of the United Nations Conference on Trade and Development (UNCTAD). She was currently practising as a lawyer in Paris, focusing on international investment law and investment dispute resolution.

62. **Ms. Joubin-Bret** (Panellist) said that she would focus on mediation for the peaceful settlement of economic disputes and the rule of law.

63. A dispute or conflict could be resolved by means of direct negotiations between the parties. Alternatively, a third party could be involved and there were three main approaches to that option. One was adjudication by a court of law; the second was international arbitration; and the third was conciliation and mediation. The neutral adjudicators in the first two cases had the authority to bind the disputing parties. The conciliators in the third case, which was also a relatively formal and structured process, were mandated by the parties to settle the dispute, but the final decision was taken by the parties themselves. The difference between conciliation and mediation consisted in the role of the third party, who played a less formal role in the case of mediation. The mediator encouraged the parties to interact and put forward their own solution.

64. One of the advantages of alternative dispute resolution was that settlements were achieved more speedily. It was also less costly and more flexible because the parties themselves agreed on the procedure and exercised greater control over it. Private economic actors and investors thus tended to prefer alternative dispute resolution, but States also frequently opted for arbitration.

65. Insufficient use was made of mediation and conciliation because of lack of awareness of that option. It was easier for States in particular to hand over a dispute to a court or an arbitral tribunal and then to abide by the decision or award. A further disadvantage of mediation and conciliation was the lack of enforceability. In addition, it might be regarded as a waste of time and money where the parties were not really intent on reaching a settlement. Government officials might also find it difficult to secure a firm mandate to negotiate and to propose a solution that might entail the transfer of funds.

66. The World Bank had conducted a survey on alternative dispute resolution in 101 economies. It had found that only seven of those economies had no consolidated law on commercial arbitration, conciliation or mediation. Only five economies had no institutions that could administer arbitration cases. Mediation and conciliation services were not widely used. However, she was pleased to note that many of the economies surveyed applied the UNCITRAL Model Law on International Commercial Conciliation.

67. Turning to practical examples, she said that the alternative dispute resolution framework in Colombia required conciliation as a prerequisite for litigation in commercial cases. A special preliminary hearing was held in which the judge acted as a conciliator. Fifty per cent of the cases referred for conciliation were settled. Ecuador had a mediation institution within the Attorney-General's Office that proposed mediation to foreign and domestic economic actors. The General Authority for Investment in Egypt had a mediation facility, which was principally used to settle disputes among investors in joint venture agreements but which could also be extended to other disputes involving investments. Lastly, the Republic of Korea had a Foreign Investment Ombudsman who mediated between government agencies and foreign investors.

68. The preferred settlement system for international investment disputes was arbitration, since there was considerable distrust of the investment treaty system and domestic courts. She argued, however, that insufficient use was made of mediation, which could pave the way for early amicable settlements. It was estimated that some 450 investor-State dispute settlement cases had been conducted to date. That was far more than the number of conciliation cases that had been conducted under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. There was nonetheless a strong impetus for mediation as an alternative means of investment dispute settlement. Arbitration was deemed to be an unduly lengthy process and far too costly. Thirty-nine per cent of the cases she had brought for international arbitration had been settled before a final award was rendered. A solution had thus been found through negotiations in the shadow of the arbitration proceedings. Such negotiations

should, in her view, be conducted with transparency and accountability under the umbrella of the rule of law.

69. Two steps should be taken to promote the acceptability of mediation. First, domestic frameworks should have built-in legal provisions for mediation based on the UNCITRAL Model Law on International Commercial Conciliation. Second, it was essential to generate awareness of mediation and to build the necessary capacity for its application.

70. **The Chairperson** said that there had been an assumption for decades that commercial and perhaps also investment arbitration ought to be confidential. He asked whether there was a role for transparency in investment mediation.

71. **Ms. Joubin-Bret** (Panellist) said that investor-State mediation rules had recently been adopted under the auspices of the International Bar Association. They included both confidentiality and transparency provisions. A certain degree of transparency was clearly necessary in the context of State interests, which were also obviously public interests.

72. **The Chairperson** invited the final panellist, Mohamed Abdel Wahab, to take the floor. Mr. Abdel Wahab was a Professor in the Faculty of Law of Cairo University, specializing in private international law and dispute resolution. He was Vice-President of the London Court of International Arbitration and Chairman of the Egyptian Branch of the Chartered Institute of Arbitrators. Mr. Abdel Wahab had also participated in the proceedings of UNCITRAL Working Group III concerning online dispute resolution.

73. **Mr. Abdel Wahab** (Panellist) said that he would focus on how online dispute resolution (ODR) could contribute to the rule of law. The definition of ODR was highly controversial, even among practitioners. However, in the context of the rule of law, ODR served as an innovative means of promoting the peaceful settlement of disputes in an international context through technology-based processes. It required the use of state-of-the-art technologies that formed part of the evolution to a paperless society. Many ODR providers had entered the global market, especially in developed countries

which had the requisite infrastructural requirements. However, there had been a notable decline in their ability to compete. While there had been some 115 providers in 2004, there were only about 63 in 2013.

74. ODR schemes could be divided into three basic categories. The first was technology-assisted schemes, in which the electronic aspect was simply added to negotiation, mediation and arbitration proceedings. A second category consisted of fully fledged technology-based ODR mechanisms, including automated negotiations whereby variables were entered into the system, which produced optimal solutions to the dispute. Thirdly, ODR not only contributed to dispute resolution but also to dispute avoidance. Certain online schemes helped to prevent disputes by providing for certainty and predictability and minimizing the risks involved in cross-border transactions.

75. The activities of the UNCITRAL Working Group on online dispute resolution could, in his view, encompass both inter-State and intra-State disputes, which formed part of the ODR mandate with respect to global governance and the rule of law. The United Nations instruments set the requisite standards and promoted harmonization. He urged State representatives who participated in standard-setting activities to ensure that the potential contribution of technology to dispute resolution and the rule of law in a transnational context was explicitly recognized.

76. ODR had a number of added values such as round-the-clock accessibility, trust and confidence in the process, the promotion of swift justice and speedy settlements, and effective prevention and proper management of disputes. In circumstances of emotional distress and conflict situations, when it was difficult to persuade the parties to sit together for the purpose of negotiations, ODR could play an important role by providing for both synchronous and asynchronous communications from afar. It was also far more affordable than other types of dispute resolution. All in all, he submitted that ODR could have a global domino effect on the rule of law across the political, economic, legal and social arenas, leading to progress and reform in intra-State and inter-State contexts.

77. A parallel set of ODR rules should be developed for inter-State disputes and conflicts. While traditional forms of dispute resolution should be maintained, innovative dimensions could be incorporated in such schemes through technology. In addition, procedural and substantive standards and trust-building mechanisms should be developed for ODR providers. While regulations were a controversial issue for many States, they promoted trust on a global level and could enable the providers to continue operating. The globalization of ODR for the benefit of the rule of law required the training of arbitrators who were acquainted with the demands of technology and its integration into the dispute resolution process.

78. **The Chairperson**, summarizing the items to be reflected in the report, said that the Commission reiterated its conviction that the rule of law in commercial relations should be incorporated into the broader rule of law agenda at the national and international levels through the appropriate United Nations bodies. The Commission thanked the previous Chairperson for addressing the High-level Meeting of the General Assembly on the rule of law and contributing to the outcome document. The Commission would be provided by the secretariat with a guidance note of the United Nations Secretary-General on the promotion of the rule of law in commercial relations, which would be widely disseminated. Efforts would be made through the various UNCITRAL bodies to reflect the Commission's views and work in ongoing processes aimed at the formulation of the post-2015 international development agenda. Lastly, the report would note that the General Assembly had decided that the topic for consideration by the Sixth Committee in 2014 was: "Sharing States' national practices in strengthening the rule of law through access to justice". Delegations were invited, if they so wished, to provide comments on the subject to the secretariat for discussion by the Commission at its next session.

The meeting rose at 4.55 p.m.

II. BIBLIOGRAPHY OF RECENT WRITINGS RELATED TO THE WORK OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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III. CHECK-LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

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| 1. General series | | |
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| A/CN.9/760 | Report of Working Group on Arbitration and Conciliation on the work of its fifty-seventh session (Vienna, 1-5 October 2012) | Part two, chap. I, A |
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| A/CN.9/762 | Report of Working Group on Online Dispute Resolution on the work of its twenty-sixth session (Vienna, 5-9 November 2012) | Part two, chap. III, A |
| A/CN.9/763 | Report of the Working Group on Insolvency Law on the work of its forty-second session (Vienna, 26-30 November 2012) | Part two, chap. IV, A |
| A/CN.9/764 | Report of the Working Group on Security Interests on the work of its twenty-second (Vienna, 10-14 December 2012) | Part two, chap. V, A |
| A/CN.9/765 | Report of the Working Group on Arbitration and Conciliation on the work of its fifty-eighth session (New York, 4-8 February 2013) | Part two, chap. I, E |
| A/CN.9/766 | Report of the Working Group on Insolvency Law on the work of its forty-third session (New York, 15-19 April 2013) | Part two, chap. IV, F |
| A/CN.9/767 | Report of the Working Group on Security Interests on the work of its twenty-third session (New York, 8-12 April 2013) | Part two, chap. V, C |
| A/CN.9/768 | Report of the Working Group on Electronic Commerce on the work of its forty-seventh session (New York, 13-17 May 2013) | Part two, chap. II, E |
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| A/CN.9/WG.II/WP.174 | Note by the Secretariat on settlement of commercial disputes: Preparation of a legal standard on transparency in treaty-based investor-State arbitration — Proposal by Governments of Argentina, Australia, Canada, Mexico, Norway, South Africa, and the United States of America, submitted to the Working Group on Arbitration and Conciliation at its fifty-seventh session | Part two, chap. I, D |
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2. Restricted series

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| A/CN.9/WG.II/LVII/ CRP.1 and Add.1-4 | Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-seventh session | Not reproduced |
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| A/CN.9/WG.II/WP.177 | Note by the Secretariat on settlement of commercial disputes: Transparency in treaty-based investor-State arbitration — Establishment of a repository of published information (“registry”), submitted to the Working Group on Arbitration and Conciliation at its fifty-eighth session | Part two, chap. I, G |
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| A/CN.9/WG.II/LVIII/ CRP.1 and Add.1-4 | Draft report of Working Group II (Arbitration and Conciliation) on the work of its fifty-eighth session | Not reproduced |
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| A/CN.9/WG.IV/ WP.118 and Add.1 | Note by the Secretariat on legal issues relating to the use of electronic transferable records, submitted to the Working Group on Electronic Commerce at its forty-sixth session | Part two, chap. II, B |
| A/CN.9/WG.IV/ WP.119 | Note by the Secretariat on legal issues relating to the use of electronic transferable records — Proposal by the Governments of Colombia, Spain and the United States, submitted to the Working Group on Electronic Commerce at its forty-sixth session | Part two, chap. II, C |
| A/CN.9/WG.IV/ WP.120 | Note by the Secretariat Overview of identity management — Background paper submitted by the Identity Management Legal Task Force of the American Bar Association, submitted to the Working Group on Electronic Commerce at its forty-sixth session | Part two, chap. II, D |

2. Restricted series

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| A/CN.9/WG.IV/XLVI/ CRP.1 and Add.1-4 | Draft report of Working Group IV (Electronic Commerce) on the work of its forty-sixth session | Not reproduced |
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| A/CN.9/WG.IV/ WP.122 | Note by the Secretariat on Draft provisions on electronic transferable records, submitted to the Working Group on Electronic Commerce at its forty-seventh session | Part two, chap. II, F |

2. Restricted series

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| A/CN.9/WG.IV/XLVII/ CRP.1 and Add.1-4 | Draft report of Working Group IV (Electronic Commerce) on the work of its forty-seventh session | Not reproduced |
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| A/CN.9/WG.III/ WP.116 | Annotated provisional agenda | Not reproduced |
| A/CN.9/WG.III/ WP.117 and Add.1 | Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-sixth session | Part two, chap. III, B |

2. Restricted series

| | | |
|---|---|----------------|
| A/CN.9/WG.III/ XXVI/CRP.1 and Add.1-4 | Draft report of Working Group III (Online dispute resolution) on the work of its twenty-sixth session | Not reproduced |
|---|---|----------------|

3. Information series

| | | |
|------------------------------------|----------------------|----------------|
| A/CN.9/WG.III/ XXVI/INF/1/Rev.1 | List of participants | Not reproduced |
|------------------------------------|----------------------|----------------|

G. List of documents before the Working Group on Online Dispute Resolution at its twenty-seventh session**1. Working papers**

| | | |
|------------------------------------|---|------------------------|
| A/CN.9/WG.III/ WP.118 | Annotated provisional agenda | Not reproduced |
| A/CN.9/WG.III/ WP.119 and Add.1 | Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules, submitted to the Working Group on Online Dispute Resolution at its twenty-seventh session | Part two, chap. III, D |
| A/CN.9/WG.III/ WP.120 | Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: timelines, submitted to the Working Group on Online Dispute Resolution at its twenty-seventh session | Part two, chap. III, E |

| | | |
|--------------------------|--|------------------------|
| A/CN.9/WG.III/ WP.121 | Note by the Secretariat on online dispute resolution for cross-border electronic commerce transactions: draft procedural rules — Proposal by the European Union observer delegation, submitted to the Working Group on Online Dispute Resolution at its twenty-seventh session | Part two, chap. III, F |
|--------------------------|--|------------------------|

2. Restricted series

| | | |
|--|---|----------------|
| A/CN.9/WG.III/ XXVII/CRP.1 and Add.1-4 | Draft report of Working Group III (Online dispute resolution) on the work of its twenty-seventh session | Not reproduced |
|--|---|----------------|

3. Information series

| | | |
|-------------------------------------|----------------------|----------------|
| A/CN.9/WG.III/ XXVII/INF/1/Rev.1 | List of participants | Not reproduced |
|-------------------------------------|----------------------|----------------|

H. List of documents before the Working Group on Insolvency Law at its forty-second session

1. Working papers

| | | |
|--------------------|---|-----------------------|
| A/CN.9/WG.V/WP.106 | Annotated provisional agenda | Not reproduced |
| A/CN.9/WG.V/WP.107 | Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law at its forty-second session | Part two, chap. IV, B |
| A/CN.9/WG.V/WP.108 | Note by the Secretariat on directors' obligations in the period approaching insolvency, submitted to the Working Group on Insolvency Law at its forty-second session | Part two, chap. IV, C |
| A/CN.9/WG.V/WP.109 | Note by the Secretariat on insolvency of large and complex financial institutions, submitted to the Working Group on Insolvency Law at its forty-second session | Part two, chap. IV, D |
| A/CN.9/WG.V/WP.110 | Note by the Secretariat on Technical assistance and cooperation, submitted to the Working Group on Insolvency Law at its forty-second session | Part two, chap. IV, E |

2. Restricted series

| | | |
|--|--|----------------|
| A/CN.9/WG.V/XLII/ CRP.1 and Add.1-4 | Draft report of Working Group V (Insolvency Law) on the work of its forty-second session | Not reproduced |
|--|--|----------------|

3. Information series

| | | |
|----------------------------|----------------------|----------------|
| A/CN.9/WG.V/XLII/ INF.1 | List of participants | Not reproduced |
|----------------------------|----------------------|----------------|

I. List of documents before the Working Group on Insolvency Law at its forty-third session

1. Working papers

| | | |
|--------------------|--|-----------------------|
| A/CN.9/WG.V/WP.111 | Annotated provisional agenda | Not reproduced |
| A/CN.9/WG.V/WP.112 | Note by the Secretariat on the interpretation and application of selected concepts of the UNCITRAL Model Law on Cross-Border Insolvency relating to centre of main interests (COMI), submitted to the Working Group on Insolvency Law at its forty-third session | Part two, chap. IV, G |
| A/CN.9/WG.V/WP.113 | Note by the Secretariat on directors' obligations in the period approaching insolvency, submitted to the Working Group on Insolvency Law at its forty-third session | Part two, chap. IV, H |
| A/CN.9/WG.V/WP.114 | Note by the Secretariat on Centre of main interests in the context of an enterprise group, submitted to the Working Group on Insolvency Law at its forty-third session | Part two, chap. IV, I |
| A/CN.9/WG.V/WP.115 | Note by the Secretariat on enterprise groups — directors' obligations in the period approaching insolvency, submitted to the Working Group on Insolvency Law at its forty-third session | Part two, chap. IV, J |

2. Restricted series

| | | |
|---|---|----------------|
| A/CN.9/WG.V/XLIII/ CRP.1 and Add.1-4 | Draft report of Working Group V (Insolvency Law) on the work of its forty-third session | Not reproduced |
|---|---|----------------|

3. Information series

| | | |
|-----------------------------|----------------------|----------------|
| A/CN.9/WG.V/XLIII/ INF.1 | List of participants | Not reproduced |
|-----------------------------|----------------------|----------------|

J. List of documents before the Working Group on Security Interests at its twenty-second session

1. Working papers

| | | |
|------------------------------------|---|----------------------|
| A/CN.9/WG.VI/WP.41 | Annotated provisional agenda | Not reproduced |
| A/CN.9/WG.VI/ WP.52 and Add.1-6 | Note by the Secretariat on a Draft Technical Legislative Guide on the Implementation of a Security Rights Registry, submitted to the Working Group on Security Interests at its twenty-second session | Part two, chap. V, B |

2. Restricted series

| | | |
|--|--|----------------|
| A/CN.9/WG.VI/ XXII CRP.1 and Add.1-4 | Draft report of Working Group VI (Security Interests) on the work of its twentieth session | Not reproduced |
|--|--|----------------|

3. Information series

| | | |
|-----------------------------|----------------------|----------------|
| A/CN.9/WG.VI/ XXII/INF/1 | List of participants | Not reproduced |
|-----------------------------|----------------------|----------------|

**K. List of documents before the Working Group on
Security Interests at its twenty-third session**

1. Working papers

| | | |
|------------------------------------|--|----------------------|
| A/CN.9/WG.VI/WP.53 | Annotated provisional agenda | Not reproduced |
| A/CN.9/WG.VI/ WP.54 and Add.1-6 | Note by the Secretariat on a Draft Technical Legislative Guide on the Implementation of a Security Rights Registry, submitted to the Working Group on Security Interests at its twenty-third session | Part two, chap. V, D |
| A/CN.9/WG.VI/ WP.55 and Add.1-4 | Note by the Secretariat on a Draft Technical Legislative Guide on the Implementation of a Security Rights Registry, submitted to the Working Group on Security Interests at its twenty-third session | Part two, chap. V, E |

2. Restricted series

| | | |
|--|---|----------------|
| A/CN.9/WG.VI/XXIII/ CRP.1 and Add.1-4 | Draft report of Working Group VI (Security Interests) on the work of its twenty-third session | Not reproduced |
|--|---|----------------|

3. Information Series

| | | |
|------------------------------|----------------------|----------------|
| A/CN.9/WG.VI/XXIII/ INF.1 | List of participants | Not reproduced |
|------------------------------|----------------------|----------------|

IV. LIST OF DOCUMENTS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW REPRODUCED IN PREVIOUS VOLUMES OF THE *YEARBOOK*

The present list indicates the particular volume, year, part and chapter where documents relating to the work of the United Nations Commission on International Trade Law were reproduced in previous volumes of the *Yearbook*; documents that do not appear in the list here were not reproduced in the *Yearbook*. The documents are divided into the following categories:

1. Reports on the annual sessions of the Commission
2. Resolutions of the General Assembly
3. Reports of the Sixth Committee
4. Extracts from the reports of the Trade and Development Board, United Nations Conference on Trade and Development
5. Documents submitted to the Commission (including reports of the meetings of Working Groups)
6. Documents submitted to the Working Groups:
 - (a) Working Group I:
Time-Limits and Limitation (Prescription) (1969 to 1971); Privately Financed Infrastructure Projects (2001 to 2003); Procurement (as of 2004)
 - (b) Working Group II:
International Sale of Goods (1968 to 1978); International Contract Practices (1981 to 2000); Arbitration and Conciliation (as of 2000)
 - (c) Working Group III:
International Legislation on Shipping (1970 to 1975); Transport Law (2002 to 2008); Online Dispute Resolution (as of 2010)
 - (d) Working Group IV:
International Negotiable Instruments (1973 to 1987); International Payments (1988 to 1992); Electronic Data Interchange (1992 to 1996); Electronic Commerce (as of 1997)
 - (e) Working Group V:
New International Economic Order (1981 to 1994); Insolvency Law (1995 to 1999); Insolvency Law (as of 2001)*

* For its 23rd session (Vienna, 11-22 December 2000), this Working Group was named Working Group on International Contract Practices (see the report of the Commission on its 33rd session A/55/17, para. 186).

(f) Working Group VI:

Security Interests (as of 2002)**

7. Summary records of discussions in the Commission
8. Texts adopted by Conferences of Plenipotentiaries
9. Bibliographies of writings relating to the work of the Commission.

** At its 35th session, the Commission adopted one-week sessions, creating six working groups.

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|--|---------------------|----------------------|
| 1. Reports on the annual sessions of the Commission | | |
| A/7216 (first session) | Volume I: 1968-1970 | Part two, I, A |
| A/7618 (second session) | Volume I: 1968-1970 | Part two, II, A |
| A/8017 (third session) | Volume I: 1968-1970 | Part two, III, A |
| A/8417 (fourth session) | Volume II: 1971 | Part one, II, A |
| A/8717 (fifth session) | Volume III: 1972 | Part one, II, A |
| A/9017 (sixth session) | Volume IV: 1973 | Part one, II, A |
| A/9617 (seventh session) | Volume V: 1974 | Part one, II, A |
| A/10017 (eighth session) | Volume VI: 1975 | Part one, II, A |
| A/31/17 (ninth session) | Volume VII: 1976 | Part one, II, A |
| A/32/17 (tenth session) | Volume VIII: 1977 | Part one, II, A |
| A/33/17 (eleventh session) | Volume IX: 1978 | Part one, II, A |
| A/34/17 (twelfth session) | Volume X: 1979 | Part one, II, A |
| A/35/17 (thirteenth session) | Volume XI: 1980 | Part one, II, A |
| A/36/17 (fourteenth session) | Volume XII: 1981 | Part one, A |
| A/37/17 and Corr.1 (fifteenth session) | Volume XIII: 1982 | Part one, A |
| A/38/17 (sixteenth session) | Volume XIV: 1983 | Part one, A |
| A/39/17 (seventeenth session) | Volume XV: 1984 | Part one, A |
| A/40/17 (eighteenth session) | Volume XVI: 1985 | Part one, A |
| A/41/17 (nineteenth session) | Volume XVII: 1986 | Part one, A |
| A/42/17 (twentieth session) | Volume XVIII: 1987 | Part one, A |
| A/43/17 (twenty-first session) | Volume XIX: 1988 | Part one, A |
| A/44/17 (twenty-second session) | Volume XX: 1989 | Part one, A |
| A/45/17 (twenty-third session) | Volume XXI: 1990 | Part one, A |
| A/46/17 (twenty-fourth session) | Volume XXII: 1991 | Part one, A |
| A/47/17 (twenty-fifth session) | Volume XXIII: 1992 | Part one, A |
| A/48/17 (twenty-sixth session) | Volume XXIV: 1993 | Part one, A |
| A/49/17 (twenty-seventh session) | Volume XXV: 1994 | Part one, A |
| A/50/17 (twenty-eighth session) | Volume XXVI: 1995 | Part one, A |
| A/51/17 (twenty-ninth session) | Volume XXVII: 1996 | Part one, A |
| A/52/17 (thirtieth session) | Volume XXVIII: 1997 | Part one, A |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|-----------------------------------|----------------------|----------------------|
| A/53/17 (thirty-first session) | Volume XXIX: 1998 | Part one, A |
| A/54/17 (thirty-second session) | Volume XXX: 1999 | Part one, A |
| A/55/17 (thirty-third session) | Volume XXXI: 2000 | Part one, A |
| A/56/17 (thirty-fourth session) | Volume XXXII: 2001 | Part one, A |
| A/57/17 (thirty-fifth session) | Volume XXXIII: 2002 | Part one, A |
| A/58/17 (thirty-sixth session) | Volume XXXIV: 2003 | Part one, A |
| A/59/17 (thirty-seventh session) | Volume XXXV: 2004 | Part one, A |
| A/60/17 (thirty-eighth session) | Volume XXXVI: 2005 | Part one, A |
| A/61/17 (thirty-ninth session) | Volume XXXVII: 2006 | Part one, A |
| A/62/17 (fortieth session) | Volume XXXVIII: 2007 | Part one, A |
| A/63/17 (fortieth-first session) | Volume XXXIX: 2008 | Part one, A |
| A/64/17 (fortieth-second session) | Volume XL: 2009 | Part one, A |
| A/65/17 (fortieth-third session) | Volume XLI: 2010 | Part one, A |
| A/66/17 (fortieth-fourth session) | Volume XLII: 2011 | Part one, A |
| A/65/17 (fortieth-fifth session) | Volume XLIII: 2012 | Part one, A |

2. Resolutions of the General Assembly

| | | |
|---------------|---------------------|--------------------|
| 2102 (XX) | Volume I: 1968-1970 | Part one, II, A |
| 2205 (XXI) | Volume I: 1968-1970 | Part one, II, E |
| 2421 (XXIII) | Volume I: 1968-1970 | Part two, I, B, 3 |
| 2502 (XXIV) | Volume I: 1968-1970 | Part two, II, B, 3 |
| 2635 (XXV) | Volume II: 1971 | Part one, I, C |
| 2766 (XXVI) | Volume III: 1972 | Part one, I, C |
| 2928 (XXVII) | Volume IV: 1973 | Part one, I, C |
| 2929 (XXVII) | Volume IV: 1973 | Part one, I, C |
| 3104 (XXVIII) | Volume V: 1974 | Part one, I, C |
| 3108 (XXVIII) | Volume V: 1974 | Part one, I, C |
| 3316 (XXIX) | Volume VI: 1975 | Part one, I, C |
| 3317 (XXIX) | Volume VI: 1975 | Part three, I, B |
| 3494 (XXX) | Volume VII: 1976 | Part one, I, C |
| 31/98 | Volume VIII: 1977 | Part one, I, C |
| 31/99 | Volume VIII: 1977 | Part one, I, C |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|------------------------|---------------------|----------------------|
| 31/100 | Volume XIII: 1977 | Part one, I, C |
| 32/145 | Volume IX: 1978 | Part one, I, C |
| 32/438 | Volume IX: 1978 | Part one, I, C |
| 33/92 | Volume X: 1979 | Part one, I, B |
| 33/93 | Volume X: 1979 | Part one, I, C |
| 34/143 | Volume XI: 1980 | Part one, I, C |
| 34/150 | Volume XI: 1980 | Part three, III |
| 35/166 | Volume XI: 1980 | Part three, III |
| 35/51 | Volume XI: 1980 | Part one, II, D |
| 35/52 | Volume XI: 1980 | Part one, II, D |
| 36/32 | Volume XII: 1981 | Part one, D |
| 36/107 | Volume XII: 1981 | Part three, I |
| 36/111 | Volume XII: 1981 | Part three, II |
| 37/103 | Volume XIII: 1982 | Part three, III |
| 37/106 | Volume XIII: 1982 | Part one, D |
| 37/107 | Volume XIII: 1982 | Part one, D |
| 38/128 | Volume XIV: 1983 | Part three, III |
| 38/134 | Volume XIV: 1983 | Part one, D |
| 38/135 | Volume XIV: 1983 | Part one, D |
| 39/82 | Volume XV: 1984 | Part one, D |
| 40/71 | Volume XVI: 1985 | Part one, D |
| 40/72 | Volume XVI: 1985 | Part one, D |
| 41/77 | Volume XVII: 1986 | Part one, D |
| 42/152 | Volume XVIII: 1987 | Part one, D |
| 42/153 | Volume XVIII: 1987 | Part one, E |
| 43/165 and annex | Volume XIX: 1988 | Part one, D |
| 43/166 | Volume XIX: 1988 | Part one, E |
| 44/33 | Volume XX: 1989 | Part one, E |
| 45/42 | Volume XXI: 1990 | Part one, D |
| 46/56 | Volume XXII: 1991 | Part one, D |
| 47/34 | Volume XXIII: 1992 | Part one, D |
| 48/32 | Volume XXIV: 1993 | Part one, D |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|------------------------|----------------------|----------------------|
| 48/33 | Volume XXIV: 1993 | Part one, D |
| 48/34 | Volume XXIV: 1993 | Part one, D |
| 49/54 | Volume XXV: 1994 | Part one, D |
| 49/55 | Volume XXV: 1994 | Part one, D |
| 50/47 | Volume XXVI: 1995 | Part one, D |
| 51/161 | Volume XXVII: 1996 | Part one, D |
| 51/162 | Volume XXVII: 1996 | Part one, D |
| 52/157 | Volume XXVIII: 1997 | Part one, D |
| 52/158 | Volume XXVIII: 1997 | Part one, D |
| 53/103 | Volume XXIX: 1998 | Part one, D |
| 54/103 | Volume XXX: 1999 | Part one, D |
| 55/151 | Volume XXXI: 2000 | Part one, D |
| 56/79 | Volume XXXII: 2001 | Part one, D |
| 56/80 | Volume XXXII: 2001 | Part one, D |
| 56/81 | Volume XXXII: 2001 | Part one, D |
| 57/17 | Volume XXXIII: 2002 | Part one, D |
| 57/18 | Volume XXXIII: 2002 | Part one, D |
| 57/19 | Volume XXXIII: 2002 | Part one, D |
| 57/20 | Volume XXXIII: 2002 | Part one, D |
| 58/75 | Volume XXXIV: 2003 | Part one, D |
| 58/76 | Volume XXXIV: 2003 | Part one, D |
| 59/39 | Volume XXXV: 2004 | Part one, D |
| 59/40 | Volume XXXV: 2004 | Part one, D |
| 61/32 | Volume XXXVII: 2006 | Part one, D |
| 60/33 | Volume XXXVII: 2006 | Part one, D |
| 62/64 | Volume XXXVIII: 2007 | Part one, D |
| 62/65 | Volume XXXVIII: 2007 | Part one, D |
| 62/70 | Volume XXXVIII: 2007 | Part one, D |
| 63/120 | Volume XXXIX: 2008 | Part one, D |
| 63/121 | Volume XXXIX: 2008 | Part one, D |
| 63/123 | Volume XXXIX: 2008 | Part one, D |
| 63/128 | Volume XXXIX: 2008 | Part one, D |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|------------------------|---------------------|----------------------|
| 64/111 | Volume XL: 2009 | Part one, D |
| 64/112 | Volume XL: 2009 | Part one, D |
| 64/116 | Volume XL: 2009 | Part one, D |
| 62/21 | Volume XLI: 2010 | Part one, D |
| 62/22 | Volume XLI: 2010 | Part one, D |
| 62/23 | Volume XLI: 2010 | Part one, D |
| 62/24 | Volume XLI: 2010 | Part one, D |
| 62/32 | Volume XLI: 2010 | Part one, D |
| 66/94 | Volume XLII: 2011 | Part one, D |
| 66/95 | Volume XLII: 2011 | Part one, D |
| 66/96 | Volume XLII: 2011 | Part one, D |
| 66/102 | Volume XLII: 2011 | Part one, D |
| 67/1 | Volume XLIII: 2012 | Part one, D |
| 67/89 | Volume XLIII: 2012 | Part one, D |
| 67/90 | Volume XLIII: 2012 | Part one, D |
| 67/97 | Volume XLIII: 2012 | Part one, D |

3. Reports of the Sixth Committee

| | | |
|----------|---------------------|--------------------|
| A/5728 | Volume I: 1968-1970 | Part one, I, A |
| A/6396 | Volume I: 1968-1970 | Part one, II, B |
| A/6594 | Volume I: 1968-1970 | Part one, II, D |
| A/7408 | Volume I: 1968-1970 | Part two, I, B, 2 |
| A/7747 | Volume I: 1968-1970 | Part two, II, B, 2 |
| A/8146 | Volume II: 1971 | Part one, I, B |
| A/8506 | Volume III: 1972 | Part one, I, B |
| A/8896 | Volume IV: 1973 | Part one, I, B |
| A/9408 | Volume V: 1974 | Part one, I, B |
| A/9920 | Volume VI: 1975 | Part one, I, B |
| A/9711 | Volume VI: 1975 | Part three, I, A |
| A/10420 | Volume VII: 1976 | Part one, I, B |
| A/31/390 | Volume VIII: 1977 | Part one, I, B |
| A/32/402 | Volume IX: 1978 | Part one, I, B |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|------------------------|---------------------|----------------------|
| A/33/349 | Volume X: 1979 | Part one, I, B |
| A/34/780 | Volume XI: 1980 | Part one, I, B |
| A/35/627 | Volume XI: 1980 | Part one, II, C |
| A/36/669 | Volume XII: 1981 | Part one, C |
| A/37/620 | Volume XIII: 1982 | Part one, C |
| A/38/667 | Volume XIV: 1983 | Part one, C |
| A/39/698 | Volume XV: 1984 | Part one, C |
| A/40/935 | Volume XVI: 1985 | Part one, C |
| A/41/861 | Volume XVII: 1986 | Part one, C |
| A/42/836 | Volume XVIII: 1987 | Part one, C |
| A/43/820 | Volume XIX: 1988 | Part one, C |
| A/C.6/43/L.2 | Volume XIX: 1988 | Part three, II, A |
| A/43/405 and Add.1-3 | Volume XIX: 1988 | Part three, II, B |
| A/44/453 and Add.1 | Volume XX: 1989 | Part one, C |
| A/44/723 | Volume XX: 1989 | Part one, D |
| A/45/736 | Volume XXI: 1990 | Part one, C |
| A/46/688 | Volume XXII: 1991 | Part one, C |
| A/47/586 | Volume XXIII: 1992 | Part one, C |
| A/48/613 | Volume XXIV: 1993 | Part one, C |
| A/49/739 | Volume XXV: 1994 | Part one, C |
| A/50/640 | Volume XXVI: 1995 | Part one, C |
| A/51/628 | Volume XXVII: 1996 | Part one, C |
| A/52/649 | Volume XXVIII: 1997 | Part one, C |
| A/53/632 | Volume XXIX: 1998 | Part one, C |
| A/54/611 | Volume XXX: 1999 | Part one, C |
| A/55/608 | Volume XXXI: 2000 | Part one, C |
| A/56/588 | Volume XXXII: 2001 | Part one, C |
| A/57/562 | Volume XXXIII: 2002 | Part one, C |
| A/58/513 | Volume XXXIV: 2003 | Part one, C |
| A/59/509 | Volume XXXV: 2004 | Part one, C |
| A/60/515 | Volume XXXVI: 2005 | Part one, C |
| A/61/453 | Volume XXXVII: 2006 | Part one, C |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|------------------------|----------------------|----------------------|
| A/62/449 | Volume XXXVIII: 2007 | Part one, C |
| A/63/438 | Volume XXXIX: 2008 | Part one, C |
| A/64/447 | Volume XL: 2009 | Part one, C |
| A/65/465 | Volume XLI: 2010 | Part one, C |
| A/66/471 | Volume XLII: 2011 | Part one, C |
| A/67/465 | Volume XLIII: 2012 | Part one, C |

**4. Extracts from the reports of the Trade and Development Board of the United Nations
Conference on Trade and Development**

| | | |
|----------------------|---------------------|--------------------|
| A/7214 | Volume I: 1968-1970 | Part two, I, B, 1 |
| A/7616 | Volume I: 1968-1970 | Part two, II, B, 1 |
| A/8015/Rev.1 | Volume II: 1971 | Part one, I, A |
| TD/B/C.4/86, annex I | Volume II: 1971 | Part two, IV |
| A/8415/Rev.1 | Volume III: 1972 | Part one, I, A |
| A/8715/Rev.1 | Volume IV: 1973 | Part one, I, A |
| A/9015/Rev.1 | Volume V: 1974 | Part one, I, A |
| A/9615/Rev.1 | Volume VI: 1975 | Part one, I, A |
| A/10015/Rev.1 | Volume VII: 1976 | Part one, I, A |
| TD/B/617 | Volume VIII: 1977 | Part one, I, A |
| TD/B/664 | Volume IX: 1978 | Part one, I, A |
| A/33/15/Vol.II | Volume X: 1979 | Part one, I, A |
| A/34/15/Vol.II | Volume XI: 1980 | Part one, I, A |
| A/35/15/Vol.II | Volume XI: 1980 | Part one, II, B |
| A/36/15/Vol.II | Volume XII: 1981 | Part one, B |
| TD/B/930 | Volume XIII: 1982 | Part one, B |
| TD/B/973 | Volume XIV: 1983 | Part one, B |
| TD/B/1026 | Volume XV: 1984 | Part one, B |
| TD/B/1077 | Volume XVI: 1985 | Part one, B |
| TD/B/L.810/Add.9 | Volume XVII: 1986 | Part one, B |
| A/42/15 | Volume XVIII: 1987 | Part one, B |
| TD/B/1193 | Volume XIX: 1988 | Part one, B |
| TD/B/1234/Vol.II | Volume XX: 1989 | Part one, B |
| TD/B/1277/Vol.II | Volume XXI: 1990 | Part one, B |

| <i>Document symbol</i> | <i>Volume, year</i> | <i>Part, chapter</i> |
|------------------------|----------------------|----------------------|
| TD/B/1309/Vol.II | Volume XXII: 1991 | Part one, B |
| TD/B/39(1)/15 | Volume XXIII: 1992 | Part one, B |
| TD/B/40(1) 14 (Vol.I) | Volume XXIV: 1993 | Part one, B |
| TD/B/41(1)/14 (Vol.I) | Volume XXV: 1994 | Part one, B |
| TD/B/42(1)19(Vol.I) | Volume XXVI: 1995 | Part one, B |
| TD/B/43/12 (Vol.I) | Volume XXVII: 1996 | Part one, B |
| TD/B/44/19 (Vol.I) | Volume XXVIII: 1997 | Part one, B |
| TD/B/45/13 (Vol.I) | Volume XXIX: 1998 | Part one, B |
| TD/B/46/15 (Vol.I) | Volume XXX: 1999 | Part one, B |
| TD/B/47/11 (Vol.I) | Volume XXXI: 2000 | Part one, B |
| TD/B/48/18 (Vol.I) | Volume XXXII: 2001 | Part one, B |
| TD/B/49/15 (Vol.I) | Volume XXXIII: 2002 | Part one, B |
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| A/CN.9/WG.I/WP.77 and Add.1-9 | Volume XLII: 2011 | Part two, II, D |
| A/CN.9/WG.I/WP.79 and Add.1-19 | Volume XLIII: 2012 | Part two, VI, B |

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| (b) Working Group II | | |
| <i>(i) International Sale of Goods</i> | | |
| A/CN.9/WG.2/WP.1 | Volume I: 1968-1979 | Part three, I, A, 2 |
| A/CN.9/WG.2/WP.6 | Volume II: 1971 | Part two, I, A, 1 |
| A/CN.9/WG.2/WP.8 | Volume III: 1972 | Part two, I, A, 1 |
| A/CN.9/WG.2/WP.9 | Volume III: 1972 | Part two, I, A, 2 |
| A/CN.9/WG.2/WP.10 | Volume III: 1972 | Part two, I, A, 3 |
| A/CN.9/WG.2/WP.11 | Volume III: 1972 | Part two, I, A, 4 |
| A/CN.9/WG.2/WP.15 | Volume IV: 1973 | Part two, I, A, 1 |
| A/CN.9/WG.2/WP.16 | Volume IV: 1973 | Part two, I, A, 2 |
| A/CN.9/WG.2/WP.15/Add.1 | Volume V: 1974 | Part two, I, 3 |
| A/CN.9/WG.2/WP.17/Add.1 | Volume V: 1974 | Part two, I, 4 |
| A/CN.9/WG.2/WP.17/Add.2 | Volume V: 1974 | Part two, I, 4 |
| A/CN.9/WG.2/WP.20 | Volume VI: 1975 | Part two, I, 4 |
| A/CN.9/WG.2/WP.2 and Add.1-2 | Volume VI: 1975 | Part two, I, 3 |
| A/CN.9/WG.2/WP.26 and Add.1 and appendix I | Volume VIII: 1977 | Part two, I, C |
| A/CN.9/WG.2/WP.27 | Volume IX: 1978 | Part two, I, B |
| A/CN.9/WG.2/WP.28 | Volume IX: 1978 | Part two, I, B |
| <i>(ii) International Contract Practices</i> | | |
| A/CN.9/WG.II/WP.33 and Add.1 | Volume XII: 1981 | Part two, I, B, 1 and 2 |
| A/CN.9/WG.II/WP.35 | Volume XIII: 1982 | Part two, III, B |
| A/CN.9/WG.II/WP.37 | Volume XIV: 1983 | Part two, III, B, 1 |
| A/CN.9/WG.II/WP.38 | Volume XIV: 1983 | Part two, III, B, 2 |
| A/CN.9/WG.II/WP.40 | Volume XIV: 1983 | Part two, III, D, 1 |
| A/CN.9/WG.II/WP.41 | Volume XIV: 1983 | Part two, III, D, 2 |
| A/CN.9/WG.II/WP.42 | Volume XIV: 1983 | Part two, III, D, 3 |
| A/CN.9/WG.II/WP.44 | Volume XV: 1984 | Part two, II, A, 2(a) |
| A/CN.9/WG.II/WP.45 | Volume XV: 1984 | Part two, II, A, 2(b) |
| A/CN.9/WG.II/WP.46 | Volume XV: 1984 | Part two, II, A, 2(c) |
| A/CN.9/WG.II/WP.48 | Volume XV: 1984 | Part two, II, B, 3(a) |
| A/CN.9/WG.II/WP.49 | Volume XV: 1984 | Part two, II, B, 3(b) |

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| A/CN.9/WG.II/WP.50 | Volume XV: 1984 | Part two, II, B, 3(c) |
| A/CN.9/WG.II/WP.52 and Add.1 | Volume XVI: 1985 | Part two, IV, B, 1 |
| A/CN.9/WG.II/WP.53 | Volume XVI: 1985 | Part two, IV, B, 3 |
| A/CN.9/WG.II/WP.55 | Volume XVII: 1986 | Part two, III, B, 1 |
| A/CN.9/WG.II/WP.56 | Volume XVII: 1986 | Part two, III, B, 2 |
| A/CN.9/WG.II/WP.58 | Volume XVIII: 1987 | Part two, III, B |
| A/CN.9/WG.II/WP.60 | Volume XIX: 1988 | Part two, II, B |
| A/CN.9/WG.II/WP.62 | Volume XX: 1989 | Part two, IV, B, 1 |
| A/CN.9/WG.II/WP.63 | Volume XX: 1989 | Part two, IV, B, 2 |
| A/CN.9/WG.II/WP.65 | Volume XXI: 1990 | Part two, IV, B |
| A/CN.9/WG.II/WP.67 | Volume XXII: 1991 | Part two, III, B, 1 |
| A/CN.9/WG.II/WP.68 | Volume XXII: 1991 | Part two, III, B, 2 |
| A/CN.9/WG.II/WP.70 | Volume XXII: 1991 | Part two, III, D, 1 |
| A/CN.9/WG.II/WP.71 | Volume XXII: 1991 | Part two, III, D, 2 |
| A/CN.9/WG.II/WP.73 and Add.1 | Volume XXIII: 1992 | Part two, IV, B |
| A/CN.9/WG.II/WP.76 and Add.1 | Volume XXIV: 1993 | Part two, II, B, 1 |
| A/CN.9/WG.II/WP.77 | Volume XXIV: 1993 | Part two, II, B, 2 |
| A/CN.9/WG.II/WP.80 | Volume XXV: 1994 | Part two, II, B |
| A/CN.9/WG.II/WP.83 | Volume XXVI: 1995 | Part two, I, B |
| A/CN.9/WG.II/WP.87 | Volume XXVIII: 1997 | Part two, II, B |
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| A/CN.9/WG.II/WP.90 | Volume XXVIII: 1997 | Part two, II, D, 2 |
| A/CN.9/WG.II/WP.91 | Volume XXVIII: 1997 | Part two, II, D, 3 |
| A/CN.9/WG.II/WP.93 | Volume XXIX: 1998 | Part two, I, B |
| A/CN.9/WG.II/WP.96 | Volume XXIX: 1998 | Part two, I, D |
| A/CN.9/WG.II/WP.98 | Volume XXX: 1999 | Part two, I, B |
| A/CN.9/WG.II/WP.99 | Volume XXX: 1999 | Part two, I, C |
| A/CN.9/WG.II/WP.100 | Volume XXX: 1999 | Part two, I, D |
| A/CN.9/WG.II/WP.102 | Volume XXX: 1999 | Part two, I, F |
| A/CN.9/WG.II/WP.104 | Volume XXXI: 2000 | Part two, I, B |
| A/CN.9/WG.II/WP.105 | Volume XXXI: 2000 | Part two, I, C |
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| <i>(iii) International Commercial Arbitration</i> | | |
| A/CN.9/WG.II/WP.108 and Add.1 | Volume XXXI: 2000 | Part two, IV, B |
| A/CN.9/WG.II/WP.110 | Volume XXXII: 2001 | Part two, III, B |
| A/CN.9/WG.II/WP.111 | Volume XXXII: 2001 | Part two, III, C |
| A/CN.9/WG.II/WP.113 and Add.1 | Volume XXXII: 2001 | Part two, III, E |
| A/CN.9/WG.II/WP.115 | Volume XXXIII: 2002 | Part two, I, B |
| A/CN.9/WG.II/WP.116 | Volume XXXIII: 2002 | Part two, I, C |
| A/CN.9/WG.II/WP.118 | Volume XXXIII: 2002 | Part two, I, E |
| A/CN.9/WG.II/WP.119 | Volume XXXIII: 2002 | Part two, I, F |
| A/CN.9/WG.II/WP.121 | Volume XXXIV: 2003 | Part two, III, B |
| A/CN.9/WG.II/WP.123 | Volume XXXIV: 2003 | Part two, III, D |
| A/CN.9/WG.II/WP.125 | Volume XXXV: 2004 | Part two, II, B |
| A/CN.9/WG.II/WP.127 | Volume XXXV: 2004 | Part two, II, D |
| A/CN.9/WG.II/WP.128 | Volume XXXV: 2004 | Part two, II, E |
| A/CN.9/WG.II/WP.129 | Volume XXXV: 2004 | Part two, II, F |
| A/CN.9/WG.II/WP.131 | Volume XXXVI: 2005 | Part two, III, B |
| A/CN.9/WG.II/WP.132 | Volume XXXVI: 2005 | Part two, III, C |
| A/CN.9/WG.II/WP.134 | Volume XXXVI: 2005 | Part two, III, E |
| A/CN.9/WG.II/WP.136 | Volume XXXVII: 2006 | Part two, II, B |
| A/CN.9/WG.II/WP.137 and Add.1 | Volume XXXVII: 2006 | Part two, II, C |
| A/CN.9/WG.II/WP.138 | Volume XXXVII: 2006 | Part two, II, D |
| A/CN.9/WG.II/WP.139 | Volume XXXVII: 2006 | Part two, II, F |
| A/CN.9/WG.II/WP.141 | Volume XXXVII: 2006 | Part two, II, G |
| A/CN.9/WG.II/WP.145 and Add.1 | Volume XXXVIII: 2007 | Part two, III, D |
| A/CN.9/WG.II/WP.147 and Add.1 | Volume XXXIX: 2008 | Part two, III, B |
| A/CN.9/WG.II/WP.149 | Volume XXXIX: 2008 | Part two, III, D |
| A/CN.9/WG.II/WP.151 and Add.1 | Volume XL: 2009 | Part two, II, B |
| A/CN.9/WG.II/WP.152 | Volume XL: 2009 | Part two, II, C |
| A/CN.9/WG.II/WP.154 | Volume XL: 2009 | Part two, II, E |
| A/CN.9/WG.II/WP.154/Add.1 | Volume XLI: 2010 | Part two, I, B |
| A/CN.9/WG.II/WP.157 and Add.1-2 | Volume XLI: 2010 | Part two, I, D |
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| A/CN.9/WG.II/WP.160 and Add.1 | Volume XLII: 2011 | Part two, I, C |
| A/CN.9/WG.II/WP.162 and Add.1 | Volume XLII: 2011 | Part two, I, E |
| A/CN.9/WG.II/WP.163 | Volume XLII: 2011 | Part two, I, F |
| A/CN.9/WG.II/WP.164 | Volume XLII: 2011 | Part two, I, G |
| A/CN.9/WG.II/WP.166 and Add.1 | Volume XLIII: 2012 | Part two, I, B |
| A/CN.9/WG.II/WP.167 | Volume XLIII: 2012 | Part two, I, C |
| A/CN.9/WG.II/WP.169 and Add.1 | Volume XLIII: 2012 | Part two, I, E |
| A/CN.9/WG.II/WP.170 and Add.1 | Volume XLIII: 2012 | Part two, I, F |
| <i>(c) Working Group III</i> | | |
| <i>(i) International Legislation on Shipping</i> | | |
| A/CN.9/WG.III/WP.6 | Volume IV: 1973 | Part two, IV, 2 |
| A/CN.9/WG.III/WP.7 | Volume IV: 1973 | Part two, IV, 3 |
| A/CN.9/WG.III/WP.11 | Volume V: 1974 | Part two, III, 3 |
| <i>(ii) Transport Law</i> | | |
| A/CN.9/WG.III/WP.21 and Add.1 | Volume XXXIII: 2002 | Part two, VI, B |
| A/CN.9/WG.III/WP.23 | Volume XXXIV: 2003 | Part two, IV, B |
| A/CN.9/WG.III/WP.25 | Volume XXXIV: 2003 | Part two, IV, D |
| A/CN.9/WG.III/WP.26 | Volume XXXIV: 2003 | Part two, IV, E |
| A/CN.9/WG.III/WP.27 | Volume XXXIV: 2003 | Part two, IV, F |
| A/CN.9/WG.III/WP.28 | Volume XXXIV: 2003 | Part two, IV, G |
| A/CN.9/WG.III/WP.29 | Volume XXXIV: 2003 | Part two, IV, H |
| A/CN.9/WG.III/WP.30 | Volume XXXIV: 2003 | Part two, IV, I |
| A/CN.9/WG.III/WP.28/Add.1 | Volume XXXV: 2004 | Part two, III, B |
| A/CN.9/WG.III/WP.32 | Volume XXXV: 2004 | Part two, III, C |
| A/CN.9/WG.III/WP.33 | Volume XXXV: 2004 | Part two, III, D |
| A/CN.9/WG.III/WP.34 | Volume XXXV: 2004 | Part two, III, E |
| A/CN.9/WG.III/WP.36 | Volume XXXV: 2004 | Part two, III, G |
| A/CN.9/WG.III/WP.37 | Volume XXXV: 2004 | Part two, III, H |
| A/CN.9/WG.III/WP.39 | Volume XXXVI: 2005 | Part two, IV, B |
| A/CN.9/WG.III/WP.40 | Volume XXXVI: 2005 | Part two, IV, C |
| A/CN.9/WG.III/WP.41 | Volume XXXVI: 2005 | Part two, IV, D |
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| A/CN.9/WG.III/WP.45 | Volume XXXVI: 2005 | Part two, IV, H |
| A/CN.9/WG.III/WP.46 | Volume XXXVI: 2005 | Part two, IV, I |
| A/CN.9/WG.III/WP.47 | Volume XXXVI: 2005 | Part two, IV, J |
| A/CN.9/WG.III/WP.49 | Volume XXXVII: 2006 | Part two, IV, B |
| A/CN.9/WG.III/WP.50/Rev.1 | Volume XXXVII: 2006 | Part two, IV, C |
| A/CN.9/WG.III/WP.51 | Volume XXXVII: 2006 | Part two, IV, D |
| A/CN.9/WG.III/WP.52 | Volume XXXVII: 2006 | Part two, IV, E |
| A/CN.9/WG.III/WP.53 | Volume XXXVII: 2006 | Part two, IV, F |
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| A/CN.9/WG.III/WP.55 | Volume XXXVII: 2006 | Part two, IV, H |
| A/CN.9/WG.III/WP.56 | Volume XXXVII: 2006 | Part two, IV, I |
| A/CN.9/WG.III/WP.57 | Volume XXXVII: 2006 | Part two, IV, J |
| A/CN.9/WG.III/WP.58 | Volume XXXVII: 2006 | Part two, IV, K |
| A/CN.9/WG.III/WP.59 | Volume XXXVII: 2006 | Part two, IV, L |
| A/CN.9/WG.III/WP.61 | Volume XXXVII: 2006 | Part two, IV, N |
| A/CN.9/WG.III/WP.62 | Volume XXXVII: 2006 | Part two, IV, O |
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| A/CN.9/WG.III/WP.67 | Volume XXXVII: 2006 | Part two, IV, T |
| A/CN.9/WG.III/WP.68 | Volume XXXVII: 2006 | Part two, IV, U |
| A/CN.9/WG.III/WP.69 | Volume XXXVII: 2006 | Part two, IV, V |
| A/CN.9/WG.III/WP.70 | Volume XXXVII: 2006 | Part two, IV, V |
| A/CN.9/WG.III/WP.72 | Volume XXXVIII: 2007 | Part two, IV, B |
| A/CN.9/WG.III/WP.73 | Volume XXXVIII: 2007 | Part two, IV, C |
| A/CN.9/WG.III/WP.74 | Volume XXXVIII: 2007 | Part two, IV, D |
| A/CN.9/WG.III/WP.75 | Volume XXXVIII: 2007 | Part two, IV, E |
| A/CN.9/WG.III/WP.76 | Volume XXXVIII: 2007 | Part two, IV, F |
| A/CN.9/WG.III/WP.77 | Volume XXXVIII: 2007 | Part two, IV, G |
| A/CN.9/WG.III/WP.78 | Volume XXXVIII: 2007 | Part two, IV, H |

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| A/CN.9/WG.III/WP.82 | Volume XXXVIII: 2007 | Part two, IV, L |
| A/CN.9/WG.III/WP.83 | Volume XXXVIII: 2007 | Part two, IV, M |
| A/CN.9/WG.III/WP.84 | Volume XXXVIII: 2007 | Part two, IV, N |
| A/CN.9/WG.III/WP.85 | Volume XXXVIII: 2007 | Part two, IV, O |
| A/CN.9/WG.III/WP.86 | Volume XXXVIII: 2007 | Part two, IV, P |
| A/CN.9/WG.III/WP.87 | Volume XXXVIII: 2007 | Part two, IV, Q |
| A/CN.9/WG.III/WP.88 | Volume XXXVIII: 2007 | Part two, IV, R |
| A/CN.9/WG.III/WP.89 | Volume XXXVIII: 2007 | Part two, IV, S |
| A/CN.9/WG.III/WP.90 | Volume XXXVIII: 2007 | Part two, IV, T |
| A/CN.9/WG.III/WP.91 | Volume XXXVIII: 2007 | Part two, IV, U |
| A/CN.9/WG.III/WP.93 | Volume XXXIX: 2008 | Part two, I, B |
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| A/CN.9/WG.III/WP.95 | Volume XXXIX: 2008 | Part two, I, D |
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| A/CN.9/WG.III/WP.103 | Volume XXXIX: 2008 | Part two, I, L |
| <i>(iii) Online Dispute Resolution</i> | | |
| A/CN.9/WG.III/WP.105 and Corr.1 | Volume XLII: 2011 | Part two, V, B |
| A/CN.9/WG.III/WP.107 | Volume XLII: 2011 | Part two, V, D |
| A/CN.9/WG.III/WP.109 | Volume XLIII: 2012 | Part two, IV, B |
| A/CN.9/WG.III/WP.110 | Volume XLIII: 2012 | Part two, IV, C |
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| (d) Working Group IV | | |
| <i>(i) International Negotiable Instruments</i> | | |
| A/CN.9/WG.IV/WP.2 | Volume IV: 1973 | Part two, II, 2 |
| A/CN.9/WG.IV/CRP.5 | Volume VI: 1975 | Part two, II, 2 |
| A/CN.9/WG.IV/WP.21 | Volume XIII: 1982 | Part two, II, A, 2(a) |
| A/CN.9/WG.IV/WP.22 | Volume XIII: 1982 | Part two, II, A, 2(b) |
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| A/CN.9/WG.IV/WP.33 | Volume XVIII: 1987 | Part two, I, 3 |
| <i>(ii) International Payments</i> | | |
| A/CN.9/WG.IV/WP.35 | Volume XIX: 1988 | Part two, I, A, 2 |
| A/CN.9/WG.IV/WP.37 | Volume XX: 1989 | Part two, I, B |
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| <i>(iii) Electronic Commerce</i> | | |
| A/CN.9/WG.IV/WP.53 | Volume XXIII: 1992 | Part two, V, B |
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| A/CN.9/WG.IV/WP.69 | Volume XXVII: 1996 | Part two, II, B |
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| A/CN.9/WG.IV/WP.73 | Volume XXIX: 1998 | Part two, II, B |
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| A/CN.9/WG.IV/WP.80 | Volume XXX: 1999 | Part two, II, F |
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| A/CN.9/WG.IV/WP.84 | Volume XXXI: 2000 | Part two, III, B |
| A/CN.9/WG.IV/WP.86 and Add.1 | Volume XXXII: 2001 | Part two, II, B |
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